FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

November 12, 1986

The Honorable George Bush
President of the Senate
United States Senate
Washington, D.C. 20510

The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Subject: Ninth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976

Gentlemen:

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, amended the Clayton Act by adding a new Section 7A, 15 U.S.C. § 18a. Subsection (j) of this section provides as follows:

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

This is the ninth annual report to Congress pursuant to this provision.

In general, Section 7A establishes a mechanism under which certain proposed acquisitions of stock or assets must be reported to the Federal Trade Commission and the Department of Justice prior to consummation. The parties must then wait a specified period, usually thirty days (fifteen days in the case of a cash tender offer), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties and other classes of acquisitions which are unlikely to raise antitrust concerns are excluded from the Act's coverage.

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with a meaningful opportunity to review mergers and acquisitions before they occur. The premerger notification program, with its filing and waiting period requirements, provides the agencies with both the time and the information to conduct this review. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies and thus is immediately available for review during the initial thirty-day waiting period.

If either agency determines during that initial waiting period that further inquiry is necessary, it is authorized by Section 7A(e) to request additional information or documentary materials from either or both of the parties to a reported transaction. Such a request extends the waiting period for a specified period, usually twenty days, after all of the requested information and documents are received. This additional time provides the agencies with the opportunity to review the information and to take appropriate action before the transaction is consummated. If either agency believes that a proposed transaction may violate the antitrust laws, Section 7A(f) allows the agency to seek an injunction in federal district court to prohibit consummation of the transaction.

Final rules implementing the premerger notification program were promulgated by the Commission, with the concurrence of the Assistant Attorney General, on July 31, 1978.[1] At that time, a comprehensive Statement of Basis and Purpose was also published containing a section-by-section analysis of the rules and an item-by-item analysis of the Premerger Notification and Report Form. The program became effective on September 5, 1978. In 1983, the Commission, with the concurrence of the Assistant Attorney General, made several changes in the premerger notification rules. Those amendments became effective on August 29, 1983.[2]

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1 43 Fed. Reg. 33,450 (1978). The rules also appear in 16 C.F.R. Parts 801 through 803. For more information concerning the development of the rules and operating procedures of the premerger notification program, see the second, third and seventh annual reports covering the years 1978, 1979 and 1983, respectively.

2 48 Fed. Reg. 34,427 (1983) (codified at 16 C.F.R. Parts 801 through 803).

Statistical Profile of the Premerger Notification Program

The appendices to this report provide a statistical summary of the operation of the premerger notification program. Appendix A shows for each year (or part of a year) in which the program has been in operation the number of transactions reported, the number of filings received, the number of transactions in which requests for additional information or documentary material (hereinafter referred to as "second requests") were issued, and the number of transactions in which requests for early termination were received, granted, and denied. Appendix B provides a month-by-month comparison of the number of filings received and the number of transactions reported for 1983 through 1985. Appendix C shows, for calendar years 1981-1985, the number of transactions in which the agencies could have issued second requests, the number of second requests issued, and the percentage of transactions in which second requests were issued. As we explained in the Eighth Annual Report, we believe that Appendix C provides a more meaningful measure of the second request rate than Appendix A because Appendix C eliminates from the total number of transactions certain transactions in which the agencies could not, or as a practical matter would not, issue second requests.[3]

The statistics set out in these appendices show that the number of transactions reported in 1985 increased 25% over the number reported in 1984 (1400 transactions were reported in 1984, 1749 in 1985). The statistics also report an increase in the number of second requests issued. Appendix A shows that the number of second requests issued increased from 77 in 1984 to 84 in 1985 while Appendix C shows an increase from 71 in 1984 to 84 in 1985. These numbers represent, however, a slight decrease in the number of second requests issued as a percentage of reported transactions (from 5.5% in 1984 to 4.8% in 1985, based on Appendix A, and from 6.3% in 1984 to 5.8% in 1985, based on Appendix C).

The statistics also show that the number of transactions involving requests for early termination has again increased

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3 See Appendix C, notes 1 and 2. The second request statistics in Appendices A and C also differ in two other respects. Appendix C includes only the number of second requests issued for transactions reported in each specified year, while Appendix A includes all second requests issued during each calendar year irrespective of when the filing was actually received. In addition, Appendix A includes secondary acquisitions while Appendix C does not.

dramatically.[4] In 1985, early termination was requested in 1415 transactions, while in 1984 it was requested in only 1064 and in only 643 in 1983. This represents, as a percentage of reported transactions, a request rate of 80.9%, as compared with 65.0% in 1984 and 57.0% in 1983. The number of requests granted has increased (from 847 in 1984 to 1077 in 1985), although the percentage of requests granted has decreased (from 79.6% in 1984 to 76.1% in 1985).

We have also included in the report, as Exhibit A, eleven tables containing other information about transactions reported in calendar year 1984. Some tables break down the number of transactions reported by the dollar value of transactions or by the reporting threshold and indicate the number and percentage of clearances granted and second requests issued for each category of transaction. Other tables provide a breakdown of transactions based on the sales or the assets of the acquiring person or the acquired entity or on the industry group (2-digit SIC code) in which the acquiring person or the acquired entity derive most of their revenues. These statistics have been included in prior annual reports for the calendar years 1981 - 1983.[5]

Recent Developments Relating to Premerger Notification Rules and Procedures

1. Rule Changes

On September 24, 1985, the Commission published in the Federal Register a Notice of Proposed Rulemaking proposing thirteen changes to the premerger notification rules and the Notification and Report Form.[6] With two exceptions, the proposed rules were designed primarily to reduce the burden of the premerger notification program. (The exceptions are a new requirement that certain transactions be reported when made through "acquisition vehicles" and the deletion of a little used exemption for acquisitions subject to a prior approval order.)

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4 As noted in the Seventh Annual Report, the increases in the number of requests for early termination and the high proportion of those requests which have been granted are probably attributable to the change in the agencies' standard for granting early termination, adopted in the formal interpretation issued by the Commission on August 20, 1982.

5 See the Eighth Annual Report, Exhibit A, for 1983 transactions, the Seventh Annual Report, Exhibit B for 1982 transactions, and the Sixth Annual Report, Exhibit A for 1981 transactions.

6 50 Fed. Reg. 38,742 (1985). Attached as Exhibit B is a copy of the Notice published in the Federal Register.

The rules proposed in the Notice seek to reduce the burden of the premerger notification program in three ways: by narrowing the types of acquisitions that are subject to the notification process; by reducing the documents and information that must accompany notifications; and by clarifying the meaning of several of the premerger notification rules.

The following list of the proposed amendments to the premerger notification rules briefly characterizes each proposal.

a. <u>§ 801.1(n) and § 801.5: Acquisition Vehicles</u>. This proposal would require the owners of an entity formed or availed of principally to make acquisitions (an "acquisition vehicle") to file notifications for acquisitions made by the acquisition vehicle as if the owners had made the acquisition themselves without the vehicle. It was designed to ensure that similar transactions be reportable notwithstanding certain differences in the form in which they are undertaken.

b. <u>§ 801.11(e): Total Assets of a Newly-Formed Person</u>. This proposal codifies an informal interpretation by the Commission staff. The rule would state that for determining if a person has the minimum amount of assets to be subject to the reporting requirements of the act, a newly-formed entity need not include cash that will be used to make an acquisition of assets or voting securities, or securities of the person the entity is acquiring. Thus, the informal interpretation would not require notifications where the acquisition merely transfers ownership of one business and does not combine two previously separate businesses.

c. <u>§ 801.12(b): Calculating Percentage of Voting Securities to be Held or Acquired</u>. This proposal also codifies an informal staff interpretation. The rule would state how to calculate the percentage of a person's voting securities held by each shareholder where the person has issued classes of securities that have different voting rights. The codification of this interpretation will make clearer when a person has a notification obligation.

d. <u>§ 801.13: Aggregation of Assets and Voting Securities</u>. This proposal limits an existing rule. It would no longer be necessary to report small acquisitions of assets solely because the acquiring person has made a previous reportable acquisition from the same seller. The effect of this proposal is to reduce the coverage of the rules by removing reporting requirements for small acquisitions that are unlikely to pose competitive problems.

e. <u>§§ 802.1, 802.2 and 802.3: Acquisition of Assets</u>. This proposal replaces the existing rule that exempts acquisitions in the ordinary course of business. That rule has functioned primarily through informal staff interpretations of the statutory exemption of "ordinary course" acquisitions. The proposed rules would clarify what transactions are in the ordinary course of business and therefore exempt, and would exempt from filing certain other asset acquisitions that are not likely to violate the antitrust laws.

f. <u>§ 802.20(b): Increase in the "Controlled Issuer" Threshold</u>. This proposal expands the exemption for acquisitions of voting securities valued at $15 million or less. The expansion would exempt almost all of the roughly 100 transactions valued at $15 million or less that are reported each year.

g. <u>§ 802.35: Acquisitions by Employee Trusts</u>. This proposal creates a new exemption for acquisitions of an employer's voting securities by certain employee trusts. Since the adoption of the tax incentives for certain acquisitions pursuant to Employee Stock Option Plans, such trusts have become common. The proposal would reduce the coverage of the notification rules but continue the review of other acquisitions by employee trusts that could pose competitive problems.

h. <u>§ 802.70(b): Acquisitions Subject to Prior Approval</u>. This proposal deletes an exemption for acquisitions subject to prior approval orders. Although the exemption affects few transactions, it can create problems in obtaining consent agreements or orders from businesses subject to prior approval orders.

i. <u>§ 803.5: Affidavit Requirements of the Acquiring Person</u>. This proposal codifies the Commission's formal interpretation concerning the notice which must be sent to an acquired person by an acquiring person and describes language for that notice that will be considered acceptable. It also proposes a new notice requirement for owners of "acquisition vehicles" to inform acquired persons of their filing obligations.

j. <u>§ 803.9: Incorporation by Reference</u>. This proposal replaces the existing rule with a more detailed description of the circumstances when information and documents that have been filed can be incorporated by reference in subsequent notification forms. This rule would reduce the burden by clarifying the circumstances in which the rule applies and by expanding some aspects of the rule.

k. <u>§ 803.10(a): Running of Time in § 801.40 Transactions</u>. This proposal codifies an informal staff interpretation by stating that the statutory waiting period for the formation of a joint venture does not begin until all persons that are required to report the formation have filed notifications.

l. <u>The Premerger Notification and Report Form</u>. These seven proposed changes would simplify the notification form, and thereby reduce the time required to prepare the form without impairing the ability to review transactions.

m. Changes in Examples to Conform With Prior Amendments to the Rules. This proposal would change certain examples that have not been altered to reflect earlier amendments to the rules. This will eliminate some unnecessary confusion by making these examples consistent with the current rules.

The comment period on these proposed rules, which was to have expired on October 24, 1985, was extended to November 29, 1985. The Commission is now considering final action on these rules in light of the 26 comments it has received.

2. Revision of the Premerger Notification and Report Form

On March 26, 1986, the Commission amended the Notification and Report Form to require the submission of 1982 revenue data instead of 1977 revenue data in response to certain items on the form.[7] The form requires data for two time periods: the most recent year for which the requested information is available, and the "base year" that coincides with the Bureau of the Census' most recently available quinquennial economic census and the Annual Survey of Manufactures. These publications provide the most readily available and reliable statistical information on industry components and market universes. The agencies compare this statistical data to the reporting persons' revenue data to determine whether a proposed transaction may raise serious antitrust problems.

Because the Bureau of the Census has now published its 1982 Census of Manufactures, the Premerger Notification and Report Form has been revised to require 1982 data instead of 1977 data in response to questions regarding revenues. This revision allows the agencies to conduct an antitrust analysis based upon more recent, and thus more relevant, statistical data. In addition, the use of more recent data reduces the burden to reporting persons of complying with the Act.

3. Change to Fiscal Year Basis

Effective October 1, 1985, the Commission converted to a fiscal year reporting basis from a calendar year basis. Beginning with next year's annual report, information will be furnished for periods covering October 1st through September 30th. The information in this annual report was compiled for calendar year 1985.

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7 51 Fed.Reg. 10,368 (1986) (to be codified at 16 C.F.R. Part 803 Appendix). Attached as Exhibit C is a copy of the Notice published in the Federal Register.

4. Compliance

As in previous years, compliance with the premerger notification program's filing requirements continues to be good. Since the program's inception, only two actions have been brought under section 7A(g)(1) to recover civil penalties for non-compliance.[9] One of those actions was brought this year.[10]

In that case, the complaint charged Weeks Petroleum Ltd. (a Bermuda Corporation with offices in New York City), Bell Resources Ltd. (a diversified company based in Australia which owns over 90 percent of Weeks Petroleum stock) and its chairman with violating the notification provisions of the Act in connection with Weeks Petroleum's purchases of stock of Asarco Incorporated (a copper producer headquartered in New York City). The complaint alleged that Weeks Petroleum, acting under the authorization and direction of Bell Resources and its chairman, acquired in excess of $15 million of Asarco stock by November 21, 1984, and continued acquiring Asarco stock thereafter, but did not file a Notification and Report Form until March 8, 1985. While the transaction by which Weeks' holding of Asarco crossed the statutory $15 million threshold and Weeks' subsequent acquisitions of Asarco shares would have been exempt from the requirements of the Act if made "solely for the purpose of investment" under section 7A(c)(9) of the Act, the Commission's investigation indicated that these acquisitions were not made solely for the purpose of investment. Accordingly, the complaint alleged that the defendants violated the Act and were in violation of the Act through April 7, 1985, when the waiting period triggered by the March 8 filing expired. Under a consent decree, Weeks was required to pay a civil penalty of $450,000.

The agencies examined a number of other transactions for possible violations of the Hart-Scott-Rodino Act in 1985. These investigations focused primarily on two issues: the validity of claims that the transactions were exempt and the possibility that transactions were unlawfully structured to evade the reporting requirements of the Act. These investigations grew out of the agencies' program of monitoring current transactions.

The agencies review newspapers and industry publications

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9 One action was brought in 1984. United States v. Coastal Corporation, Cv. No. 84-2675 (D.D.C. filed August 30, 1984). Coastal paid the maximum civil penalty authorized and divested the stock that it was alleged to have acquired illegally.

10 United States v. Bell Resources Ltd., Weeks Petroleum Ltd., and M.R.H. Holmes a Court, 85 Civ. 6202 (S.D.N.Y. filed August 9, 1985).

for announcements of transactions that may not have been reported in accordance with the requirements of the Act. In addition, industry sources, such as competitors, customers and suppliers, and interested members of the public often provide the agencies with further information about transactions. If a proposed transaction is announced that appears to be covered by the statute and rules, but no filing is received within a reasonable time, Commission staff sends letters to the parties requesting an explanation for their failure to file. The same procedure is followed when the staff learns of a consummated transaction for which no prior filing was received.

In almost all cases, these investigations establish that the transactions were not covered by the Act or were exempt from it. In a few cases, most often involving individuals or relatively small corporations, parties have failed to file when required to do so, but their failure was inadvertent rather than deliberate. In all of the latter cases in which such violations have been identified, the parties have belatedly filed Notification and Report Forms when they were made aware of their filing obligation. None of these investigations has involved a transaction that presented the serious possibility of a violation of the antitrust laws.

Merger Enforcement Activity During 1985[11]

The Antitrust Division filed four complaints in merger cases during calendar year 1985.[12] Three of these cases, United States v. Cooper Industries, Inc., United States v. Allied Corporation, and United States v. Baxter Travenol Laboratories, Inc. and American Hospital Supply Corporation, have been settled by the entry of consent decrees. The other case, United States v. Industrial Asphalt, et al., is pending.

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11 The cases mentioned in this report were not necessarily reportable under the premerger notification program. Because of the Act's provisions regarding the confidentiality of the information obtained pursuant to this program, it would be inappropriate to identify which cases were initiated under the premerger notification program.

12 United States v. Cooper Industries, Inc., Cv. No. 85-0765 (D.D.C. filed March 6, 1985); United States v. Industrial Asphalt, et al., Cv. No. 85-4631(RG) (C.D. Cal. filed July 15, 1985); United States v. Allied Corporation, Cv. No. 85-2475 (D.D.C. filed August 2, 1985); and United States v. Baxter Travenol Laboratories, Inc. and American Hospital Supply Corporation, Cv. No. 85C09856 (N.D. Ill. filed November 22, 1985).

In United States v. Cooper Industries, Inc., the Division challenged Cooper Industries' October 1982 acquisition of Westinghouse Electric Corporation's aviation lighting equipment business, alleging that competition may be lessened in the manufacture and sale of aviation lighting equipment. The consent decree requires Cooper, over the next ten years, to notify the government before consummating any future acquisition of a plant which had been producing aviation lighting equipment in the two-year period prior to the acquisition.

In United States v. Allied Corporation, the Division challenged Allied's proposed merger with The Signal Companies Inc., alleging that the merger of the air turbine starter businesses of the two firms would violate Section 7 of the Clayton Act. An air turbine starter is a pneumatic motor used to start the large gas turbine engines on most commercial aircraft as well as many military airplanes and helicopters. The consent decree required Allied to sell its air turbine starter business by the end of 1985.

In United States v. Baxter Travenol Laboratories, Inc. and American Hospital Supply Corporation, the Division challenged Baxter Travenol's proposed acquisition of American Hospital Supply Corporation. The suit alleged that Baxter Travenol's acquisition of American Hospital Supply would lessen competition in five health-care product markets: parenteral solutions (sterile intravenous (IV) fluids); fluid administration sets (disposable devices attached to parenteral solutions or blood containers through which parenteral solutions or blood flows to patients); electronic flow control devices (electro-mechanical devices that infuse fluids at predetermined rates into patients during intravenous therapy); therapeutic hemapheresis equipment (separates blood into components for therapeutic uses); and surgeons' gloves and procedure gloves (used inside and outside the operating room for surgical procedures). The defendants entered into a series of divestiture and contractual agreements to resolve the competitive problems that would arise from the acquisition. The consent decree ensures that the defendants will perform each of these agreements, and, if they do not, that the assets involved will be divested by a trustee in a manner that will preserve effective competition in each of the five affected markets.

In United States v. Industrial Asphalt, et al., the Division filed suit challenging the formation of a joint venture formed on December 20, 1983. The joint venture resulted in the merger of two competing sellers of asphalt concrete, Industrial Asphalt and Huntmix, Inc., both of Van Nuys, California. Asphalt concrete is commonly used in the paving of roads, parking lots and airport runways. The complaint seeks divestiture and alleges that the merger caused a lessening of competition in the manufacture and sale of asphalt concrete in two areas of Southern California: the greater Los Angeles area and western San Diego County.

On one occasion the Antitrust Division informed the parties to a proposed transaction that it would file suit challenging the transaction unless the parties restructured the proposal to avoid competitive problems or abandoned the proposal altogether.[13] The parties abandoned the proposed transaction.

Finally, the Division entered into consent decrees in five merger cases in which complaints had been filed prior to January 1, 1985.[14]

The Commission authorized its staff to seek preliminary injunctions in four merger cases in calendar year 1985. In three cases the parties abandoned the transactions before the papers were filed in court. In the fourth case, the preliminary injunction action was filed on January 6, 1986, seeking to enjoin a proposed merger between PPG Industries Inc. and Swedlow, Inc., two leading manufacturers of aircraft windshields, canopies, and cockpit and cabin windows. The Commission also issued an administrative complaint in this case.[15] In Federal Trade Commission v. PPG Industries, Inc. and Swedlow, Inc.,[16] the Commission charged that the proposed merger would create a single firm possessing a near monopoly on the technology for the fabrication of glass and acrylic aircraft transparencies. The court granted the preliminary injunction pending the submission of an acceptable hold separate order. Subsequently, the court modified its decree by entering a hold separate order. The Commission appealed that decision and, on

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13 Department of Justice Press Release issued January 8, 1985, involving the proposed acquisition by Borden, Inc. of Reichhold Chemicals' resin plant in White City, Oregon.

14 United States v. Alcan Aluminium Limited, Cv. No. C-84-1028-L-A (W.D. Ky. filed October 5, 1984 and consent decree entered January 15, 1985); United States v. IBM Corp., 1985-1 Trade Cas. (CCH) ¶66,439 (D.D.C. filed November 19, 1984 and consent decree entered February 22, 1985); United States v. Waste Management, Inc., Cv. No. 84-2832 (D.D.C. filed September 12, 1984 and consent decree entered June 6, 1985); United States v. Newell Company, Cv. No. CIV-N-82-305 (D. Conn. filed June 14, 1982 and consent decree entered July 16, 1985); and United States v. Calmar Inc., Cv. No. 84-5271 (D.N.J. filed December 20, 1984 and consent decree entered September 16, 1985).

15 PPG Industries, Inc. and Swedlow, Inc., Docket 9204 (issued January 29, 1986).

16 Federal Trade Commission v. PPG Industries, Inc. and Swedlow, Inc., 628 F.Supp. 881 (D.D.C. 1986).

August 22, 1986, the appellate court reversed the lower court's ruling and directed the issuance of a preliminary injunction.[17]

The Commission accepted final consent agreements in three merger cases in 1985.[18] In Allied Corporation, Allied agreed to divest certain assets used in the avionics business to offset the alleged anticompetitive effects of its acquisition of King Radio Company's competing business. In addition, for a period of ten years, Allied must obtain Commission approval prior to acquiring any interest in a company that manufactures or sells weather radar.

In InterNorth, Inc., the Commission charged that the acquisition by InterNorth of the Houston Natural Gas Corporation would lessen competition among pipeline companies that purchase and transport gas out of the southwestern U.S. InterNorth and Houston Natural were direct competitors, each engaged in the exploration for and production of oil and gas. InterNorth agreed to divest four natural gas pipelines to lessen the alleged anticompetitive effects of its proposed acquisition. The company is also prohibited from acquiring assets or stock of any company engaged in the production or transportation of natural gas in certain parts of the Southwest.

In Columbian Enterprises, Inc., Columbian, the third largest U.S. producer of carbon black, sought to acquire the Continental Carbon Company, the nation's sixth largest producer. In 1984 the Commission sought and was granted a preliminary injunction against Columbian, based upon the anticompetitive effects of the proposed acquisition. In 1985, the Commission accepted a consent order under which Columbian agreed not to acquire, for a period of five years, any part of the U.S. rubber carbon black business of any other person if, as a result of the acquisition, Columbian would increase its U.S. rubber carbon black production capacity by more than 130 million pounds. Columbian further agreed, for a period of five years, to obtain the prior approval of the Commission before completing any acquisition not prohibited by the consent agreement.

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17 Federal Trade Commission v. PPG Industries, Inc. et al., No. 86-5206 (D.C. Cir. Aug. 22, 1986) (order granting preliminary injunction).

18 Allied Corporation (accepted June 17, 1985); InterNorth, Inc. (accepted September 30, 1985); and Columbian Enterprises, Inc. (accepted November 13, 1985).

In a related case, the Commission provisionally accepted a consent order.[19] In Bass Brothers Enterprises, Inc. et al., Bass sought to acquire the Carbon Black Division of the Ashland Chemical Company, the second largest domestic producer of carbon black. In 1984, the Commission sought and was granted a preliminary injunction against Bass. In 1985, the Commission provisionally accepted a consent order in which Ashland agreed to terminate any agreement that provided for the acquisition by Bass of Ashland's carbon black business. Ashland also agreed to expand its reporting obligation beyond the requirements of Section 7A of the Clayton Act by agreeing to notify the Commission, for a period of four years, of certain proposed sales of U.S. carbon black manufacturing plants that are not subject to Section 7A. Ashland further agreed to observe the waiting period and second request requirements of Section 7A when it notified the Commission of any such proposed sale. A final consent agreement was accepted in 1986.

The Commission issued two administrative complaints in merger cases in 1985.[20] In MidCon Corp., the Commission charged that the acquisition by MidCon of the stock of United Energy Resources, Inc. could lessen competition in the transportation of natural gas in various parts of the U.S. The Commission provisionally accepted a consent order in part of that case; the remainder of the case is still in litigation before an Administrative Law Judge.

In Olin Corporation, the Commission challenged Olin's proposed acquisition from FMC Corporation of certain assets involved in the manufacture and sale of swimming pool sanitizers. The Commission charged that the acquisition would violate the antitrust laws by increasing concentration in the relevant market, and eliminating direct competition between Olin and FMC. The case is presently in adjudication.

Four final orders were issued by the Commission in merger cases in which administrative complaints were issued before January 1, 1985.[21] The Commission upheld dismissal of a complaint against Echlin Inc., challenging Echlin's acquisition

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19 Bass Brothers Enterprises, Inc. et al (provisionally accepted as to Ashland Oil September 26, 1985; final acceptance March 12, 1986).

20 Olin Corporation, Docket 9196 (issued July 18, 1985); and MidCon Corp., Docket 9198 (issued September 19, 1985).

21 Echlin Inc., Docket 9157 (issued June 28, 1985); Kaiser Aluminum & Chemical Corporation, Docket 9080 (issued August 27, 1985); Hospital Corporation of America, et al, Docket 9161 (issued October 25, 1985); and Weyerhauser Company, Docket 9150 (issued December 26, 1985).

of Borg-Warner Corporation's automotive aftermarket operations. Hospital Corporation of America ("HCA") was ordered to divest four hospitals it had acquired from Forum Group, Inc., to remedy the threat to competition in the provision of general acute care hospital services and psychiatric hospital services posed by HCA's acquisition. The Commission also issued a final order dismissing a complaint against Kaiser Aluminum & Chemical Corporation ("Kaiser"), which arose out of Kaiser's acquisition of certain basic refractory assets of the Lavino Division of International Minerals & Chemicals Corporation. Lastly, the Commission upheld an Administrative Law Judge's decision dismissing charges that Weyerhauser Company's acquisition of a corrugating medium mill from Menasha Corporation violated the antitrust laws.

Assessment of the Effects of the Premerger Notification Program

Although a complete assessment of the impact of the premerger notification program on the business community and on antitrust enforcement is not possible in this limited report, the following observations can be made.

First, as indicated in past annual reports, one of the premerger notification program's primary objectives, eliminating the so-called "midnight merger," has been achieved. The requirement that parties file and wait ensures that virtually all significant mergers or acquisitions occurring in the United States will be reviewed by the antitrust agencies prior to consummation. The agencies have the opportunity to challenge unlawful transactions before they occur, thus avoiding the problem of constructing effective post-acquisition relief.

Second, in most cases the parties provide sufficient information to allow the enforcement agencies to determine promptly whether a transaction raises any antitrust problems. The agencies and the parties have sometimes been able to use this information to isolate one element of a larger transaction that would create an antitrust violation. The parties then have an opportunity to cure that problem without sacrificing the benefits of an entire transaction. In addition, over the years, parties have increasingly supplied information voluntarily to the Commission and the Antitrust Division. This cooperation has resulted in fewer second requests than would otherwise have been possible.

Third, the existence of the premerger notification program alerts businesses to the antitrust concerns raised by proposed transactions. In addition, the greatly increased probability that antitrust violations will be detected prior to consummation forestalls certain questionable transactions from occurring. Prior to the premerger notification program, businesses could, and frequently did, consummate transactions which raised significant antitrust concerns, before the antitrust agencies had the opportunity to adequately consider their competitive effects. The enforcement agencies were forced to pursue lengthy post-acquisition litigation during the course of which the consummated transaction continued in place (and afterwards as well, where effective post-acquisition relief was not possible or available). Because the premerger notification program requires reporting before consummation, this problem has been significantly reduced.

Finally, the past year's statistics show that the agencies have granted far more requests for early termination of the waiting period than in the early days of the program. By shortening the waiting period for transactions that clearly do not raise antitrust problems, the agencies continue the effort to reduce the burden of the premerger notification program.

The Assistant Attorney General of the Antitrust Division has indicated his concurrence with this annual report.

By direction of the Commission,

Daniel Oliver
Chairman

cc: The Honorable Strom Thurmond
President Pro Tempore
United States Senate
Washington, D.C. 20510

List of Appendices

List of Attachments

Appendix A
Summary of Transactions, 1978 - 1985

	Sept.-Dec.	January - December							
	1978	1979	1980	1981	1982	1983	1984	1985	Total
Transactions Reported	355	868	824	1,083	1,144	1,128	1,400	1,749	8,551
Filings Received[1]	627	1,818	1,462	2,000	1,954	2,001	2,533	3,244	15,639
Transactions Where Additional Information was Requested[2]	36	109	74	79	50	48	77	84	557
FTC[2]	23	58	36	46[3]	26[4]	20[5]	37[6]	31	277
DOJ[2]	13	51	38	33[3]	24[4]	28[5]	40[6]	53	280
Number of Transactions Involving a Request for Early Termination[8]	31	115	104	174	341[7]	643[7]	1,064	1,415	3,887
Granted[8]	16	62	89	143	255[7]	599	847	1,077	3,088
Denied[8]	15	53	15	31	86[7]	44	217	338	799

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1 Usually, two filings are received, one from the acquiring person and one from the acquired person, when a transaction is reported. Only one filing is received when an acquiring party files for an exemption under sections 7A(c)6 or (c)(8) of the Clayton Act.

2 These statistics are based on the date the request was issued and not the date of the H-S-R filing. Some of these numbers have been amended to reflect more accurate data and are, therefore, different from those which have appeared in previous annual reports. These amended statistics indicate that the Commission requested additional information in 46 transactions in 1981, rather than in 48, as previously reported, and that the Antitrust Division requested additional information in 24, rather than 23, transactions in 1982.

3 Each number includes one transaction in which the relevant agency withdrew a request for additional information.

4 Each number includes one transaction which was withdrawn after the issuance of a second request. Also, one transaction was withdrawn after the Commission obtained a temporary restraining order from the court.

5 One transaction was withdrawn after the issuance of a second request by the Commission and two transactions were withdrawn after the issuance of second requests by the Antitrust Division.

6 Each number includes five transactions that were withdrawn after the issuance of a second request. In addition, one transaction was restructured and refiled after the Commission issued a second request.

7 These numbers are different from, and more accurate than, those which appeared in the Sixth Annual Report. Occasionally parties request early termination but the waiting period expires before the agencies can take any formal action to grant or deny the request. In previous annual reports such requests were erroneously omitted from the number of requests for early termination but an improved tracking system has permitted us to include them here. Because the waiting period expired without the agencies granting early termination the requests were effectively denied and they are counted in the "denied" category. Furthermore, the large increases in 1982 and subsequent years in the number of transactions in which a request was made for early termination reflects a liberalization of the standard for granting early termination following the decision in Heublein, Inc. v. Federal Trade Commission, 539 F. Supp. 123 (D. Conn. 1982) and the Commission's Formal Interpretation of August 20, 1982.

8 These statistics are based on the date of the H-S-R filing and not on the date action was taken on the request.

Appendix B

Number of Filings Received[1] and Transactions Reported by Month for the Years 1983 - 1985.

	1983		1984		1985	
	Filings	Transactions	Filings	Transactions	Filings	Transactions
nuary	149	91	131	76	211	111
bruary	116	57	180	98	210	110
rch	148	80	255	136	295	153
ril	129	81	212	118	267	149
y	139	88	199	107	286	156
ne	191	104	193	112	232	126
ly	169	92	211	120	302	160
gust	199	116	260	144	239	136
ptember	184	99	200	109	241	123
tober	155	89	229	132	350	195
vember	210	107	269	145	348	187
cember	212	124	194	103	263	143
TAL	2001	1128	2533	1400	3244	1749

1 Usually, two filings are received, one from the acquiring person and one from the acquired person, when a transaction is reported. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

Appendix C

'ansactions in Which Additional Information Was Requested for Calendar 'ears 1981 - 1985 [1]

	1981	1982	1983	1984	1985
'ansactions[2]	762	713	903	1119	1450
'equests for Additional Information					
- Number	78	42	51	71	84
- Percent [3]	10.2	5.9	5.6	6.3	5.8

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1 The statistics are based on the date of the H-S-R filing, not the date on which the request was issued.

2 These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a compliant notification); (2) transactions reported pursuant to the exemption provisions of sections 7A(c)(6) and 7A(c)(8) of the Act; and (3) transactions which were found to be non-reportable. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing for the 15% threshold and later filing for the 25% threshold, only a single consolidated transaction has been counted because, as a practical matter, the agencies do not issue more than one second request in such a case. Similarly, where a party has filed for a cash tender offer to acquire 50% of a target's voting securities and has also filed for the exercise of an option to acquire shares from the target issuer and for a subsequent merger, the transaction is assigned three numbers by the Premerger Office but treated in this table as one transaction. In contrast, the same transaction would be counted as three transactions on Table A and, if second requests were issued, as three second requests.

These statistics also omit from the total number of transactions reported secondary acquisitions filed pursuant to § 801.30(a)(4) of the premerger notification rules. Secondary acquisition have been deducted in order to be consistent with the statistics for 1984 transactions included in Exhibit A, Tables I through XI, and similar statistics for 1981-1983 transactions included in prior annual reports. Last year, when this appendix was devised, the figures did not exclude secondary acquisitions. Accordingly, the number of transactions for 1981-1984 appearing herein differ from those that appeared in Appendix C to last year's annual report.

3 Second requests as a percentage of the total number of transactions listed in this table.

TA I

EXHIB A

ACQUISITIONS BY SIZE OF TRANSACTION, 1/ 1984
(By Size Range)

Transaction Range ($Millions)	H-S-R Transactions		Clearance Granted to FTC or DOJ					Second Requests Issued				
	Number 2/	Percent 3/	Number		Percent 4/			Number		Percent 4/		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Less than 15	132	11.8	3	6	2.3	4.5	6.8	0	3		2.3	2.3
15 up to 25	234	20.9	6	20	2.6	8.5	11.1	4	9	1.7	3.8	5.6
25 up to 50	291	26.0	17	16	5.8	5.5	11.3	4	10	1.4	3.4	4.8
50 up to 100	180	16.1	19	14	10.6	7.8	18.3	8	2	4.4	1.1	5.6
100 up to 150	82	7.3	8	8	9.8	9.8	19.5	2	7	2.4	8.5	11.0
150 up to 200	48	4.3	6	2	12.5	4.2	16.7	2	1	4.2	2.1	6.2
200 up to 300	59	5.3	5	11	8.5	18.6	27.1	1	2	1.7	3.4	5.1
300 up to 500	51	4.6	8	7	15.7	13.7	29.4	3	4	5.9	7.8	13.7
500 up to 1000	22	2.0	4	2	18.2	9.1	27.3	1	1	4.5	4.5	9.1
1000 and up	20	1.8	11	2	55.0	10.0	65.0	6	1	30.0	5.0	35.0
All Transactions	1119	100.0	87	88	7.8	7.9	15.6	31	40	2.8	3.6	6.3

1/ The size of transaction is based on the aggregate total amount of voting securities and assets to be held by the acquiring person as a result of the transaction and is taken from the response to Item 3(c) of the premerger notification and report form.

2/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as a result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

3/ Percentage of total transactions.

4/ Percentage of transaction range group.

Note: Detail may not add to total due to rounding.

TABLE III

TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY, 1984

Transaction Range ($ Millions)	Clearance Granted By Agency			Clearance Granted as a Percentage of: Total Number of Transactions 1/			Transactions in Each Transaction Range Group 2/			Total Number of Clearances Granted		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
Less than 15	3	6	9	0.3	0.5	0.8	2.3	4.5	6.8	1.7	3.4	5.1
15 up to 25	6	20	26	0.5	1.8	2.3	2.6	8.5	11.1	3.4	11.4	14.9
25 up to 50	17	16	33	1.5	1.4	2.9	5.8	5.5	11.3	9.7	9.1	18.9
50 up to 100	19	14	33	1.7	1.3	2.9	10.6	7.8	18.3	10.9	8.0	18.9
100 up to 150	8	8	16	0.7	0.7	1.4	9.8	9.8	19.5	4.6	4.6	9.1
150 up to 200	6	2	8	0.5	0.2	0.7	12.5	4.2	16.7	3.4	1.1	4.6
200 up to 300	5	11	16	0.4	1.0	1.4	8.5	18.6	27.1	2.9	6.3	9.1
300 up to 500	8	7	15	0.7	0.6	1.3	15.7	13.7	29.4	4.6	4.0	8.6
500 up to 1000	4	2	6	0.4	0.2	0.5	18.2	9.1	27.3	2.3	1.1	3.4
1000 and up	11	2	13	1.0	0.2	1.2	55.0	10.0	65.0	6.3	1.1	7.4
All Clearances	87	88	175	7.8	7.9	15.6	7.8	7.9	15.6	49.7	50.3	100.0

1/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

2/ Percentages also appear in TABLE I.

Note: Detail may not add to total due to rounding.

TABLE IV

TRANSACTIONS INVOLVING THE ISSUANCE OF SECOND REQUESTS, 1984

Transaction Range ($ Millions)	Transactions Involving the Issuance of Second Requests			Second Requests Issued as a Percentage of: Total Number of Transactions 1/			Transactions in Each Transaction Range Group 2/			Total Number of Second Requests		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
Less than 15	0	3	3	-	0.3	0.3	-	2.3	2.3	-	4.2	4.2
15 up to 25	4	9	13	0.4	0.8	1.2	1.7	3.8	5.6	5.6	12.7	18.3
25 up to 50	4	10	14	0.4	0.9	1.3	1.4	3.4	4.8	5.6	14.1	19.7
50 up to 100	8	2	10	0.7	0.2	0.9	4.4	1.1	5.6	11.3	2.8	14.1
100 up to 150	2	7	9	0.2	0.6	0.8	2.4	8.5	11.0	2.8	9.9	12.7
150 up to 200	2	1	3	0.2	0.1	0.3	4.2	2.1	6.2	2.8	1.4	4.2
200 up to 300	1	2	3	0.1	0.2	0.3	1.7	3.4	5.1	1.4	2.8	4.2
300 up to 500	3	4	7	0.3	0.4	0.6	5.9	7.8	13.7	4.2	5.6	9.9
500 up to 1000	1	1	2	0.1	0.1	0.2	4.5	4.5	9.1	1.4	1.4	2.8
1000 and up	6	1	7	0.5	0.1	0.6	10.0	5.0	15.0	8.5	1.4	9.9
All Transactions	31	40	71	2.8	3.6	6.3	2.8	3.6	6.3	43.7	56.3	100.0

1/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

2/ Percentages also appear in TABLE I.

Note: Detail may not add to total due to rounding.

TABLE V

ACQUISITIONS BY REPORTING THRESHOLD, 1984

Threshold	H-S-R Transactions		Clearance Granted to FTC or DOJ					Second Requests Issued				
			Number		Percentage of Threshold Group			Number		Percentage of Threshold Group		
	Number 1/	Percent	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$15 Million	17	1.5	1	1	5.9	5.9	11.8	-	-	-	-	-
15%	44	3.9	1	2	2.3	4.5	6.8	-	1	-	2.3	2.3
25%	59	5.3	8	4	11.6	6.8	20.3	2	-	3.4	-	3.4
50%	665	59.4	49	46	7.4	6.9	14.3	19	20	2.9	3.0	5.9
Assets Only	327	29.2	28	35	8.6	10.7	19.3	10	19	3.1	5.8	8.9
Undetermined 2/	7	0.6	-	-	-	-	-	-	-	-	-	-
All Transactions	1119	100.0	87	88	7.8	7.9	15.6	31	40	2.8	3.6	6.3

1/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

2/ Seven filings were withdrawn before the threshold could be accurately determined.

Note: Detail may not add to total due to rounding.

TABLE VI

TRANSACTIONS BY ASSETS OF ACQUIRING PERSONS, 1984

Asset Range ($ Millions)	H-S-R Transactions		Clearance Granted to FTC or DOJ					Second Requests Issued				
	Number 1/	Percent	Number		Percentage of Asset Range Group			Number		Percentage of Asset Range Group		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Less than 15	29	2.6	1	-	3.4	-	3.4	-	-	-	-	-
15 up to 25	19	1.7	-	2	-	10.5	10.5	-	2	-	10.5	10.5
25 up to 50	56	5.0	2	4	3.6	7.1	10.7	-	2	-	3.6	3.6
50 up to 100	68	6.1	2	1	2.9	4.4	7.4	-	1	-	1.5	1.5
100 up to 150	77	6.9	6	5	7.9	6.5	14.3	-	2	-	2.6	2.6
150 up to 200	44	3.9	2	3	4.5	6.8	11.4	-	1	-	2.3	2.3
200 up to 300	67	6.0	5	5	7.5	7.5	14.9	3	2	4.5	3.0	7.5
300 up to 500	102	9.1	4	6	3.9	5.9	9.8	1	4	1.0	3.9	4.9
500 up to 1000	117	10.5	6	5	5.1	4.3	9.4	2	3	1.7	2.6	4.3
1000 and up	524	46.8	59	51	11.3	9.7	21.0	25	19	4.8	3.6	8.4
Assets not available	16 2/	1.4	-	4	-	25.0	25.0	-	4	-	25.0	25.0
All Transactions	1119	100.0	87	88	7.8	7.9	15.6	31	40	2.8	3.6	6.3

1/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

2/ This category is composed of 6 newly formed acquiring persons whose assets could not be accurately determined based on submitted documents; 2 private investors who do not prepare personal balance sheets; and, 8 filings which were withdrawn before their asset size could be accurately determined.

Note: Detail may not add to total due to rounding.

TABLE VII

TRANSACTIONS BY SALES OF ACQUIRING PERSONS, 1984

Sales Range ($ Millions)	H-S-R Transactions		Clearance Granted to FTC or DOJ					Second Requests Issued				
	Number 1/	Percent	Number		Percentage of Sales Range Group			Number		Percentage of Sales Range Group		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Less than 15	61	5.4	1	4	1.6	6.6	8.2	-	4	-	6.6	6.6
15 up to 25	23	2.1	-	2	-	8.7	8.7	-	1	-	4.3	4.3
25 up to 50	41	3.7	1	2	2.4	4.9	7.3	-	1	-	2.4	2.4
50 up to 100	74	6.6	3	4	4.1	5.4	9.5	-	3	-	4.1	4.1
100 up to 150	51	4.6	1	2	2.0	3.9	5.9	-	1	-	2.0	2.0
150 up to 200	49	4.4	3	4	6.1	8.2	14.3	1	2	2.0	4.1	6.1
200 up to 300	59	5.3	4	4	6.8	6.8	13.6	-	2	-	3.4	3.4
300 up to 500	107	9.6	6	9	5.6	8.4	14.0	3	4	2.8	3.7	6.5
500 up to 1000	128	11.4	8	2	6.2	1.6	7.8	3	2	2.3	1.6	3.9
1000 and up	499	44.6	57	55	11.4	11.0	22.4	24	20	4.8	4.0	8.8
Sales not available	27 2/	2.4	3	-	11.1	-	11.1	-	-	-	-	-
All Transactions	1119	100.0	87	88	7.8	7.9	15.6	31	40	2.8	3.6	6.3

1/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

2/ Transactions in this category include private investors whose sales could not be accurately determined, newly formed acquiring companies, and withdrawn filings.

Note: Detail may not add to total due to rounding.

TABLE VIII

TRANSACTIONS BY ASSETS OF ACQUIRED ENTITY 1/, 1984

Asset Range ($ Millions)	H-S-R Transactions		Clearance Granted to FTC or DOJ					Second Requests Issued				
	Number 2/	Percent	Number		Percentage of Asset Range Group			Number		Percentage of Asset Range Group		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Less than 15	85	7.6	1	5	1.2	5.9	7.1	–	3	–	3.5	3.5
15 up to 25	186	16.6	10	20	5.4	10.8	16.1	5	7	2.7	3.8	6.5
25 up to 50	233	20.8	15	10	6.4	4.3	10.7	3	8	1.3	3.4	4.7
50 up to 100	175	15.6	16	8	9.1	4.6	13.7	9	3	5.1	1.7	6.9
100 up to 150	84	7.5	6	3	7.1	3.6	10.7	2	2	2.4	2.4	4.8
150 up to 200	64	5.7	3	8	4.7	12.5	17.2	1	2	1.6	3.1	4.7
200 up to 300	66	5.9	5	8	7.6	12.1	19.7	3	3	4.5	4.5	9.1
300 up to 500	46	4.1	5	9	10.9	19.6	30.4	1	6	2.2	13.0	15.2
500 up to 1000	51	4.6	11	3	21.6	5.9	27.5	3	1	5.9	2.0	7.8
1000 and up	63	5.6	12	6	19.0	9.5	28.6	4	2	6.3	3.2	9.5
Assets not available	66 3/	5.9	3	8	4.5	12.1	16.7	–	3	–	4.5	4.5
All Transactions	1119	100.0	87	88	7.8	7.9	15.6	31	40	2.8	3.6	6.3

1/ The assets of the acquired entity were taken from responses to Item 2(d)(1) (Assets to be Acquired) or from Items 4(a) or 4(b) (SEC documents and annual reports) of the premerger notification and report form.

2/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party to the transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

3/ The value of the assets of the entity being acquired is not available for the sixty-six transactions in this category.

Note: Detail may not add to total due to rounding.

TABLE IX

TRANSACTIONS BY SALES OF ACQUIRED ENTITY 1/, 1984

Sales Range ($ Millions)	H-S-R Transactions		Clearance Granted to FTC or DOJ					Second Requests Issued				
			Number		Percentage of Sales Range Group			Number		Percentage of Sales Range Group		
	Number 2/	Percent	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Less than 15	147	13.1	2	7	1.4	4.8	6.1	2	5	1.4	3.4	4.8
15 up to 25	114	10.2	6	8	5.3	7.0	12.3	4	3	3.5	2.6	6.1
25 up to 50	212	18.9	7	16	3.3	7.5	10.8	1	5	0.5	2.4	2.8
50 up to 100	185	16.5	16	9	8.6	4.9	13.5	4	3	2.2	1.6	3.8
100 up to 150	92	8.2	7	8	7.6	8.7	16.3	5	5	5.4	5.4	10.9
150 up to 200	43	3.8	6	10	14.0	23.3	37.2	2	6	4.7	14.0	18.6
200 up to 300	76	6.8	5	7	6.6	9.2	15.8	-	4	-	5.3	5.3
300 up to 500	68	6.1	7	7	10.3	10.3	20.6	2	6	2.9	8.8	11.8
500 up to 1000	48	4.3	8	7	16.7	14.6	31.2	3	1	6.2	2.1	8.3
1000 and up	72	6.5	16	9	22.2	12.5	34.7	5	2	6.9	2.8	9.7
Sales not available	62 3/	5.5	7	-	11.3	-	11.3	3	-	4.8	-	4.8
All Transactions	1119	100.0	87	88	7.8	7.9	15.6	31	40	2.8	3.6	6.3

1/ The sales of the acquired entity were taken from responses to Item 5 (dollar revenues) and Items 4(a) and 4(b) (SEC documents and annual reports) of the premerger notification report form.

2/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party to the transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

3/ Transactions in this category are represented by the acquisition of newly formed corporations or corporate joint ventures from which no sales have been generated and the acquisitions of assets which had produced no sales or revenues.

Note: Detail may not add to total due to rounding.

TABLE X

INDUSTRY GROUP OF ACQUIRING PERSON, 1984

2-Digit SIC Code 1/	Industry Description	Acquiring Person: Number 2/	Clearance Granted To FTC or DOJ: FTC	Clearance Granted To FTC or DOJ: DOJ	Clearance Granted To FTC or DOJ: Total	Second Requests Issued: FTC	Second Requests Issued: DOJ	Second Requests Issued: Total
01	Agriculture Production-Crops	1	-	-	-	-	-	-
02	Agriculture Production-Livestock	3	-	-	-	-	-	-
10	Metal Mining	14	2	-	2	-	-	-
12	Bituminous Coal and Lignite Mining	10	-	-	-	-	-	-
13	Oil and Gas Extraction	40	3	1	4	1	1	2
14	Mining and Quarrying of Nonmetallic Minerals, Except Fuels	3	-	2	2	-	1	1
15	Building Construction-General Contractors and Operative Builders	12	-	2	2	-	-	-
16	Construction other than Building Construction-General Contractors	3	-	-	-	-	-	-
17	Construction-Special Grade Contractors	3	-	1	1	-	1	1
20	Food and Kindred Products	80	11	10	21	4	4	8
21	Tobacco Manufacturers	1	-	-	-	-	-	-
22	Textile Mill Products	6	-	-	-	-	-	-
23	Apparel and other Finished Products made from Fabrics and Similar Materials	12	3	1	4	-	1	1
24	Lumber and Wood Products, Except Furniture	6	1	-	1	1	-	1

TABLE 8 (Continued)

INDUSTRY GROUP OF ACQUIRING PERSON, 1984

2-Digit SIC Code 1/	Industry Description	Number 2/	Acquiring Person: Clearance Granted To FTC or DOJ: FTC	DOJ	Total	Acquiring Person: Second Requests Issued: FTC	DOJ	Total
25	Furniture and Fixtures	10	-	-	-	-	-	-
26	Paper and Allied Products	12	1	1	2	1	-	1
27	Printing, Publishing and Allied Industries	29	-	3	3	-	3	3
28	Chemicals and Allied Products	15	1	4	7	2	2	4
29	Petroleum Refining and Related Industries	8	1	1	2	1	1	2
30	Rubber and Misc. Plastics Products	12	1	1	2	-	-	-
32	Stone, Clay, Glass, and Concrete Products	12	5	-	5	3	-	3
33	Primary Metal Industries	16	-	4	4	-	2	2
34	Fabricated Metal Products, Except Machinery and Transportation Equipment	25	1	2	1	-	1	1
35	Machinery, Except Electrical	15	1	1	6	-	1	1
36	Electrical and Electronic Machinery, Equipment and Supplies	15	-	2	2	-	-	-
37	Transportation Equipment	16	1	-	1	1	-	1
38	Measuring, Analyzing and Controlling Instruments; Photographic, Medical And Optical Goods; Watches and Clocks	1	-	1	1	-	1	1
39	Miscellaneous Manufacturing Industries	4	-	-	-	-	-	-

TABLE X (continued)

INDUSTRY GROUP OF ACQUIRING PERSON, 1984

2-Digit SIC Code 1/	Industry Description	Number 2/	Acquiring Person: Clearance Granted To FTC or DOJ			Second Requests Issued		
			FTC	DOJ	Total	FTC	DOJ	Total
40	Railroad Transportation	2	-	-	-	-	-	-
41	Local and Suburban Transit and Interurban Highway Passenger Transportation	2	-	-	-	-	-	-
42	Motor Freight Transportation And Warehousing	5	-	-	-	-	-	-
44	Water Transportation	1	-	-	-	-	-	-
45	Transportation by Air	2	-	1	1	-	-	-
47	Transportation Services	2	-	-	-	-	-	-
48	Communication	24	-	3	3	-	3	3
49	Electric, Gas, and Sanitary Services	28	1	4	7	2	2	4
50	Wholesale Trade-Durable Goods	17	-	2	2	-	1	1
51	Wholesale Trade-Nondurable Goods	17	-	2	2	-	1	1
52	Building Materials, Hardware, Garden Supply and Mobile Home Dealers	8	1	-	1	-	-	-
53	General Merchandise Stores	15	1	1	2	-	1	1
54	Food Stores	11	1	-	1	-	-	-
55	Automotive Dealers and Gasoline Service Stations	1	-	-	-	-	-	-

TABLE X (continued)

INDUSTRY GROUP OF ACQUIRING PERSON, 1984

2-Digit SIC Code 1/	Industry Description	Number 2/	Acquiring Person: Clearance Granted To FTC or DOJ			Acquiring Person: Second Requests Issued		
			FTC	DOJ	Total	FTC	DOJ	Total
56	Apparel and Accessory Stores	5	-	-	-	-	-	-
57	Furniture, Home Furnishing, and Equipment Stores	2	-	-	-	-	-	-
58	Eating and Drinking Places	10	-	-	-	-	-	-
59	Miscellaneous Retail	9	2	-	2	-	-	-
60	Banking	12	-	-	-	-	-	-
61	Credit Agencies other than Banks	18	-	1	1	-	-	-
62	Security and Commodity Brokers, Dealers, Exchanges, and Services	18	-	-	-	-	-	-
63	Insurance	35	-	-	-	-	-	-
65	Real Estate	16	-	1	1	-	-	-
67	Holding and other Investment Offices	21	-	-	-	-	-	-
70	Hotels, Rooming Houses, Camps, and other Lodging Places	9	-	-	-	-	-	-
73	Business Services	14	1	-	1	1	-	1
75	Automotive Repair, Services, and Garages	1	-	1	1	-	1	1

TABLE X (continued)

INDUSTRY GROUP OF ACQUIRING PERSON, 1984

2-Digit SIC Code 1/	Industry Description	Acquiring Person						
			Clearance Granted To FTC or DOJ			Second Requests Issued		
		Number 2/	FTC	DOJ	Total	FTC	DOJ	Total
78	Motion Pictures	2	-	-	-	-	-	-
79	Amusement and Recreation Services, Except Motion Pictures	3	-	-	-	-	-	-
80	Health Services	30	4	2	6	3	-	3
89	Miscellaneous Services	2	-	1	1	-	-	-
98	Nonclassifiable Establishments	1	-	-	-	-	-	-
DV	Diversified Companies	275	55	10	65	11	12	23
00	Not Available	33 3/	1	-	1	-	-	-
	All Transactions	1119	87	88	175	31	40	71

1/ 2-Digit SIC codes are part of the system of Standard Industrial Classification established by the U.S. Government, Standard Industrial Classification Manual, 1972, Executive Office of the President - Office of Management and Budget. The SIC groupings used in this table were determined from responses submitted by filing parties to Item 5 of the premerger notification and report form.

2/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as a result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

3/ Transactions included in this category represent newly formed companies, companies with no U.S. operations, notifications filed by individuals, and filings withdrawn before the industry classification could be determined.

TABLE XI

INDUSTRY GROUP OF ACQUIRED ENTITY, 1984

2-Digit SIC Code 1/	Industry Description	Acquired Entity Number 2/	Clearance Granted To FTC or DOJ: FTC	DOJ	Total	Second Requests Issued: FTC	DOJ	Total	Number of 2-Digit Intra-Industry Transactions
01	Agricultural Production-Crops	2	-	-	-	-	-	-	-
02	Agricultural Production-Livestock	1	-	-	-	-	-	-	-
10	Metal Mining	9	2	-	2	-	-	-	4
12	Bituminous Coal and Lignite Mining	15	1	1	2	-	-	-	7
13	Oil and Gas Extraction	100	5	2	7	-	-	-	26
14	Mining and Quarrying of Nonmetallic Minerals, Except Fuels	3	1	1	2	-	-	-	2
15	Building Construction-General Contractors and Operative Builders	8	-	-	-	-	-	-	2
16	Construction other than Building Construction-General Contractors	2	-	-	-	-	-	-	1
17	Construction-Special Grade Contractors	4	1	1	2	-	-	-	1
20	Food and Kindred Products	81	11	11	24	3	6	9	51
21	Tobacco Manufacturers	1	-	-	-	-	-	-	-
22	Textile Mill Products	12	-	-	-	-	-	-	4
23	Apparel and other Finished Products made from Fabrics and Similar Materials	15	1	-	1	-	-	-	5

TABLE X (Continued)

INDUSTRY GROUP OF ACQUIRED ENTITY, 1984

2-Digit SIC Code 1/	Industry Description	Acquired Entity Number 2/	Clearance Granted To FTC or DOJ: FTC	Clearance Granted To FTC or DOJ: DOJ	Clearance Granted To FTC or DOJ: Total	Second Requests Issued: FTC	Second Requests Issued: DOJ	Second Requests Issued: Total	Number of 2-Digit Intra-Industry Transactions
24	Lumber and Wood Products, Except Furniture	13	2	-	2	2	-	2	1
25	Furniture and Fixtures	10	-	-	-	-	-	-	6
26	Paper and Allied Products	11	1	1	2	1	-	1	4
27	Printing, Publishing and Allied Industries	29	-	3	3	-	3	3	11
28	Chemicals and Allied Products	51	5	8	13	3	4	7	18
29	Petroleum Refining and Related Industries	8	3	2	5	2	2	4	2
30	Rubber and Misc. Plastics Products	23	1	2	3	-	-	-	5
31	Leather and Leather Products	1	-	-	-	-	-	-	-
32	Stone, Clay, Glass, and Concrete Products	11	4	-	4	2	-	2	7
33	Primary Metal Industries	34	1	4	5	1	1	2	10
34	Fabricated Metal Products, Except Machinery and Transportation Equipment	36	3	6	9	-	3	3	9
35	Machinery, Except Electrical	45	3	6	9	2	4	6	14
36	Electrical and Electronic Machinery, Equipment and Supplies	35	9	2	11	4	1	5	7

TABLE XI (continued)

INDUSTRY GROUP OF ACQUIRED ENTITY, 1984

2-Digit SIC Code 1/	Industry Description	Number 2/	Clearance Granted To FTC or DOJ: FTC	DOJ	Total	Second Requests Issued: FTC	DOJ	Total	Number of 2-Digit Intra-Industry Transactions
37	Transportation Equipment	11	3	1	4	-	-	-	-
38	Measuring, Analyzing and Controlling Instruments; Photographic, Medical And Optical Goods; Watches and Clocks	13	1	1	2	1	1	2	-
39	Miscellaneous Manufacturing Industries	8	-	-	-	-	-	-	2
41	Local and Suburban Transit and Interurban Highway Passenger Transportation	1	-	-	-	-	-	-	1
42	Motor Freight Transportation And Warehousing	6	-	1	1	-	-	-	-
44	Water Transportation	5	-	-	-	-	-	-	1
45	Transportation by Air	4	-	1	1	-	-	-	2
46	Pipelines, Except Natural Gas	6	1	1	2	1	1	2	-
47	Transportation Services	7	-	-	-	-	-	-	-
48	Communication	42	-	4	4	-	4	4	19
49	Electric, Gas, and Sanitary Services	18	2	4	6	1	2	3	7
50	Wholesale Trade-Durable Goods	28	-	3	3	-	1	1	8

TABLE X. (continued)

INDUSTRY GROUP OF ACQUIRED ENTITY, 1984

2-Digit SIC Code 1/	Industry Description	Acquired Entity							
			Clearance Granted To FTC or DOJ			Second Requests Issued			Number of 2-Digit Intra-Industry Transactions
		Number 2/	FTC	DOJ	Total	FTC	DOJ	Total	
51	Wholesale Trade-Nondurable Goods	41	1	2	3	-	-	-	17
52	Building Materials, Hardware, Garden Supply and Mobile Home Dealers	11	1	1	2	-	-	-	5
53	General Merchandise Stores	14	1	-	1	-	-	-	8
54	Food Stores	19	1	2	3	-	1	1	6
55	Automotive Dealers and Gasoline Service Stations	5	-	-	-	-	-	-	-
56	Apparel and Accessory Stores	10	-	-	-	-	-	-	4
57	Furniture, Home Furnishing, and Equipment Stores	1	-	-	-	-	-	-	1
58	Eating and Drinking Places	8	-	-	-	-	-	-	4
59	Miscellaneous Retail	19	5	-	5	1	-	1	3
60	Banking	10	-	-	-	-	-	-	3
61	Credit Agencies other than Banks	30	-	1	1	-	1	1	13
62	Security and Commodity Brokers, Dealers, Exchanges, and Services	16	-	1	1	-	-	-	7
63	Insurance	35	-	-	-	-	-	-	23

TABLE XI (continued)

INDUSTRY GROUP OF ACQUIRED ENTITY, 1984

2-Digit SIC Code 1/	Industry Description	Acquired Entity: Number 2/	Clearance Granted To FTC or DOJ: FTC	Clearance Granted To FTC or DOJ: DOJ	Clearance Granted To FTC or DOJ: Total	Second Requests Issued: FTC	Second Requests Issued: DOJ	Second Requests Issued: Total	Number of 2-Digit Intra-Industry Transactions
64	Insurance Agents, Brokers, and Services	8	-	-	-	-	-	-	-
65	Real Estate	16	-	-	-	-	-	-	5
67	Holding and other Investment Offices	13	-	-	-	-	-	-	3
70	Hotels, Rooming Houses, Camps, and other Lodging Places	14	-	-	-	-	-	-	6
72	Personal Services	1	-	-	-	-	-	-	-
73	Business Services	24	2	1	1	1	1	2	5
75	Automotive Repair, Services, and Garages	2	-	1	1	-	1	1	-
78	Motion Pictures	5	-	4	4	-	-	-	-
79	Amusement and Recreation Services, Except Motion Pictures	6	-	-	-	-	-	-	2
80	Health Services	35	4	2	6	3	-	3	26

TABLE XI (continued)

INDUSTRY GROUP OF ACQUIRED ENTITY, 1984

2-Digit SIC Code 1/	Industry Description	Acquired Entity: Number 2/	Clearance Granted To FTC or DOJ: FTC	Clearance Granted To FTC or DOJ: DOJ	Clearance Granted To FTC or DOJ: Total	Second Requests Issued: FTC	Second Requests Issued: DOJ	Second Requests Issued: Total	Number of 2-Digit Intra-Industry Transactions
82	Educational Services	1	-	-	-	-	-	-	-
89	Miscellaneous Services	5	-	1	1	-	-	-	2
DV	Diversified Companies	50	10	4	14	3	3	6	23
00	Not Available	14	1	-	1	-	-	-	9
	All Transactions	1119	87	88	175	31	40	71	412

1/ 2-Digit SIC codes are part of the system of Standard Industrial Classification established by the U.S. Government, Standard Industrial Classification Manual, 1972, Executive Office of the President - Office of Management and Budget. The SIC groupings used in this table were determined from responses submitted by filing parties to Item 5 of the premerger notification and report form.

2/ During calendar year 1984, 1400 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1119, reflects adjustments to eliminate the following types of transactions: (1) 9 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 72 transactions which were followed by separate notifications for one or more additional transactions between the same parties during 1984 (such transactions are listed here as a single consolidated transaction); 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a compliant notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.30 (a)(4)) reported as a result of reportable primary transactions. The table does not however, exclude 13 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

3/ Transactions in this category include filings withdrawn before an industry group could be determined and newly formed acquired entities.

Exhibit B

federal register

Tuesday
September 24, 1985

Part II

Federal Trade Commission

16 CFR Parts 801, 802, and 803

Premerger Notification; Reporting and Waiting Period Requirements; Proposed Rule

FEDERAL TRADE COMMISSION

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 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 proposed revisions are intended to further reduce the cost to the public of complying with the rules and to improve the program's effectiveness.

DATES: Comments must be received on or before October 24, 1985.

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

FOR FURTHER INFORMATION CONTACT: John M. Sipple, Jr., Senior Attorney, Premerger Notification Office, or Kenneth M. Davidson, Attorney, Evaluation Office, Bureau of Competition, Room 392, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 523-3404.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

With two exceptions, the proposed 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 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 on 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 these rules, is therefore inapplicable.

Paperwork Reduction Act

The Hart-Scott-Rodino Premerger Notification rule 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, Attention: Desk Officer for the Federal Trade Commission.

Background

Section 7A of the Clayton Act ("the act"), 15 U.S.C. 18a, as added by section 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, eliminating the problem of unscrambling the assets after the transaction has taken place.

Subsection 7A(d)(1) of the act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, 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 33450, and became effective on September 5, 1978.

The rules are divided into three parts which appear at 16 CFR Part 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.

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

The third set of changes were 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.

In addition, the Notification and Report Form, found in 16 CFR 803 (Appendix), has been revised twice. The new versions were approved by the Office of Management and Budget on December 29, 1981, and February 23, 1983, respectively. Since that time the Notification and Report Form, in its current version with some additional minor clarifications, has been approved by the Office of Management and Budget. The most recent approval came on September 14, 1984.

The genesis of this set of proposed changes to the premerger notification rules is a continuing effort by the Commission to reduce the burden of filing premerger notifications. That effort was the focus of a Notice of Request for Comments the Commission published in the Federal Register on July 2, 1982, (47 FR 29182). With two exceptions the amendments to the rules proposed in this Notice are based on that Request for Comments, the comments received as a result of that Request, and related burden reduction efforts. The proposals seek to accomplish this reduction by: (1) Narrowing the types of acquisitions that must be reported through the notification process, (2) reducing the documents or information that must accompany notifications, and (3) clarifying the meaning of the notification rules. The two proposals that do not fit this description are discussed separately below.

The 1982 Request for Comments outlined four approaches to reducing the burden of the notification program, three of which form the basis of some of these proposed amendments to the rules. The approaches to burden reduction on which comments were requested included: narrowing the coverage of the rules by raising the dollar thresholds that determine which acquisitions must be reported; setting separate higher dollar reporting thresholds for acquisitions in some industries; eliminating one or more of the successive reporting requirements for additional acquisitions of voting securities; and, allowing persons filing notifications to reference information and documents filed in previous notifications, rather than require them to resubmit those materials.

The Commission is proposing to raise one of the dollar thresholds that determine the coverage of the rules but not the one discussed in the Request for Comments. The Request 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 is clear from statistics covering 1982 and 1983 that the pattern of lower enforcement interest does not persist in the subsequent years. Consequently the Commission has not pursued that approach.

The Commission has, however, included three proposals in this Notice that would narrow the coverage of the rules. In proposal 6, the Commission would raise the dollar threshold in § 802.20(b) and thereby reduce the number of acquisitions valued at $15 million or less that are reportable. In proposal 7, the Commission would add a new rule, proposed § 802.35, to exempt the acquisition of an employer's voting securities by certain employee trusts. In proposal 4, the Commission would no longer require a notification for certain small acquisitions where the parties had previously filed a notification.

The Commission has not found a basis for establishing separate thresholds for different industries. The Request for Comments noted doubts that such system could be devised. Further study has confirmed the difficulty of defining industries and establishing separate thresholds. In proposal 5, however, the Commission would establish a higher threshold for acquisitions of carbon-based minerals in proposed § 802.3 and would exempt entirely acquisitions of certain kinds of real property that are defined in proposed § 802.2.

The Commission has not proposed to eliminate any of the sequential thresholds for reporting increased holdings of voting securities. The Commission continues to find an increase in the percentage of securities d by a person to be a matter that can have competitive significance.

The Commission adopted the suggestions in the Request that persons filing notification should be permitted to incorporate by reference certain previously submitted documents and information when it promulgated § 802.3(e) in 1983 (48 FR 34438 (July 29, 1983)). On the basis of experience with this rule the Commission would in proposal 10 now further reduce the materials that must be submitted with a notification. A new section, proposed § 803.9, would replace existing § 802.3(e). In proposal 12 the Commission would also reduce the information required by the Notification and Report Form.

In addition to these approaches, the Commission seeks to reduce the burden of the notification program by a series of amendments to clarify the meaning of these rules, largely by codifying informal interpretations of the Commission staff. These amendments include: a method of calculating the assets of a newly-formed entity in proposal 2; a method of calculating the percentage of voting securities a person holds in proposal 3; a description of acquisitions that are exempt because they are in the ordinary course of business in proposal 5; the requirements for giving notice to an acquired entity in proposal 9; the time when the statutory waiting period begins for notifications of the formation of joint ventures in proposal 11; and a series of changes to examples in the rules to reflect amendments to the rules in proposal 13.

Finally in proposal 1 and proposal 8 the Commission addresses matters other than burden reduction. Proposal 1 would add a new rule to cover a form of transaction that has become increasingly prevalent. The proposed rule would require persons to file notifications for acquisitions made through entities whose principal purpose is to make the acquisitions as if the acquisitions had been made directly. Proposal 8 would eliminate a little used exemption to ensure that certain acquisitions are subject to meaningful antitrust review.

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 the appropriateness of the proposed amendments to the rules as solutions to those problems. The Commission invites special attention to proposal 1 (concerning the "acquisition vehicle" rule), proposal 5 (concerning the exemption of certain kinds of assets), proposal 6 (concerning an increase in an exemption threshold) and proposal 7 (concerning an exemption for acquisitions by employee trusts) because each of these determines for a substantial number of transactions whether an acquisition must be reported. In addition proposals 1 and 7 deserve attention because these amendments respond to ongoing developments in the form and manner of making acquisitions.

The thirteen proposals in this Notice are arranged, to the extent that clear exposition permits, in the order they would appear in the Code of Federal Regulations.

List of Subjects

16 CFR Parts 801 and 802

Antitrust.

16 CFR Part 803

Antitrust, Reporting and recordkeeping requirements.

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

Authority

The Federal Trade Commission proposes 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.

I. Sections 801.1(n) and 801.5 Acquisition vehicles

The Commission proposes to amend its rules to require persons intending to make acquisitions through certain entities to file notifications as if they were making those acquisitions directly. Although the premerger notification rules subject many indirect acquisitions to antitrust review, acquisitions made by entities that are not "controlled" by other persons frequently are not reportable. The Commission has concluded that such acquisitions should be reportable if the entity's main function is to make the acquisition and if the acquisition would have been reportable had the entity's owners made their acquisitions directly instead of through that entity (or "acquisition vehicle"). The Commission proposes to add a new rule, proposed § 801.5, to require owners to file notifications for acquisitions made by entities deemed to be acquisition vehicles. The definition of the term "acquisition vehicle" would be placed in proposed § 801.1(n).

For tax and other business reasons, many acquisitions are made by a newly-formed entity. The owner of that entity typically contributes the capital or arranges for loans that are used to make the acquisition. Commonly, after an acquisition is completed the legal existence of either the acquired entity or the newly-formed entity is dissolved in a statutory merger.

In most transactions, this formation of an entity to make an acquisition has no effect on the parties who are required to file premerger notifications. Typically the newly-formed entity is a wholly owned subsidiary of an existing corporation. Because, pursuant to § 801.1(a)(1), the subsidiary is controlled by its parent corporation, the rules deem the "ultimate parent entity" to be the acquiring person. Accordingly the pre-existing parent corporation is required to file a premerger notification whether or not it creates a subsidiary to effect the acquisition.

As the Statement of Basis and Purpose to § 801.1(a)(1) notes, if this were not the result "the ultimate parent entity would be able to evade the requirements of the act by manipulating the [subsidiary]." 43 FR 33456 (July 31, 1978). Quite apart from the question of evasion, that filing obligation is appropriate because the parent corporation is the real party in interest. The subsidiary, whatever the reasons for its creation, is not a functioning business, at least not until the acquisition is completed. It is a shell incapable of corporate action until capital and corporate purposes are supplied by its owner. The ultimate parent entity is, therefore, the acquiring person. Moreover, it is the control obtained by the parent and the potential for anticompetitive effects from combining its business with that of the acquired entity that the act seeks to have the enforcement agencies review.

These reasons for requiring notifications also apply to some acquisitions in which owners of acquiring entities do not fit the premerger rules' definition of an "ultimate parent entity." If, for example, four corporations each acquire 25 percent of the voting securities or assets of another corporation, the acquisition would be reportable (assuming the act's size-of-person, size-of-transaction and other notification criteria are satisfied). The four separate transactions would be examined to determine if ownership of the acquired person's voting securities or assets by any of the four is likely to lessen competition. If, for purposes of acquiring the voting securities, the four were to create an entity to make the acquisition, the antitrust interest in the transaction would be unchanged. In fact, such acquisitions typically are followed y a statutory merger that is not subject to the rule's notification requirements and that transfers direct ownership to the four owners. In those instances, not only is the antitrust interest in the transaction the same as in a direct acquisition, the resulting legal rights in the business are identical: each would then directly own 25 percent of the shares of the acquired business.

Nevertheless, existing rules do not consider any of these owners to be a parent of the acquiring entity (because they do not control the entity as that term is defined in § 801.1(a)(b), i.e., none has either 50 percent of the voting securities of the entity or the contractual power to designate a majority of its board of directors). Although the objective criteria of the existing rules, like the one defining control, have been the key to making the premerger review program workable in most circumstances, the consequence here is that owners may not be required to report the acquisition. In fact, the transaction might not be reportable by anyone.

Two examples illustrate how the rules do not always make such transactions reportable and why that result is inappropriate. If the entity formed for the purpose of making the acquisition is a partnership, its owners are not required to report acquisitions made by the entity. If the entity is a corporate joint venture, the transaction also may not be reportable.

The partnership transaction is easier to follow. Assume the four corporations are competitors of each other and of the firm to be acquired. Assume further that each firm is valued in excess of $1 billion. The formation of the partnership is not reportable because § 801.40 covers the formation of only corporations, not partnerships. The acquisition by the partnership is not reportable because the partnership does not meet the size-of-person test of section 7A(a)(2) (that is, it does not have total assets or annual net sales of $10 million or more), and it is not controlled by any other person. For reasons discussed below in this Notice in connection with the proposed changes to § 801.11, the premerger rules do not count the over $1 billion in cash that will be contributed to make the acquisition, thus the partnership is considered too small to be required to report its acquisitions. Moreover, a partnership does not fit § 801.1(b)'s definition of a controlled entity under existing informal interpretations. Unless the partnership has other assets, no part of the transaction will be reportable, even though the size of the firms and their market shares in this example suggest that the acquisition should be closely reviewed.

The same transaction, if pursued through a corporate joint venture, would not be reportable if the acquisition were undertaken with loans (that were not guaranteed by the persons forming the corporation) or if the voting securities in the new venture were valued at $15 million or less. Section 801.40 counts cash and loans extended or guaranteed by the owners as assets of the joint venture. Thus only if the newly-formed corporation had received cash or owner-guaranteed loans to make a $1 billion acquisition would it meet the size-of-person criteria of section 7A(a)(2) of the act. And only if the securities were valued at more than $15 million would size-of-transaction criteria be met and the transaction not be exempt under § 802.20. If either criteria is not met, the formation of the corporate joint venture would not be reportable. The failure to require the reporting of acquisitions by newly-formed entities whose only assets are cash or loans (see discussion of this issue in proposal 2 below) has become a significant omission in certain circumstances because of the growing popularity of leveraged buyouts in which loans are secured by the assets being purchased. If the four competitors obtained financing in the manner described or valued voting securities at $15 million or less, neither the formation of nor the acquisition by their corporate joint venture would be reportable.

Even if the formation and subsequent acquisition were reportable, the result under the existing rules would not provide a fully satisfactory opportunity to review the acquisition. Because the formation and acquisition transactions would be reported separately, the notification of the formation would show several firms forming a joint venture corporation which at that time had no business. The second transaction would show that corporation (or "acquisition vehicle") acquiring an existing business. In neither case would the notification by the newly-formed company be directly helpful for antitrust analysis because it has no business and cannot reflect on its notification form the potential anticompetitive effects of the acquisition. And because the timing of the notification requirements for the two transactions are separate it is possible the enforcement agencies could lose the advantage given them by the act in obtaining information from the owners of the new corporation through requests for additional information. If, for example, the acquisition vehicle were formed sixty days prior to filing for the subsequent acquisition, the enforcement agencies might have no indication of what is the intended target and no basis for preventing the joint venture if, by itself, it does not violate the antitrust laws. When the acquisition vehicle files for the subsequent acquisition, its notification is likely to provide little indication of the competitive overlap that could exist as a result of the transition. Moveover, the owners might be beyond the reach of the enforcement agencies' demands through requests for additional information.

In order to ensure acquisitions by newly formed non-controlled entities are reportable and an opportunity for examining competitive consequences of such acqusitions, the Commission proposes to treat such transactions as if the owners of the acquisition vehicle had directly acquired the voting securities or assets of the acquired person. The existing definition of "person" in § 801.1(a)(1) is designed to prevent avoidance of reporting obligations by making the formation of subsidiaries irrelevant. Similarly, proposed § 801.5 would eliminate all inquiry into the reasons owners chose the organizational form used to make an acquisition. The proposal should reduce any bias created by existing rules to structure transactions in less efficient form in order to avoid filing a premerger notification. It would thereby supplement § 801.90 which requires such transactions to be reported if the creation of the acquisition vehicle had "the purpose of avoiding the obligation to comply with the requirements of the act." In addition to shaping the reporting obligation according to the substance of the transaction rather than its form, the proposal would eliminate the anomaly under existing joint venture rules that makes it possible for a person acquiring voting securities or assets (through newly-formed entities) to complete its waiting period before the waiting period for the newly-formed entity's acquisition begins.

The Commission believes it has authority, with the concurrence of the Attorney General, to treat these acquisitions as if they were made by the owners of the acquisition vehicle on the following grounds: the requirement in section 7A(a) of the act that persons who acquire voting securities or assets "directly or indirectly" file notifications, the authority in section 7A(d)(2)(A) to "define the terms used in [the act]" including the terms "directly," "indirectly" and "hold;" and the authority in section 7A(d)(2)(C) to "prescribe such other rules as may be necessary and appropriate to carry out e purposes of [the act]" including treating transactions which have similar characteristics in the same manner.

The Proposed Rules

The proposed acquisition vehicle rules have five principal elements. First, § 801.5(a) states the general rule that acquisitions of voting securities or assets by an acquisition vehicle are attributed to its owners on a proportional basis. Second, an acquisition vehicle is defined in § 801.1(n) as an entity formed or availed of principally for the purpose of making acquisitions. Third, § 801.5(b) establishes the method for calculating the number of voting securities that will be attributed as a result of an acquisition by the vehicle. Fourth, § 801.5(c) does the same for calculating the value of voting securities and assets that are attributed. Fifth, § 801.5(d) describes the circumstances in which voting securities and assets will no longer be attributed to owners of acquisition vehicles.

The General Rule

Proposed § 801.5(a) is designed to treat owners of acquisition vehicles as if they were the acquisition persons making the acquisitions directly without the agency of the acquiring vehicle. The effect of this paragraph and these proposed rules is to require an owner of an acquisition vehicle to file a premerger notification in circumstances where the proportion of the acquisition attributed to it and any other voting securities or assets it holds combine to meet or exceed one of the reporting thresholds of § 801.1(h). Proposed § 801.5 does not alter the reporting obligation arising from the formation of a joint venture under § 801.40 or the reporting obligation of the acquisition vehicle, which may be required to file separately.

The Definition of Acquisition Vehicle

The definition in proposed § 801.1(n) is formulated to include as an acquisition vehicle any entity that makes an acquisition but conducts little or no business activity apart from activities involved in making the acquisition. Thus, the definition applies to any type of entity (corporation, partnership, trust, etc.) or combination of entities, whether newly-formed or already existing, as long as its principal purpose is to make an acquisition. The definition is not limited to entities treated as evasion devices. This rule applies to all new entities even where the formation of the entity is dictated by sound business reasons. It includes all entities except those that are established, ongoing businesses. Owners of an ongoing business are required to report acquisitions of that business only if the transaction meets the criteria of § 801.90, that is, if structured "for the purpose of avoiding the obligation to comply with the requirements of the act." This is made clear by a proposed new example to be added to that rule.

The Number of Voting Securities Acquired

Section 801.13 establishes the method of determining how many voting securities are held as a result of an acquisition. According to that section, an acquiring person holds already held voting securities, those to be acquired, and, as a result of proposed § 801.5, those treated as held or to be held. Proposed § 801.5(b) provides the formula for determining how many shares held by the acquisition vehicle are attributed to each of its owners. Paragraph (b) establishes two methods, one for an acquisition vehicle that is a single corporation and the other for all other kinds of acquisition vehicles.

Where the single corporation rule applies, each owner multiplies the total number of voting securities which will be held by the acquisition vehicle (for example, 1000) times the percentage of shares in the vehicle the owner holds (for example, 25 percent) and that will give the number of voting securities to be treated as acquired through the acquisition vehicle (that is, $1000 \times .25$, or 250 voting securities). These voting securities would then be added to any other voting securities held by the owner to determine if it had a reporting obligation.

In other circumstances the number of voting securities held by each owner is determined by the owner's beneficial interest in the acquisition vehicle. The use of beneficial ownership criteria is designed to facilitate the calculation of proportional interests where a series of entities including corporations and partnerships obtain complex interests in an acquired entity. For these transactions the formula is the same: only the calculation of the percentage is different. Each owner multiplies the total number of voting securities the acquisition vehicle will hold by the larger of the following ratios: (1) the proportion of profits of the acquisition vehicle to which the owner would be entitled if all profits were distributed; or, (2) the proportion of assets to which each owner would be entitled upon dissolution of the acquisition vehicle.

The Value of Voting Securities and Assets Acquired

Section 801.14 establishes the method of determining the aggregate value of voting securities and assets held as a result of an acquisition. The aggregate total for each owner includes, among others, voting securities and assets acquired by the acquisition vehicle that are attributed to it by proposed § 801.5(c). The attribution rules of paragraph (c) are calculated in the same fashion as the number of voting securities are calculated under proposed § 801.5(b). The difference is that the dollar value treated as acquired by the owner is determined by multiplying the aggregate value of voting securities and assets held by the acquisition vehicle instead of by multiplying the total number of voting securities held by the acquisition vehicle.

When Attribution Ceases

Proposed § 801.5(d) declares that voting securities and assets held by an entity shall not be treated as held by its owners when the entity ceases to be an acquisition vehicle. An entity ceases to be an acquisition vehicle, pursuant to the definition in proposed § 801.1(n), when it commences active management of a business.

Affidavits Required

The Commission proposes to establish new procedures to inform the acquired person of the acquiring entity's status as an acquisition vehicle and the consequent obligation of the acquired person to file notifications in response to filings by the owners of the vehicle. The new requirements are similar to those required by existing and proposed § 803.5(a) which requires persons buying voting securities to notify the issuer of its obligations to file a premerger notification form. The new procedures will require owners to attach an affidavit to their notification and report forms stating that they have notified the acquired entity of the owner's status as an acquiring person. The proposed procedures would be contained in a new paragraph (c) of § 803.5 These amendments are discussed and set out in proposal 9 of this Federal Register notice.

Effects on Other Rules

In addition to rules 801.13 and 801.14 mentioned above, several other rules are affected by the addition of the acquisition vehicle rule. This section mentions some of those rules. This is not an exhaustive list, nor does it provide comprehensive treatment of each rule discussed.

Section 801.1(a)(2) Entity: The term "acquisition vehicle" is a characterization of the legal status of an entity. Thus any entity—corporation, partnership, trust, etc.—is an acquisition vehicle when it meets the definition of proposed § 801.1(n).

Section 801.1(b) Control: The acquisition vehicle rules do not alter the definition of control or the rules based on control. Thus an entity may be both an acquisition vehicle and controlled by an ultimate parent entity. Where both statuses exist, persons holding a minority of the voting securities of the acquisition vehicle will have their obligation to file notifications determined by proposed § 801.5. Persons holding a majority of the voting securities in a corporate acquisition vehicle will be the vehicle's ultimate parent entity and will be required to report accordingly.

Certain premerger rules that come into operation only when an entity is controlled never have an effect on owners of minority interests of acquisition vehicles. For example the "secondary acquisitions" described in § 801.4, the "controlled issuer" threshold of § 802.20(b) and § 802.51(b) all require the person addressed in the rules to have a controlling interest.

Section 801.1(c) Hold: The premerger rules' "hold" concept is the means by which the acquisition vehicle rules are integrated with the rest of the rules. Proposed § 801.5 requires owners of acquisition vehicles to treat the number of voting securities and the value of assets held by the vehicle as held by the owners on a proportional basis.

Section 801.2 Acquiring and acquired persons: It is through the operation of the hold concept that the owners of an acquisition vehicle become "acquiring persons" when the vehicle makes an acquisition. However owners do not automatically become "acquired persons." In a transaction described by § 801.31, for example, those accepting a non-cash tender offer of the acquisition vehicle's securities would not hold voting securities of the owner unless the vehicle were also a controlled person. Owners do not become acquired persons solely because the vehicle is an acquired person.

Section 801.10 Value of voting securities and assets to be acquired: When an acquisition vehicle acquires assets of voting securities, it must value them in accordance with § 801.10. The owners of the vehicle then apply proposed § 801.5(c) to determine the portion of that value attributable to each of them.

Section 801.12 (a) and (b) Calculating percentages of voting securities: When an acquisition vehicle acquires voting securities, each owner must first determine the number of voting securities of each class attributed to it by proposed § 801.5(b), and then calculate according to proposed § 801.12(b) the percentage of voting securities it holds.

Section 801.20 Acquisitions subsequent to exceeding threshold: Owners of acquisition vehicles are required by § 801.20 to recalculate their entire holdings to determine if as a result of the vehicle's acquisition the owners will meet or exceed a reporting threshold. Similarly, owners must calculate whether they continue to qualify for the five year exemption provided by § 802.21 or the amended tender offer exemption of § 802.23.

Section 801.30 Tender offers and acquisitions of voting securities from third parties: As with other rules, each owner must determine for itself whether it has reporting obligations under § 801.30. If such obligations exist, the acquisition vehicle cannot acquire voting securities until all of the statutory waiting periods have expired. To take down shares before then would transfer the shares to a person (one of the owners) in violation of the premerger rules. The acquired person must file a separate notification in response to filings from each owner.

Section 801.40 Formation of joint venture or other corporations: Owners can have an obligation to file notifications for the formation of an acquisition vehicle under § 801.40 as well as a separate obligation to report acquisitions of the vehicle under proposed § 801.5. The vehicle also can have a separate obligation to report when it makes acquisitions.

Proposed §§ 802.1, 802.2 and 802.3 Acquisition of assets: When assets are attributed to owners under these proposed rules, they maintain the exempt or non-exempt character they had as a result of the acquisition by the vehicle. Thus when a vehicle acquires substantially all the assets of an operating division, a one-third owner cannot claim it need not report the transaction because it holds only one-third of the acquired entity's assets. The owner has an undivided one-third interest in all the assets and therefore the transaction is not exempt.

Section 802.9 Acquisition solely for the purpose of investment: In contrast to assets, a specific number of shares held by the vehicle can be and are attributed to each owner because each share represents an undivided interest in the acquired entity. Nevertheless, the Commission believes that the intent of an acquisition vehicle to acquire control of an entity is a factor indicating that none of its owners have the "solely for the purpose of investment" intent required for the exemption established by § 802.9. At the same time the Commission recognizes that attributing such an intent in all acquisitions will create reporting obligations for passive investors in, for example, leveraged buyout transactions where there is no intention to alter the management of the business and no desire by those investors to play any role in the management of the business. As these passive investors are unlikely to raise antitrust concerns by their acquisitions, the Commission would welcome suggestions on how to exempt them yet include others who are part of a plan to transform an acquired entity.

Exempt transactions generally: In general, the exempt character of a transaction is not affected by the attribution of assets or voting securities pursuant to proposed § 801.5. For example, transfers to or from a federal agency (exempted by section 7A(c)(4)) or transactions subject to the approval of the Federal Deposit Insurance Corporation (exempted by section 7A(c)(7)) will be exempt for both the acquisition vehicle and its owners. Owners need not report transactions on the basis of acquisitions made by their acquisition vehicle if the owners would be exempt from reporting a direct acquisition equivalent to the one attributed to them by proposed § 801.5.

A. Authority

The authority for Parts 801–803 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.

B. The Commission proposes to amend its rules by the addition of § 801.1(n), § 801.5, and an Example 3 to § 801.90, as set forth below.

PART 801—COVERAGE RULES

§ 801.1 Definitions.

* * * * *

(n) *Acquisition vehicle.* The term "acquisition vehicle" means any entity or series of entities formed or availed of principally for the purpose of acquiring voting securities or assets. An entity is (or a series of entities are) an acquisition vehicle notwithstanding that the particular organizational form (e.g., partnership, corporation, etc.) chosen furthers a legitimate business purpose or that the entity engages (or entities engage) in incidental or minor business activities prior to the acquisition of voting securities or assets. An entity ceases to be an acquisition vehicle when the entity commences active management of a business other than the business of acquiring voting securities and assets.

Examples: 1. A partnership is formed by a corporation, A, and two individuals, B and C. A has annual net sales of $1 billion and is entitled to 40 percent of the profits of the partnership (or 40 percent of the assets upon dissolution). The partnership, which has no business of its own, acquires Oldco for $50 million with bank loans guaranteed by A, B and C. The partnership is an acquisition vehicle regardless of the purpose for which it was formed, because at the time it acquired Oldco its sole function was to make the acquisition. Because Corporation A is an acquisition vehicle, "A" will be required to report the acquisition of Oldco pursuant to § 801.5 unless the transaction is otherwise exempt. "B" and "C" may also be required to file notifications if they meet the size-of-person and other reporting criteria.

2. Newco is formed by corporations A, B, C and D, for the purpose of buying and revitalizing Oldco. Each corporation has annual net sales or total assets in excess of $1 billion. At the time Newco is formed, A contributes a patent that will make the operations of Oldco more competitive. B contributes $15 million to be used to acquire Oldco. C contributes a fleet of trucks which will be used to deliver Oldco products and a factory which is sold to obtain the remaining million needed to acquire Oldco. D contributes $10 million in capital to be used to revitalize and expand the Oldco operations. Newco is an acquisition vehicle because the principal purpose for which it was formed was to acquire Oldco. It had no business operations prior to that acquisition. The contribution of the patent and capital and the sale of the factory are incidental to that acquisition.

3. Assume the same facts as in example 2 except that Newco was initially formed as a subsidiary of A corporation to export A's products. Although the corporation was formed and a board of directors met, the corporation never began operations. Three years later A contributed its patent to Newco and sold shares of Newco to B, C and D on the terms outlined above when the four corporations decided to buy Oldco. Newco is an acquisition vehicle because it never had any business operations and is now being availed of principally for the purpose of acquiring Oldco.

4. Newco, an acquisition vehicle, transfers all its assets in exchange for 40 percent of the voting securities of Oldco. Newco uses its Oldco securities to nominate directors of Oldco. Newco ceases to be an acquisition vehicle when it begins to direct or participate in the management of Oldco notwithstanding that Newco's only assets are voting securities of Oldco.

§ 801.5 Acquisitions by an acquisition vehicle.

(a) Owners (holders of voting securities, partners, etc.) of an acquisition vehicle shall, until the event described in paragraph (d) of this section, be treated under these rules as if they also hold on a proportional basis voting securities or assets held by the acquisition vehicle.

(b) The number of voting securities held by an acquisition vehicle that are treated as if they are or will be held by each of its owners shall be calculated as follows:

(1) If the acquisition vehicle is a single corporation or a single corporation and wholly owned subsidiaries of that single corporation, the number of any class of voting securities attributed to each owner is the total number of each class of voting securities held by the acquisition vehicle multiplied by the percentage of voting securities issued by the single corporation held by each owner.

(2) In circumstances other than those described by paragraph (b)(1) of this section, the number of any class of voting securities attributed to each owner is the total number of each class of voting securities held by the acquisition vehicle multiplied by the larger of the following ratios:

(i) The proportion of profits of the acquisition vehicle to which each owner would be entitled if all profits were distributed; or,

(ii) The proportion of assets to which each owner becomes entitled upon dissolution of the acquisition vehicle.

(c) The value of voting securities and assets held by an acquisition vehicle that are treated as if they are or will be held by each owner shall be calculated as follows:

(1) If the acquisition vehicle is a single corporation or a single corporation and wholly owned subsidiaries of that single corporation, the value of an acquisition attributed to each owner is the value of voting securities and assets held by the acquisition vehicle multiplied by the percentage of voting securities issued by the single corporation held by each owner.

(2) In circumstances other than those described in paragraph (c)(1) of this section, the value of the acquisition attributed to each owner is the value of the voting securities or assets held by the acquisition vehicle multiplied by the larger of the following ratios:

(i) The proportion of profits of the acquisition vehicle to which each owner would be entitled if all profits were distributed; or,

(ii) The proportion of assets to which each owner becomes entitled upon dissolution of the acquisition vehicle.

(d) When an entity ceases (or a series of entities cease) to be an acquisition vehicle, the voting securities or assets held by that entity (or those entities) shall no longer be treated as if they are also held by its (or their) owners.

Examples: 1. A Corporation together with B Corporation form a partnership for the purpose of buying Oldco for $100 million. The partnership forms Newco to buy the shares of Oldco. The partnership and Newco are an acquisition vehicle because, pursuant to § 801.1(n), they are a series of entities formed for the purpose of acquiring voting securities. A has total assets valued at $1 billion. B Corporation has assets totalling $9 million and had net sales of $5 million in the previous year. B is entitled to 5 percent of the profits of the partnership and would receive upon dissolution 10 percent of its assets. Although "A" does not control the partnership pursuant to § 801.1(b), it will be required to file a notification because "A" meets the size-of-person criteria of section 7A(a)(2) of the act and because, pursuant to § 801.5, A has attributed to it an acquisition that meets the size-of-transaction criteria of section 7A(a)(3)(B) of the act. The value of the shares in Oldco that will be deemed acquired by A is $95 million, that is, $100 million (the acquisition price) times 95 percent (the proportion of profits to which A is entitled). "B" is not required to file a notification both because its assets and annual net sales are less than the minimum size specified in the act and because the value of its acquisition results in "B" holding less than the $15 million in assets and voting securities.

2. Corporations A, B, C and D formed Newco I in which each held 25 percent of the voting securities. Each corporation has annual sales and total assets in excess of $1 billion. After formation Newco I engaged in no business activity because the business opportunity for which it was formed disappeared. Subsequently A, B, C and D decided to buy Oldco for $100 million using Newco I. Newco I then formed Newco II to buy certain assets of Oldco and Newco III to acquire the voting securities of Oldco. A, B, C and D corporations are each, pursuant to § 801.5, deemed to be acquiring $25 million in assets and voting securities of Oldco and will have to file notifications prior to the acquisition. They are shareholders of Newco I, which, although formed for other purposes, was at the time it became a functioning business entity used principally for the purpose of acquiring Oldco. Newco I will also have to file a notification for the acquisition if it meets the size of person test of section 7A(a)(2) of the act.

After the acquisition of Oldco and its assets, Newco II was merged into Newco I. Newco I then sought to acquire Otheroldco. Because Newco I is no longer a corporate shell with neglible business activity its acquisition of Otheroldco is no longer attributable to its shareholders pursuant to § 801.5. The obligation to file a notification if there is one, will rest solely with Newco I.

§ 801.90 Transactions or devices for avoidance.

* * * * *

Examples: * * *

3. Corporations A, B, C and D, each with annual net sales or total assets in excess of

llion, decide to buy Oldco for $100 ...llion. Rather than acquire Oldco directly or from a new business entity to acquire Oldco, the four corporations decide on the following course of action for the purpose of avoiding filing a notification under the act. A, B, C and D corporations each acquire one quarter of the outstanding securities of Littleco for a total of $1 million. Littleco is an established manufacturing concern with annual net sales and total assets of less than $10 million. They then lend Littleco $100 million and cause it to acquire Oldco. Because the purpose of acquiring Oldco through Littleco (which does not meet the size of person test of § 7A(a)(2) of the act) was to avoid reporting the transaction, the existence of Littleco as an ongoing corporation, will be disregarded. Instead Littleco will be treated as if it were a business entity formed or availed of to acquire Oldco pursuant to § 801.5. "A", "B", "C" and "D" each will be required to report the acquisition of 25 percent of Oldco.

2. Section 801.11 Total Assets of a Newly-Formed Person

The Commission proposes to amend § 801.11 to codify a longstanding informal position of the staff that a newly-formed entity generally should not include funds used to make an acquisition in determinig its size. Under this proposed rule, if an entity's only assets are cash that will be used to ...e the acquisition and securities of ... entity it is acquiring, it generally will not have to file for that acquisition because the new entity will be deemed too small to meet the act's size-of-person test. Codification of this informal position is intended to limit coverage of the premerger rules to those situations where an antitrust violation is most likely to be present, that is, where one business entity of a substantial size acquires another business entity of a substantial size. The basic rule is explained below. The proposed rule contains an exception where the new entity acquires assets or voting securities of more than one person.

The Purpose of the Proposed 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 this requires one of the parties to have at least annual net sales or total assets of $10 million and the other at least annual net sales or total assets of $100 million. Section 801.11 establishes the procedure by which the size of parties to an acquisition is to be determined. Existing § 801.11 provides that the annual net sales and total ...sets of a person shall be the sales and ...sets stated on its last regularly prepared financial statements. It does not directly address the question of how to calculate the size of a person that does not have a regularly prepared balance sheet. However, by implication, the rule requires the preparation of a balance sheet for persons who have none. See 43 FR 33474 (July 31, 1978). In advising newly-formed persons of their obligation to prepare balance sheets, the Commission staff has advised that acquiring persons should not include as assets cash or loans that will be used to make an acquisition. The Commission now proposes to adopt this staff position and incorporate it in a new § 801.11(e) which establishes the procedure for calculating the total assets of newly-formed persons. The proposed rule does not alter the manner in which ongoing firms determine whether they meet the act's size-of-person criteria, because they have regularly prepared financial statements subject to § 801.11(a)–(d).

The distinction between the calculation of assets for ongoing business entities and newly-formed entities is based on the competitive potential of a newly-formed entity and on the certainty and simplicity of the existing balance sheet rule. In most circumstances the size of an acquiring person provides some measure of its competitive presence. Congress concluded that the amount of sales and assets were useful criteria. These size criteria can be misleading, however, when applied to entities formed for the purposes of making acquisitions. Such entities typically have had no sales and frequently have no assets other than the cash or loans used to make the acquisition. In such circumstances the acquiring person has no competitive presence. The acquisition does not combine businesses and therefore cannot reduce competition. The transaction merely changes the ownership of a single ongoing business. Accordingly, the Commission has concluded that no purpose is served by requiring such acquisitions to be reported. The Commission will not count the cash which flows through the newly-formed entity to make an acquisition, because those assets do not add to the competitive presence of the business entity which results from the acquisition. (Of course, competition could be lessened if the newly-formed business were owned by current or potential competitors of the person being acquired. Proposed § 801.5 is designed to alert the antitrust enforcement agencies to such acquisitions by requiring certain owners of newly-formed entities to file notifications.)

Similary, where the newly-formed business acquires voting securities or assets of one-person (including securities issued by entities within that person) in several transactions, the prior possession of voting or non-voting securities of that person generally does not enhance the anticompetitive potential of the transaction. The already acquired securities do not constitute a business entity which when combined with additional securities of that issuer will lessen competition. There is only one business being bought. However, if the newly-formed entity acquires assets or voting securities of more than one person an anticompetitive combination could result. For that reason an exception in proposed § 801.11(e) requires counting cash, loans and securities in those circumstances and would make such transactions reportable.

Although it might be argued that existing corporations also should be directed to deduct cash or loans which are earmarked for making the acquisition and securities issued by the entity being acquired from their total assets, the desirability of such a rule is more questionable. 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 reintroduce the complexity of compliance with the rules that the Commission eliminated when it promulgated the existing financial statements rule of § 801.11 (see 43 FR 33473–4 (July 31, 1978)). The considerations set out below confirm the original conclusion that there is no need to revise paragraphs (a)–(d) of the existing rule.

First, the existing rule, to a large degree, automatically arrives at the same result for ongoing corporations as proposed § 801.11(e) does for newly-formed corporations. Under the existing balance sheet rule, loans made to ongoing corporations for the purpose of making an acquisition usually are not included when calculating an acquiring person's total assets. Such loans are normally made just prior to consummation of the acquisition and are therefore not reflected on the person's last regularly prepared financial statement. Consequently even if loans ought not to be counted there is little need to deduct these assets because they usually are not included.

Second, there is value to the predictability and convenience of the balance sheet approach of the current rule even if it results in small inconsistencies in measuring corporate size. That approach allows the vast majority of firms to rely on their balance sheets to determine whether they have an obligation to file a notification. Businesses can quickly determine from existing records whether they must file. That convenience outweighs the value of trying to make more precise or more uniform the calculation of the dollar size criteria (which are at best only very preliminary measures of competitive significance). Accordingly the Commission will continue to rely on regularly prepared balance sheets for determining the size of ongoing businesses. To do otherwise would unnecessarily complicate the rules, introduce uncertainty about coverage and make the process of calculating size much more exact than is warranted by the rough measure established by Congress.

The Proposed Rule

General Rule

Proposed section 801.11(e) states that it applies only where the person does not have a regularly prepared balance sheet. As a practical matter the section applies only to newly-formed entities (that are not controlled by any other person). Persons with outdated or otherwise incomplete balance sheets are required to reconstruct their financial documents in accordance with paragraphs (a)–(d) of this section. 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 and securities issued by the acquired person (or an entity within the acquired person).

The exclusion of cash, loans or securities established by proposed § 801.11(e) continues until the acquiring person has a regularly prepared balance sheet. This exclusion means, for example, that a series of separate acquisitions of voting securities of one person over a four month period by one acquiring person will be treated as if the separate transactions all occurred at the same time because the non-inclusion is not ended by the first acquisition. Neither the cash to be used to acquire additional voting securities nor any voting securities of the same acquired person already held by the acquiring person are counted as assets until they appear on its regularly prepared balance sheet. Thus, if the acquiring person without a regularly prepared balance sheet accumulated $200 million in voting securities of one person over the four month period, it would not meet the size-of-person test if its only assets were those voting securities and cash to acquire more voting securities of that same person. In contrast, the proposal has no effect on the acquisition of assets. Assets must be reflected on the newly-formed entity's balance sheet as soon as they are acquired.

The first two examples illustrate how, in general, proposed § 801.11(e) measures size. Example 1 illustrates the applicability of paragraph (e) when only cash is used in the acquisition. Example 2 illustrates the applicability of the rule when the newly-formed company has non-cash assets. Example 2 also illustrates treatment of cash as an asset of an acquired person. Since the rule only allows a person to exclude cash "used to make an acquisition," other cash is always included as an asset of a newly-formed acquired person in determining its size.

Exceptions to the General Rule

As explained above, the general rule of proposed § 801.11(e) is appropriate because transactions that may pose an antitrust concern are those in which two or more parties of significant size combine. In two circumstances, the general rule cannot be applied because the underlying antitrust rationale does not apply. These situations are (1) where a new entity acquires assets or voting securities of two or more persons, and (2) where a new entity is formed to make an acquisition and the owners of that entity meet the size-of-person criteria and are therefore required to report the transaction pursuant to proposed § 801.5. The method in proposed § 801.11(e)(1) for calculating the total assets of a newly-formed acquired person requires separate calculations "for acquisitions of each acquired person." This means that if a newly-formed entity will acquire assets or voting securities of person A and of person B, then, in determining if the newly-formed entity is large enough to have an obligation to report the acquisition of A, the newly-formed entity must include as part of its total assets the cash it will use to acquire B and any securities of B that it holds. Similarly, in measuring the size of the newly-formed entity to determine whether the acquisition of B must be reported the entity must include the securities of A it holds and cash that will be used to acquire assets or voting securities of A. Example 3 illustrates the calculation of total assets when the newly-formed entity will make two (or more) acquisitions after its formation.

Newly-Formed Acquired Persons

There appear to be good reasons for creating a new entity with few assets other than cash to make an acquisition. Such transactions are frequent and, as discussed above, unlikely to have direct competitive significance. However, the Commission is not aware of good business reasons for creating a new entity with cash as its primary asset for the purpose of becoming an acquisition target, nor is this a typical form of transaction. Thus it does not seem necessary for the premerger rules to treat newly-formed acquired persons the same as newly-formed acquiring persons. Accordingly proposed § 801.11(e)(2) calculates the total assets of a newly-formed acquired person by including all assets.

C. Commission proposes to revise § 801.11(a) and add a new § 801.11(e) as set forth below. New language is indicated by arrows: (► new language ◄)

§ 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 paragraph ►s◄ (d) ►and (e)◄ of this section.

* * * * *

►(e) Except in acquisitions in which § 801.40(c) is applicable, and 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 financial statements described in paragraph (c) of this section shall be, for acquisition 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 voting securities issued by that acquired person (or an entity within that acquired person) 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 financial statements described in paragaph (c) of this section shall be all assets held by the acquired person at the time of the acquisition.◄

►Examples: 1. Assume that A is a newly-formed company which is not controlled by any other entity and whose formation is not subject to § 801.40. Assume also that A has no sales and does not have the financial statements described in paragraph (c) of this section. A plans to borrow $105 million in cash and purchase assets from B for $100 million. 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 in section 7A(a)(2).

2. In example 1 above, assume that A will, at the time it acquires B's assets, have $25

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 it has borrowed 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. In example 1, 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 substracts 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. Both acquisitions are therefore reportable. ◄

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

Section 801.12(b) sets out the method by which persons are to determine the percentage of voting securities of an issuer that they hold or will hold as a result of an acquisition. The Commission proposes to refine the method to reflect more accurately the amount of voting influence one person has over another. The language of the existing formula, when applied literally, produces a grossly distorted representation of voting power if different classes of an issuer's voting securities possess substantially different voting power. For that reason the Commission staff has responded to inquiries concerning such transactions 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. The Commission now proposes to codify this staff advice by revising the formula for calculating holdings of voting securities contained in § 801.12(b).

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 what 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). For all these reasons it is important that accurate determinations be made of the percentage of voting securities held by business entities.

Although the proposed revision is a great improvement it does not describe fully the voting power associated with an acquisition of shares. The Commission has found no objective and administrable criteria that will reflect for all situations the actual power resulting from an acquisition of shares. Because of the shortcomings of this proposed rule, the Commission particularly invites suggestions on how to better calculate holdings of voting securites.

The difficulties of formulating a completely descriptive rule are easily illustrated. It is well known, for example, that effective or "working" control of a widely held corporation can be maintained or in some cases obtained by ownership of a small fraction of its shares. There is, however, no objective and reliable way to determine the degree of control conferred when a person acquires a small fraction of the shares of a particular company. In addition, acquisitions of voting securities are also subject to more formal constraints which modify their power. Staggered elections of corporate directors, cumulative voting rights, voting trusts or agreements, supermajority provisions and convertible securities can each magnify or diminish the voting power of securities.

There is no way to translate these myriad factors into a single proportional measure of voting power such as the statutory "15 per centum or more of the voting securities" criterion set out in section 7A(a)(3)(A) of the act. Even a single one of these factors—cumulative voting rights—can frustrate that attempt by both enlarging and reducing voting power of shares at the same time. Cumulative voting rights can diminish the power of a majority shareholder and simultaneously magnify the power of some minority shareholders.

Like the Congressional criterion of section 7A(a)(3)(A), the Commission's proposal sometimes measures voting power only roughly, but the rule's objective criteria are quickly ascertainable in most instances. Such certainty of application has been a primary consideration in the formulation of these rules. They rely on business entities to identify themselves as having an obligation to file notifications of their acquisitions. The Commission believes therefore that the proposed rule is preferable to a rule that might measure voting power more precisely but would be less certain in its application.

The existing formula in § 801.12(b) directs 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 portrays the amount of influence the buyer will have over the acquired firm. In some instances, however, this formula can significantly misrepresent the voting power of the buyer. This discrepancy occurs where there are several classes of voting securities, and one class of voting stock has voting power disproportionate to another class. It is in such instances that the Commission staff has responded to inquiries by advising that persons filing calculate their voting power on a proportional basis. The Commission now proposes to adopt 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 literal application of the language in the existing rule to all acquisitions: 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 existing § 801.12(b), since Y can only cast 100 votes for directors, the percentage of voting securities held by Y after the acquisition will be 100 divided by 1,100 (the total number of votes for directors that anyone may cast) or about 9 percent. However, this percentage does not accurately reflect Y's influence over X, since Y can elect six of X's ten directors. Under the present rule, therefore, Y's acquisition would not cross the 15 percent threshold and, if valued at $15 million or less would not be reportable. In addition, the rules' conclusive presumption of control set out in § 801.1(b)(1) would not apply since Y does not hold 50 percent or more of X's voting securities.

The proposed new § 801.12(b)(1) would calculate 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:

$$\frac{\text{Number of votes of class 1 stock held by Y}}{\text{Total votes of class 1 stock}} \times \frac{\text{Directors elected by class 1 stock}}{\text{Total number of directors}}$$

Plus

$$\frac{\text{Number of votes of class 2 stock held by Y}}{\text{Total votes of class 2 stock}} \times \frac{\text{Directors elected by class 2 stock}}{\text{Total number of directors}}$$

One of the examples following proposed § 801.12(b)(1) discusses this hypothetical acquisition further.

D. It is proposed that § 801.12(b)(1), (b)(1) (i) and (ii) be revised, and examples 1, 2 and 3 be added as set forth below. New language is indicated by arrows: (►new language◄). Deleted language is indicated by brackets [deleted language].

§ 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 [ratio] ►sum of the separate ratios for each class of voting securities◄, expressed as a percentage [, which—] ► The ratio for each class of voting securities equals:◄

(i) ►(A)◄ The number of votes for directors of the issuer which [voting securities presently entitle] the holder ►of a class of voting securities is entitled◄ to cast, ►and◄ [or,] as a result of the acquisition, will ►become entitled◄ [entitle the acquiring person] to cast, [bears to] ►divided ◄ (ii) ►(B)◄ The total number of votes for directors of the issuer which presently may be cast ►by that class◄, [or] ►and◄ which will be entitled to be cast, ►by that class◄ after the acquisition. [whichever is greater.] ►; 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 common stock 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, proposed § 801.12(b) requires calculations of the percentage of voting securities held to be made according to the following formula:

$$\frac{\text{Number of votes of class 1 held}}{\text{Total votes of class 1}} \times \frac{\text{Directors elected by class 1 stock}}{\text{Total number of directors}}$$

Plus

$$\frac{\text{Number of votes of class 2 held}}{\text{Total votes of class 2}} \times \frac{\text{Directors elected by class 2 stock}}{\text{Total number of directors}}$$

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 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 total the percentages calculated for each class, Y holds a total of 56 percent (20 percent plus 36 percent) of the voting securities of company X.◄

* * * * *

4. Section 801.13 Aggregation of Assets and Voting Securities

Sections 801.13 and 801.14 require parties to aggregate their purchases of voting securities and assets from the same person to determine whether the act's 15 percent of voting securities or $15 million notification thresholds are met. 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. Unfortunately, the existing rule can require repeated and burdensome reporting of even small acquisitions that have no anticompetitive potential, because it requires aggregation. For example, the rules currently require the aggregation of two asset purchases from the same person if the purchases occur within 180 days of each other, even though the first purchase was already reported and the second was very small. A similar problem arises when a small purchase of assets follows a reportable acquisition of voting securities. To reduce these problems, the Commission proposes to amend § 801.13 to eliminate the requirement that previously reported purchases must be aggregated with subsequent purchases of assets.

The current rules require aggregation in the following circumstances. Section 801.13(b) requires an acquiring person to add the value of any assets acquired within the past 180 days to the value of any present acquisition of assets from the same seller to determine whether the present purchase is reportable. If all other reporting requirements are met, therefore, an acquisition of $10 million worth of assets would have to be reported if it followed a $10 million asset purchase from the same person the previous month. Where the original acquisition was of voting securities, § 801.14 imposes similar requirements but includes no 180-day time limit for aggregating the current acquisition of assets with the earlier stock purchase. Thus, where the acquiring person acquired $8 million of stock a year ago and now intends to purchase $8 million of assets from the same company, the asset purchase is reportable (assuming other reporting requirements are satisified).

Aggregation can cause acquiring and acquired persons to file multiple notifications for tiny transactions. Once a person makes a reportable acquisition by buying $15 million of another person's voting securities or assets, the aggregation requirement (which requires the inclusion of the prior transaction) guarantees that any additional purchase, however small, will also satisfy the act's size-of-transaction criteria. Consequently the transaction will again be subject to the notification and waiting requirements of the act (unless otherwise exempted). Repeated filings can be quite burdensome to the parties in such transactions. Where the assets have a small dollar value, the costs of filing a notification and the delay of even an abbreviated waiting period may deter parties from entering into transactions that otherwise would be advantageous.

This proposal would alleviate this burden by creating separate aggregations for each cluster of transactions that amount to $15 million. Thus, after one acquisition has been reported, it would not require the acquiring person to report subsequent acquisitions until they again amounted to $15 million in the aggregate. The proposed modification would no longer require reporting (and therefore would not deter) small subsequent transactions.

Burdening or deterring small subsequent transactions, as the current rule does, would be justified if it were likely that the subsequent transactions would lessen competition. For example, an initial reportable sale of $150 million in assets might include only assets without competitive significance. Then, if there were no aggregation rule, a subsequent anticompetitive transaction would avoid the scrutiny of the notification process if additional assets valued at $15 million or less were transferred. But, while such transactions are possible, it seems unlikely that this proposal will eliminate from premerger review a significant number of acquisitions that raise antitrust concerns.

The proposal strikes a more practical balance of contending interests than the existing rule, yet maintains much of the protection provided by the aggregation principle. For example, under the proposal the subsequent $15 million or less acquisition becomes not reportable only because there has been an antitrust analysis of a transaction between the parties. In other words, the antitrust agencies will have already examined the antitrust potential of combining certain assets of the businesses of the two parties. In doing so they may well have considered the overall effect of combining the entities and thus may be alerted to the anticompetitive danger of transferring the anticompetitive component, especially if the transaction makes sense only with that component. In such circumstances a subsequent transaction, even if unreported, is likely to come to the attention of the antitrust agencies.

These considerations do not eliminate the possibility that anticompetitive transactions will avoid scrutiny under the rules, but they suggest that few, other than persons intending to evade the act, will have an incentive to structure transactions to take advantage of the proposed modifications. Neither the proposed rule nor the existing one are designed to prevent a willful evasion of the reporting obligations under the act. Under the existing rule a determined evader can merely wait 180 days to consummate the second transaction. Willful evasions are addressed by § 801.90 and section 7A(g) of the act. On the other hand the proposed modifications make possible, or at least eliminate a barrier to, competitively insignificant transactions that could be deterred by the requirement of filing multiple notifications.

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, where a series of acquisitions involves only voting securities, § 802.21 exempts from reporting requirements all individual acquisitions except those that meet or exceed the notification thresholds defined in § 801.1(h).

The Commission proposes to amend § 801.13 so that previously-acquired assets and voting securities which have already been subject to the reporting and waiting period requirements of the act will not be aggregated with a subsequent acquisition of assets from the same person. This change would make the aggregation requirements for successive asset acquisitions more consistent with the aggregation requirements for successive stock acquisitions. In addition, the change would eliminate the obligation to file for asset acquisitions that, because of their small size, are unlikely to violate the antitrust laws.

E. Accordingly, the Commission proposes to amend § 801.13(a)(1), add a new § 801.13(a)(3), add example 4 following § 801.13(a) and revise § 801.13(b)(2)(ii) as set forth below. New language is indicated by arrows: (►new language◄). Deleted language is indicated by brackets: [deleted language].

§ 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 subparagraph 3 of this paragraph,◄ 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) * * *

►(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.◄

Examples: * * *

►(4) On January 1, Company A acquired $20 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" need 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.◄

(b) *Assets.* * * *

(2) * * *

(ii) Subject to the provisions of § 801.15, if the acquiring person has acquired [any assets] from the acquired person within the 180 calendar days preceding the signing of such agreement [and such assets] ►any assets which◄ are presently held by the acquiring person, ►and the acquisition of which was not previously subject to the filing and waiting requirements of the act,◄ then only for purposes of section 7A(a)(3)(B) and § 801.1(h)(1), both the acquiring and the acquired person 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.

* * * * *

5. Sections 802.1, 802.2, and 802.3 Acquisitions of Assets

Proposed §§ 802.1, 802.2, and 802.3 describe certain types of acquisitions of assets that are and are not exempt from the notification requirements of the act. The proposed rules have been developed as a result of uncertainties about the much less specific rule in the existing § 802.1. The new language reflects to a large degree informal advice given by Commission staff in response to questions. The proposals introduce and define a number of new terms. Unlike existing § 802.1 which was based solely on the statutory exemption in section 7A(c)(1) of the act for "acquisitions . . . in the ordinary course of business" and the Commission's authority (with the concurrence of the Assistant Attorney General for Antitrust) in section 7A(d)(2)(A) to "define the terms used in [section 7A]," the proposed rules also reply on the authority in section 7A(d)(2) (B) and (C) to "exempt . . . transactions which are not likely to violate the antitrust laws" and to "prescribe such other rules as may be necessary and appropriate to carry out the purposes of [section 7A]."

The proposed rules outline basic kinds of asset transactions that must undergo the premerger screening process established by the act for the antitrust enforcement agencies. Transactions are exempted if it is not necessary to examine the individual circumstances of an acquisition to determine that the category of acquisition has little potential to violate the antitrust laws. In proposed § 802.1 the principal basis for determining that potential is whether the assets transferred constitute substantially the equivalent of a business entity or are fundamental to the existence of a business. This proposal makes most transfers of assets that are the equivalent of a business reportable. When a transaction can be described that transfers assets that are less than a fundamental element of a business the proposed rule generally exempts such transactions. Proposed § 802.2 (concerning certain real property assets) and proposed § 802.3 (concerning carbon-based mineral rights), in contrast, exempt acquisitions even if they transfer an entire existing business. These transactions are proposed to be exempt because the large supply of the assets and the nature of the market for those assets make it unlikely that a transfer covered by the proposed rules will violate the antitrust laws.

The use of the "equivalent of a business" and "fundamental element of a business" criteria for the exemption in proposed § 802.1 reflects the obligations of the enforcement agencies to identify and prevent acquisitions which are likely to violate the antitrust laws by lessening competition. Mergers or acquisitions of businesses (as opposed to sales of goods or realty) can lessen competition because they automatically diminish the number of competitors in a market when the buyer is a competitor or potential competitor. Such mergers are more likely to lessen competition when the product or service market has few competitors and the business that disappears is of a substantial size. Accordingly, the proposed rule declares transactions exempt if it can be determined without review of the individual circumstances of a transaction that the acquisition of assets is not equivalent to the transfer of a business.

Business equivalency and the need for individual review are the basis for exemptions in the act and the existing rules, as well as the proposed rule. For example, section 7A(c)(1) exempts "acquisitions of goods or realty transferred in the ordinary course of business." Individual review of such transactions is unnecessary typically because selling goods is the essence of manufacturing, wholesaling, and retailing businesses. In no way do sales in the ordinary course of business diminish the capacity of the selling firm to compete. Consistent with this principle, the existing § 802.1(b) does not exempt the sale of assets if they constitute "substantially all of the assets of . . . an operating division." A business is often the sum of its assets, thus the sale of assets can diminish the productive capacity of the selling firm and concentrate productive capacity among the remaining firms. Although it is possible that the effects of selling productive assets might be to enhance competition in a particular industry, to determine those effects each acquisition must be judged individually. The rules therefore require that such transactions be reported. Proposed § 802.1 applies this business equivalency approach in greater detail.

Proposed §§ 802.2 and 802.3 rely on a different justification. Unlike the ordinary course of business criteria of proposed § 802.1, these exemptions are not determined by the use that sellers or buyers make of the acquired assets. Rather it is the abundance of the assets described in these sections and the unconcentrated nature of the market in which the assets are transferred that justifies these exemptions. Where such assets are plentiful and widely held it is not necessary to examine individual transactions to determine if typical transactions will violate the antitrust laws.

The Proposed Rules

The proposed rules are divided into three parts. Proposed § 802.1 describes three common categories of acquisitions of goods. It describes some of the circumstances in which such transactions are and are not exempt from the notification obligations of the act because the acquisitions are or are not made in the ordinary course of business. Proposed § 802.2 describes certain real property transactions that would be exempt from the notification requirements on the ground that such acquisition are unlikely to violate the antitrust laws. Proposed § 802.3 would exempt acquisitions of carbon-based minerals valued at $150 million or less, also on the grounds that such transactions are unlikely to violate the antitrust laws.

Assets Acquired in the Ordinary Course of Business

Proposed § 802.1 defines some of the circumstances in which the acquisition of assets is exempt from the notification obligations of the act.

Operating Divisions

Proposed § 802.1(a) provides guidance on when an acquisition of assets will be considered equivalent to the acquisition of a business. It states that an acquisition is reportable if it includes substantially all the assets of an operating division and gives numerous examples of operating divisions. The term "operating division" is derived from existing § 802.1(b). Paragraph (a) defines an operating division as assets that have been operated as a business entity. The sale of new tangible goods or current supplies by manufacturers, wholesalers and retailers is generally exempt except when sold as part of the sale of substantially all the assets of an ongoing business. For example, if a firm manufactures widgets and sells as part of a sale of substantially all its assets an inventory of widgets, the acquisition of those widgets would not be exempt.

The sale of an operating division is a divestiture of productive capacity. As such, the sale of the assets is extraordinary and not in the ordinary course of business. If the seller has operated the collection of assets as a free-standing profit center, the ansaction can be competitively significant. It is either an exit from the market by a competitor, an entry by a new competitor or an opportunity for an existing competitor to increase its productive capacity. Because such transactions need to be examined individually to determine if they will lessen competition, they are not exempt from the reporting requirements of the act. The sale of assets that do not constitute an operating division can be reportable nevertheless if the acquisition does not meet the exemption criteria of other rules.

Current Supplies

Proposed § 802.1(b) describes a type of asset acquisition that does not constitute the sale of a business—the acquisition of current supplies. Raw materials, components, inventory, maintenance supplies and the like are used up on a current basis, consequently their acquisition does not create or extinguish a competitive entity. Such acquisitions are clearly transactions in the ordinary course of business and are therefore exempt from the notification requirements. When inventory is the primary asset of a business, as is the case for antique shops and art galleries, the sale of all inventory is the sale of all the assets of that business and can be equivalent to the sale of a business and is not exempt under this paragraph.

Paragraph (b) introduces a new term, "current supplies," which is defined in subparagraphs (1), (2) and (3).

Durable Goods

Proposed § 802.1 deals with another problematic kind of transaction, the acquisition of "durable goods." In certain businesses, an integrated set of manufacturing machines or other pieces of equipment is the foundation of a business even though those machines do not constitute substantially all the assets of an operating division. The sale of such equipment therefore can represent the equivalent of an entry or exit of a business operation in spite of the fact that the acquisition of the machine necessarily will be supplemental by the acquisition of other goods. Such transactions can be competitively significant because, for example, one firm could monopolize an industry with high entry barriers by buying only the critical machinery from each of its competitors. Some "durable goods" acquisitions therefore need to be reviewed on an individual basis. Proposed § 802.1(c) declares which of these transactions are exempt.

Subparagraph (c)(1) exempts sales of new "durable goods." Because routine sales by manufacturers, wholesalers or retailers of new durable goods are clearly in the normal course of their businesses the sales are always exempt. Acquisitions of new machines normally only expand productive capacity and therefore do not tend to lessen competition.

In contrast, the acquisition of "used durable goods" transfers existing productive capacity from one person to another. Such used durable goods transactions may be common and considered by the parties to be in the ordinary course of their businesses. Nevertheless, where both the seller and buyer use such goods in their businesses, subparagraph (c)(2) does not define such acquisitions, however common, as ones in the ordinary course because they can lessen competition by concentrating productive capacity. Subparagraph (c)(2) exempts from the requirements of the act only those acquisitions of used durable goods in which either the buyer or seller is a dealer and not a user of such goods. Such transactions are in the ordinary course of the dealer's business.

Although sales of used durable goods to a dealer may have competitive consequences, these do not normally raise antitrust issues. The sale of such productive assets may represent an exit of a business from an industry and thereby lessen the number of competitors, but there is no basis in the antitrust laws for requiring a firm to remain in the business. When the buyer is not a competitor and has no plans to enter the business, there is no effect on competition beyond the closing of the seller's facilities. Accordingly there is nothing for the antitrust authorities to analyze and the transaction is exempt from the notification requirements.

For similar reasons there is little for antitrust officials to review when a dealer sells used durable goods. As with the sale of new durable goods, the most usual effect is to increase the productive capacity of the industry. Consequently the subparagraph exempts both sales and purchases of used goods transactions by dealers.

There is normally little reason for antitrust concern about sales of used goods to dealers because the assets are taken out of production. Unlike a competitor, a dealer has no reason to pay a premium for the goods in order to reduce industry production capacity. Rather the goods are abandoned by their former owner and lose their immediate competitive significance. Moreover when resold by a dealer they, like the assets of a "failing company," are similar to acquisitions of new durable goods which normally enlarge productive capacity and generally do not lessen competition.

However, in contrast to the sale of a failing company's assets to a possible competitor, a transaction that requires case-by-case review by antitrust authorities, the sale of used durable goods by or to dealers does not require routine examination. The primary reason for individually examining the acquisition of failing companies is to determine if the buyer is a competitive or potential competitor whose acquisition might lessen competition and to determine if the seller is going out of business as it asserts. In the case of used durable goods, the sale to the dealer resolves both of those issues. By definition the dealer is neither an actual nor potential competitor, thus there is no prospect of competitive harm resulting from the sale to a dealer. And, the seller does abandon the assets. Accordingly the Commission can generalize about such transactions and exempt the acquisition of used durable goods where either the acquired or acquiring person is a dealer.

To be sure, the combined effect of a sale to a dealer and a resale by the dealer to a competitor can be the equivalent of a sale of assets between competitors. The reasons for the used goods dealer exemption do not apply when the intermediary is merely a conduit for real parties in interest that are users of the durable goods. As a consequence, the proviso to subparagraph (c)(2) denies the exemption if the intermediary is acquiring the assets for a specific person who uses the goods. This criterion is not whether the intermediary is an agent of either seller or buyer or whether the intermediary takes title and assumes the risk of loss over the goods, rather it is whether the intermediary has agreed, at the time it acquires the goods, to whom it will resell those goods. If the intermediary has made such an agreement then its role in the transaction is ignored and the acquisition must be reported as one between the persons who are users of the durable goods. Although the proviso does not affect the dealer's right to take title to the goods from the seller (that acquisition is exempt under proposed § 802.1(c)(2)), the proviso does prevent the dealer from completing the transaction by transferring the used goods to the buyer with whom he has a contract until both buyer and seller have complied with the notification and waiting requirements of the act.

The term "durable good" is new. It is defined in proposed § 802.1(c)(1) to be a d which is used repeatedly and has a ful life of more than one year.

Certain Real Property Transactions

Proposed § 802.2 exempts certain real property transactions on the ground that they are unlikely to lessen competition. The kinds of property proposed § 802.2 would exempt include unimproved land. office buildings and residential properties. Most. if not all. transactions conveying these kinds of property have been considered exempt under existing § 802.1. Exemption of such transactions. however. does not fit within the explicit sale of business rationale of proposed § 802.1. Unlike that section. which exempt certain acquisitions of "current supplies." and "durable goods." this section exempts acquisitions of assets that constitute freestanding business entities. It is evident. therefore. that if these real property transactions are to continue to be exempt. the exemption must have a distinct justification. The Commission has concluded that sufficient justification exists to continue exempting these transactions.

The basis for exempting the named categories of real property is that the total quantity of the resources and the large number of annual transactions makes the $15 million size-of-transaction criteria of section 7A(a)(3)(B) overly inclusive and burdensome. Although there is much variety in the market structure of transactions affected by proposed § 802.2 (for example. most competitors are engaged in business in one or a few of the many diverse regional or local markets) they have one characteristic in common. It is unlikely that acquisitions of property named in proposed § 802.2 would have any significant potential to increase market power. The low risk of anticompetitive transactions is a result of the widely dispersed holding of these resources as well as the small size of typical transactions relative to the total amount of resources. One indication of how unlikely it is that a merger of real property holdings would produce a violation of the antitrust laws is provided by a computer search of decided cases. Pairing the words "office buildings." "residential properties." and "mergers" identified no cases. Even adding the word "antitrust" to the search did not result in the identification of any relevant cases. Another indication that such mergers are unlikely to be anticompetitive is the absence of substantial barriers to entry in these most general categories of real property. Capital is available to finance real estate projects on a national basis. and. in general. anyone with financing can enter a local or regional market in the named industries.

The Commission proposes to continue the total exemption provided for acquisitions of these categories of real property. notwithstanding that the rationale for these exemptions is quantitative (that is. typical transactions are too small to harm competition) rather than inherent in the nature of the assets being transferred. It is possible that competitive harm could result from an unusually large transaction or series of transactions. Nevertheless the Commission believes it is unwarranted to burden the many real property transactions that pose no threat to competition solely on the ground that it is theoretically possible that such transactions could reduce competition.

Proposed § 802.2 also exempts the acquisition of voting securities of a corporation holding only these real property assets and incidental related assets. This provision derived from the existing § 802.1(a) which deems "an acquisition of the voting securities of an entity whose assets consist solely of real property" and related assets to be an acquisition of real property. The proposed treatment of real property corporations has the same intent but is more narrow and more specific. Its see-through provision applies only to the kinds of real property which are exempted by proposed § 802.2.

The term "unimproved land." is defined in proposed § 802.2(a) and "office building." and "residential property" are defined in proposed § 802.2(b). "Unimproved land" does not include property if agricultural land. structures. hydro or geothermal power. or reserves of timber or minerals account for more than $15 million of the total value of the property. "Office buildings" and "residential properties" are structures that generate ninety percent of their revenues from these functions or contain facilities used for other functions that are valued at $15 million or less.

Carbon-Based Mineral Reserves

Proposed § 802.3 would add a limited exemption for acquisitions of carbon-based mineral reserves. Like the proposed exemption of § 802.3 for certain real property transactions. this proposal is based on the likelihood that typical acquisitions that satisfy the $15 million size-of-transaction criterion of section 7A(a)(3) are too small to reduce competition. However an appreciable number of larger acquisitions of carbon-based mineral reserves warrant individual examination of their competitive effects. The Commission proposes therefore to limit this exemption to acquisitions valued at $150 million or less.

Currently some acquisitions of carbon-based mineral rights are not reportable under informal interpretations of the statutory exemption for acquisitions in the ordinary course of business (see section 7A(c)(1) of the act). These staff interpretations have been applied to undeveloped mineral rights. They are justified on the grounds that the acquisitions are essentially routine purchases of raw materials by processors of carbon-based minerals in the ordinary course of their business. While the Commission believes there is some basis to the existing staff interpretation. it believes the primary justification for exempting the reserves is not that they are current supplies. Rather. it is that there are a large number of transactions valued at more than $15 million that have little anticompetitive potential.

The Commission has made numerous studies of the coal and the oil and gas industries. including in recent years the 1982 report on *Mergers in the Petroleum Industry* and the 1978 staff point report on the *Structure of the Nation's Coal Industry*. On the basis of these and other studies four conclusions seem warranted. First. the total dollar value of reserves in these industries dwarfs asset holdings of most other industries. Second. the holdings of U.S. reserves in these industries are widely dispersed. resulting in generally low industry concentration ratios in relevant product and geographic markets. Third. acquisitions of reserves have had little effect on overall concentration ratios. Fourth. the scale of the largest acquisitions of reserves. however. does warrant a careful examination of the potential effects on competition.

The Commission has therefore rejected a blanket exemption approach and proposes to adopt a $150 million limit on this exemption. The $150 million limitation serves several purposes. It avoids imposing a filing requirement on many transactions that have previously been considered exempt. It also preserves for the antitrust enforcement agencies the procedural advantages of the act in those transactions where competition has a greater probability of being affected—acquisitions in excess of $150 million. Finally. by requiring filings the limitation will provide a record of the number of notifications filed and enforcement interest in these transactions that might form the basis for raising or lowering the exemption mitation after experience with the proposed rule.

The proposed rule groups together different kinds of carbon-based minerals. This single category seems appropriate both because reserves are frequently found together, as is the case with oil and gas, and because the largest firms frequently are major reserve holders in the several industries. Accordingly rather than attempt to define separate exemptions for each kind of mineral, the Commission proposes to group them together.

Aggregation Rules

At present transactions exempted by section 7A(c)(1) of the act (that is, acquisitions in the ordinary course of business) are addressed in § 801.15(a). That paragraph directs that the aggregation rules of § 801.13 not be applied. Thus in determining whether the more than $15 million size-of-transaction criterion of section 7A(a)(3) is met, the value of assets acquired in the ordinary course of business are not counted. Because proposed § 802.1 merely declares that certain transactions meet and others do not meet the ordinary course of business criteria of section 7A(c)(1), there would be no occasion to change the placement of that statutory exemption or separately list proposed § 802.1. Under the proposed provisions a sale of used durable goods valued at $10 million and current supplies values at $8 million, would not meet the more than $15 million size-of-transaction criterion (assuming the sale did not constitute substantially all the assets of an operating division) because the current supplies are exempt pursuant to section 7A(c)(1).

The other transactions that would be made exempt under this proposal are no longer based on section 7A(c)(1); therefore they must be listed separately in § 801.15 to make clear whether and under what circumstances the assets they describe must be aggregated pursuant to § 801.13. (Proposed amendments to § 801.15 are set forth in proposal 7 of this Notice.) Proposed § 802.2(a), which would exempt unimproved land, would be placed in § 801.15(b) because the Commission believes it is important to aggregate the value of separate transfers of otherwise non-exempt assets for purposes of applying the $15 million limitation on the definition of unimproved land. Greater accumulations of mineral rights, timber reserves, etc., even in separate transactions, increases the probability that the toal transferred will have antitrust significance. § 801.15(b) directs that the aggregation rules of § 801.13 be applied only if the assets, as a result of aggregation, will have exceeded a quantitative limitation on the exemption of assets of that kind. Thus, if one person made two acquisitions from the same person within 180 days of unimproved land, each valued at $30 million and each contained timber valued at $10 million, then the transactions would not be exempt. Because of aggregation, the value of timber held after the second transaction would be $20 million and the entire $80 million transfer would be reportable. Proposed § 802.2(b), which would exempt office buildings and residential properties, would be placed in § 801.15(a). Because the exemption of these assets is determined by the characteristics of each individual structure it would be inconsistent to aggregate the dollar values of separate transactions.

Proposed § 802.3, which deals with carbon-based minerals, also would be placed in § 801.15(b). Like the assets subject to the $15 million limitation in proposed § 802.2(a) the antitrust significance of transfers of carbon-based minerals can be greater in larger transactions. It is therefore appropriate to aggregate these acquisitions. Thus, if a company bought $100 million of coal rights valued at $100 million in January and then bought oil and gas rights valued at $100 million in March from the same seller, then the company would have exceeded the $150 million exemption for carbon-based minerals in proposed § 802.3 and the March acquisition would be valued at $200 million for purposes of calculating the size of the transaction.

Even with proposed §§ 802.1, 802.2 and 802.3 the exempt status of some transactions will remain unaddressed by these rules. Acquisitions of certain kinds of intangible rights such as the sale of franchise rights by the franchisor have been considered to be transfers in the ordinary course of business under section 7A(c)(1) of the act and therefore exempt. In contrast an acquisition of title to a patent has not been considered to be in the ordinary course. These and other transactions will continue to be defined through informal interpretations by the Commission staff. Persons who desire advice on the exempt status of a proposed transaction should contact the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580, or phone (202) 523-3894. With these limitations in mind, the proposed rules should significantly reduce confusion, unnecessary filings and disputes over the scope of exemptions.

F. The Commission proposes to amend its rules by revising § 802.1 and adding new §§ 802.2 and 802.3 and examples as set forth below. New language is indicated by arrows: (►new language◄). Deleted language is indicated by brackets: [deleted language].

[§ 802.1 Acquisitions of goods or realty in the ordinary course of business.

(a) *Acquisitions of voting securities of entities holding only realty.* For purposes of section 7A(c)(1), an acquisition of the voting securities of an entity whose assets consist or will consist solely of real property and assets incidental to the ownership of real property (such as cash, prepaid taxes or insurance, rentals receivable and the like) shall be deemed an acquisition of realty.

(b) *Certain acquisitions of assets.* No acquisition of the goods or realty of an entity (except for entities described in paragraph (a) of this section) shall be made "in the ordinary course of business" within the meaning of section 7A(c)(1), if, as a result thereof, the acquiring person will hold all or substantially all of the assets of that entity or an operating division thereof.]

[§ 802.1 Acquisition of certain assets in the ordinary course of business.

Acquisitions of goods in the ordinary course of business are, pursuant to section 7A(c)(1), exempt from the notification requirements of the act. This section sets out criteria for determining whether certain kinds of transactions are or are not in the ordinary course of business.

(a) *Operating Divisions.* An acquisition of all or substantially all the assets of an entity or operating division thereof is not an acquisition in the ordinary course of business. The term "operating division" means a collection of assets that have been operated as a distinct or self contained business undertaking. The term includes, but is not limited to, the following collections of assets: regional or branch units, international units, financial units, service units, transportation units, factories, mines, oil wells, hotels, and shopping malls.

Example: Corporation A, a nationwide finance business, closes all of its 22 offices in one metropolitan area and sells all of its accounts receivable from these offices to corporation B. The acquisition of these accounts by B is not exempt under § 802.2(b), because these accounts receivable constitute substantially all the assets of a regional or branch unit (the remaining assets are office supplies). It is therefore the acquisition of an erating division and not in the ordinary course of business.

(b) *Current Supplies.* Except when acquired as part of a transaction described in paragraph (a) of this section, an acquisition of current supplies is in the ordinary course of business. The term "current supplies" includes, but is not limited to, the following kinds of assets:

(1) Goods bought solely for the purpose of resale (e.g., inventory).

(2) Goods bought for consumption in the ordinary course of the acquirer's business (e.g., office supplies, maintenance supplies or electricity), and.

(3) Goods bought to be incorporated in the final product (e.g., raw material and components).

(c) *Durable Goods.* (1) Except when acquired as part of a transaction described in paragraph (a) of this section, an acquisition of durable goods is in the ordinary course of business if the goods purchased are new. A good is "durable" if it is used repeatedly in the business and has a useful life greater than one year.

(2) An acquisition of used durable goods is in the ordinary course of business only if the acquiring person or the acquired person is not a user of such goods and has no plans to become a user of such goods: *provided*, however, if a person making an acquisition that is exempt under this subparagraph has agreed to acquire specific goods from an identified person who is or has been a user of the goods for another person who is or intends to become a user of such goods, then that other person is deemed to be acquiring the goods from the user and that acquisition by the person who is or intends to become a user from the person who is or has been a user is not in the ordinary course of business.

Example. Middleman Company agrees to acquire five used jet planes from Landing Airlines and then resell them to Flying Airlines for $100 million. Middleman then purchases the five airplanes from Landing Airlines. Although Middleman's acquisition is exempt, the transaction cannot be completed by transferring the planes to Flying until Flying and Landing file notifications because the proviso to § 802.1(c)(2) deems that the acquisition be treated as if Flying bought them directly from Landing for $100 million. The acquisition by Flying from Landing is subject to the notification requirements of the act assuming all other reporting requirements are met.◄

[§ 802.2 Acquisitions of certain kinds of real property.

(a) Acquisitions of unimproved land or the voting securities of an entity whose assets consist solely of unimproved land are exempt from the requirements of the act. The term "unimproved land" includes any real property unless the aggregate value of structures, agricultural land, reserves of timber or minerals and hydro or geothermal power account for more than $15 million of the value of the property.

(b) Acquisitions of office buildings or residential properties or the voting securities of an entity whose assets include solely office buildings and residential properties are exempt from the requirements of the act. A structure is an "office building" or a "residential property" if it has generated no more than 10 percent of its revenues from functions other than office or residential use in each of the two years prior to the proposed date of acquisition or if the areas used for those other functions are valued at $15 million or less. If the structure has been erected during the two year period, the revenue criteria of this exemption is satisfied if 10 percent or less of the structure's revenue came from uses other than office or residential during that shorter period (or is projected to come from these functions if the structure has generated no revenue).

(c) Assets incidental to the ownership of real property exempted by paragraphs (a) and (b) (such as cash, prepaid taxes or insurance, rentals receivable and the like) shall not be considered part of the otherwise non-exempt property for purposes calculating the $15 million limitations of this section.

Example: 1. "A" acquires unimproved land valued at $200 million from "B". The property contains mineral rights and structures valued at $13 million. Because these otherwise non-exempt assets are valued at $15 million or less, the acquisition meets the definition of unimproved land and the transaction is exempt. Two months later "A" acquires from "B" a $30 million tract of unimproved land that includes mineral rights valued at $8 million. Because § 802.2(a) transactions are listed in § 801.15(b), separate transfers of unimproved land are aggregated in accordance with § 801.13. As a result of that aggregation the value of the otherwise non-exempt assets that will be held after the second transaction is 21 million. The $15 million limitation of § 802.2(a) is therefore exceeded and the entire $230 million transfer must be reported unless it is exempt under other provisions of the rules or the act.

2. "A" acquires two office buildings, each valued at $50 million, from "B". Each structure contains retail space valued at $10 million which generates 20 percent of the revenue of the building. Although more than 10 percent of the revenue of each building is generated by functions other than office or residential uses and the total value of that space exceeds $15 million, the transaction continues to meet the exemption criteria of § 802.2(b). That $15 million limitation on the value of non-office, non-residential space is calculated for each structure and is not exceeded in this example because the value of that space is $10 million for each building.◄

►§ 802.3 Acquisition of carbon-based mineral reserves.

An acquisition of carbon-based mineral reserves (such as oil, natural gas, coal, shale or tar sands) or rights to carbon-based mineral reserves are exempt from the requirements of the act if the total assets held as a result of the acquisition do not exceed $150 million and if the value of associated machinery, structures or other assets included in the acquisition does not exceed $15 million.

Example: Company A acquires rights to oil and gas reserves valued at $100 million from company B. Sixty days later A buys coal reserves valued at $100 million. Pursuant to § 801.13(b) "A" will hold any assets acquired from "B" within 180 calendar days of signing the agreement to acquire coal reserves as a result of the acquisition of coal, therefore that acquisition of carbon based mineral reserves is valued at $200 million and is not exempt.◄

6. Section 802.20(b) Increase in the "Controlled Issuer" Threshold

Section 802.20(b) exempts acquisitions of voting securities valued at $15 million or less if the voting securities held as a result of the acquisition do not confer control of an issuer that has total assets or net annual sales of $25 million or less. The Commission proposes to expand this exemption (and parallel exemptions in §§ 802.50 and 802.51) by raising the controlled issuer threshold to $200 million, because the experience of the antitrust agencies demonstrates that few of the transactions made reportable by § 802.20(b) have raised substantial competitive problems and none have resulted in enforcement actions. Our enforcement experience indicates that raising the threshold from $25 to $200 million would eliminate the vast majority of filings required by paragraph (b), while still requiring reports for those which have the greatest possibility of raising significant antitrust concerns.

The proposed change would constitute a major increase in one of the two size-of-transaction tests in the act and rules. When read together, section 7A(a)(3)(B) of the act and § 802.20 establish two minimum size-of-transaction tests. Under these tests, notification is not currently required unless, as a result of the acquisition, the acquiring person would hold either:

(1) Voting securities, assets or a combination of voting securities and

ssets of the acquired person valued at more than $15 million; or

(2) Sufficient voting securities to control a firm which, together with all the entities the acquired firm controls, has annual net sales or total assets of $25 million.

The first minimum size-of-transaction test is the one more commonly met. It establishes the basic rule that a filing is required (assuming other requirements are met) whenever a transaction is valued at more than $15 million. Almost 90 percent of the transactions reported meet this criterion. The second minimum size-of-transaction test provides a limited supplement to this basic rule. Roughly 100 transactions a year have been reported under this criterion. These transactions valued at $15 million or less are reported whenever one party will acquire enough voting securities to control a firm with sales or assets of $25 million or more. (Control is defined in § 801.1(b).) The proposed revision would substantially increase the threshold in the second test but not affect the first.

The decision to increase the threshold in § 802.20(b) is supported by an analysis of enforcement interest in transactions filed under the act during the years 1981, 1982 and 1983. The chart below shows the antitrust agencies had a consistently lower interest in transactions valued at $15 million or less than in other transactions. (Enforcement interest is reflected by two kinds of agency actions: "clearance," the first indication of antitrust concern, initiates a procedure by which the two agencies decide which will begin an in depth review of a transaction, and "second requests," a procedure under the act for obtaining additional information from the parties and generally an indication of a greater level of concern.) In 1983, for example, the first level of interest, "clearances," showed that in only seven of every hundred transactions valued at $15 million or less was it considered at all probable that a violation might exist. In contrast, for transactions above $15 million, it was felt worthwhile to determine which agency should examine transactions more closely in fifteen of each hundred transactions, or twice as often. The disparity in interest was even greater for "second requests," where the agencies were three times as likely to request additional information from parties to transactions valued at more than $15 million. To put it another way, although the $15 million or less transactions constituted over twelve percent of the total reported in 1983, they made up just over six percent of the total clearances and not quite four percent of the total second requests. An analysis of the aggregate data for all three years using a chi square test of statistical independence shows there is a less than one percent chance that the lower interest in $15 million or less transactions is a reflection of sampling error. The observed differences in clearance rates and second request rates for transactions valued at $15 million or less and more than $15 million are therefore statistically significant. On the basis of these statistics and the fact that no enforcement actions have been instituted based on reported transactions valued at $15 million or less, the Commission believes § 802.20(b) should be altered.

ENFORCEMENT INTEREST IN $15 MILLION OR LESS REPORTED TRANSACTIONS [1]

[1981–1983]

	1983	1982	1981
Number of $15 million or less transactions	111	80	87
$15 million or less transactions as a percentage of all transactions (percent)	12.3	13.0	11.4
$15 million or less clearance rate (percent)	7.2	4.3	11.5
More than $15 million clearance rate (percent)	15.3	21.5	23.1
$15 million or less second request rate (percent)	1.8	1.1	3.5
More than $15 million second request rate (percent)	6.2	6.6	11.1

[1] Based on Table I of the statistical supplement to the Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 for the years 1981, 1982, 1983.

The Commission has considered, but rejected, deleting § 802.20(b) entirely. As the Commission has noted before, the two different transaction size thresholds in the act indicate "a clear congressional intention to reach at least some acquisitions that satisfy only the percentage (of voting securities) test," even though the absolute value of the securities purchased may be relatively low. See 43 FR 33450, 33491 (July 31, 1978); 44 FR 66781, 66782 (November 21, 1979. The Commission's proposal would preserve this statutory design.

The separate controlled issuer criteria of § 802.20(b) can be a valuable supplement when the value of the acquired entity's voting securities does not adequately reflect its competitive presence. For example, the acquired securities could represent 50 percent of the issuer's voting securities, but a much smaller percentge of the total capitalization of a large company. Also, if a company is failing as a business enterprise, its market value may be low regardless of the competitive significance of its assets. Such a firm could, for example, have a large market share and a strong competitive position, yet face bankruptcy solely as a result of liabilities based on prior tortious conduct. Athough the purchase of a large but failing company will often be permissible under the "failing company" defense, that defense requires a careful examination of the acquired company's actual prospects, the competitive importance of its productive assets and inventory, and the possibility of its acquisition by a non-competing company. That determination can only be made after a scrutiny of the proposed acquisition; the required distinctions are far too complex to be written into the reporting threshold.

Raising the threshold of § 802.20(b) to $200 million reflects a balancing of the possibility of anticompetitive transactions valued at $15 million or less with the Commission's experience that few such transactions are likley to occur. The requirement that the acquired entity have annual net sales or total assets of $200 million or more would have exempted over ninety percent of the less than $15 million transactions filed during 1982 and 1983 (the most recent years for which complete statistics exist). At the same time it preserves for premerger review by the antitrust enforcement agencies transactions in which firms of substantial size are acquied.

The Commission also proposes to raise the corresponding controlled issuer threshold in § 802.50 (a)(2) and (b)(2), "Acquisitions by foreign assets or voting securities of a foreign issuer by United States persons," and § 802.51(b)(2), "Acquisitions by foreign persons," from $25 million to $200 million. Although the number of transactions filed under these provisions are too small to permit meaningful analysis, the considerations in evaluating the competitive significance of acquiring firms valued at $15 million or less are the same. The Commission proposes therefore to continue the parallel thresholds in §§ 802.20(b), 802.50(a)(2), 802.50(b)(2) and 802.51(b)(2).

G. The Commission proposes to revise § 802.20(b) and its example, § 802.50(a)(2) and its example 2, § 802.50(b)(2) and its example, § 802.51(b)(2) and its example 2, the example to § 802.52 and example 3 following paragraph (d) of § 801.2, as set forth below. New language is indicated by arrows: (►new language◄). Deleted language is indicated by brackets: [deleted language].

§ 802.20 Minimum dollar value.

* * * * *

(b) Voting securities which confer control of an issuer which, together with all entities which it controls, has annual net sales or total assets of [$25] ►$200◄ million or more.

Examples: 1. Acquiring person "A" intends to acquire 66 percent of the voting securities of corporation X from X's ultimate parent entity, "W", and "A" holds no other assets or voting securities of acquired person [s] "W". X has no subsidiaries and does not have annual net sale or total assets of [$10] ►$200◄ million. If the postacquisition value of "A" 's holdings of voting securities of X would be $15 million or less, the acquisition would be exempt under this section.

• • • • •

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

(a) *Assets.* * * *

(2) The acquisition of assets located outside the United States, to which sales in or into the United States are attributable, shall be exempt from the requirements of the act unless as a result of the acquisition the acquiring person would hold assets of the acquired person to which such sales aggregating [$25] ►$200◄ million or more during the acquired person's most recent fiscal year were attributable.

Examples: * * *

2. Sixty days after the transaction in example 1, "A" proposes to sell to "B" a second manufacturing plant located abroad; s[illegible] in or into the United States attributable t[illegible] plant totaled [$20] ►$200◄ million in the most recent fiscal year. Since "B" would be acquiring the second plant within 180 days of the first plant, both plants would be considered assets of "A" now held by "B". See § 801.13(b)(2). Since the total annual sales in or into the United States exceed [$25] ►$200◄ million, the acquisition of the second plant would not be exempt under this paragraph.

(b) *Voting securities.* * * *

(2) Made aggregate sales in or into the United States of [$25] ►$200◄ million or more in its most recent fiscal year.

Example: "A", a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of [$27] ►$270◄ million in the most recent fiscal year. The transaction is not exempt under this section.

§ 802.51 Acquisitions by foreign persons.

• • • • •

(b) * * *

(2) A U.S. issuer with annual net sales or total assets of [$25] ►$200◄ million or more;

• • • • •

Examples: * * *

2. In example 1, assume that "A" is acquiring "B's" stock and that included w[illegible] "B" is issuer C, a U.S. issuer whose t[illegible] assets are valued at [$27] ►$217◄ million. Since C's voting securities will be acquired indirectly, and since "A" thus will be acquiring control of a U.S. issuer with total assets of more than [$25] ►$200◄ million, the acquisition cannot be exempt under this section.

§ 802.52 Acquisitions by or from foreign governmental corporations.

• • • • •

Example: The government of foreign country X has decided to sell assets of its wholly owned corporation, B, all of which are located in foreign country X. The buyer is "A", a U.S. person. Regardless of the aggregate annual sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate annual sales were less than [$10] ►$200◄ million, the transaction would also be exempt under § 802.50.)

§ 801.2 Acquiring and acquired persons.

• • • • •

(d) * * *

(2) * * *

(iii) * * *

Examples: * * *

3. In the above example, suppose the consideration for Y is 50 percent of the voting securities of Z, a wholly-owned subsidiary of A which, together with all entities it controls, has annual net sales and total assets of less than [$25] ►$200◄ million. Suppose also that the value of these securities is $15 million or less. Since the acquisition of the voting securities of Z is exempt under the minimum dollar value exemption in § 802.20, "A" will report in this transaction as an acquiring person only and "B" as an acquired person only.

7. Section 802.35 Acquisitions by Employee Trusts

The Federal Trade Commission proposes to exempt from the reporting provisions of the act acquisitions of an employer's voting securities by certain employee trusts. It is common for pension plans, profit sharing plans and bonus plans to acquire shares in an employer's business on behalf of its employees. Typically these plans hold shares in trust for the employees. Even where the trustees of the plans are appointed by the employer, the current rules make such acquisitions of employer voting securities reportable (assuming the act's other notification criteria are met). Proposed § 802.35 would exempt acquisitions of the employer's voting securities by qualified trusts pursuant to Employee Stock Ownership Plans ("ESOPs"). The proposed rule would not exempt an ESOP's acquisition of securities issued by persons other than the employer.

Under existing premerger rules, acquisitions of an employer's securities pursuant to an ESOP are 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) because the acquisitions represent an inexpensive source of financing for the employer. Also, the ESOP trust is likely to meet the $10 million size-of-person criterion of section 7A(a)(2) because the trust is 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 the size of the trust. However, for purposes of the intraperson exemption in § 802.30, the ESOP is not within the same person as the employer, and, thus the acqusition of the employer's stock by the ESOP is not exempt.

The conclusion that ESOP transactions should be exempt is based on the mixture of stock ownership characteristics in such trusts. If complete ownership of voting securities, rather then just voting rights, were to pass to individual employees, such acquisitions almost certainly would be too small to be subject to 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, 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 therefore proposes to create a new exemption for such acquisitions based on the distinctive characteristics of ESOP trusts discussed below.

Acquisitions of an employer's securities pursuant to an ESOP enable employers to receive advantageous tax treatment when their securities are acquired with borrowed money. See generally 26 U.S.C. 401 et seq. Typically employers initiate the formation of ESOPs and appoint and remove the trustees who manage the assets of a plan. However, to establish such plans requires the approval of the plan by affected employees. See 26 U.S.C. 401(b)(1)(A). Once the trust is established, the employees of a publicly held corproation, not the trustees, vote the employer securities held by the trust. 26 U.S.C. 409A(e)(2). The employer-appointed trustees retain the power to sell the employer securities or to purchase additional securities.

Despite these characteristics, § 801.1(c) (4) and (5) deem the securities to be held solely by the trust. For most non-ESOP trusts, that is the appropriate result because trustees usually have the authority to both vote and dispose of all securities. From an antitrust viewpoint, therefore, a danger of lessening competition would result if those non-ESOP trusts acquired voting securities of the employer and of competing firms. In the case of an ESOP trust which also held securities of both the employer and a competing company, however, the two sets of securities would not be voted by the ESOP trust. The employees would vote the securities of their employer. Consequently most ESOP trusts do not pose the same kind of antitrust concern as other trusts.

This does not mean that employee stock ownership trusts can not pose any antitrust concerns, only that other procedures of the premerger screening program are adequate to protect the remaining antitrust interests. For example, the influence of the employer over the trust can be great due to its authority to appoint and remove trustees. An employer might use this influence to obtain control of a competitor through the trust. It also might exert great influence over the way its employees vote as shareholders. The existing premerger rules explicitly recognize the possibility of influence through control over trustees. Because the employer controls the trust, the rules require the employer to report the trust's acquisition of shares in a competing (or other) firm as its own. Section 801.1(c) declares that a person controls an entity (including a trust) 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" (i.e., trustees). Consequently, the competitive implications of acquiring another firm's voting securities would continue to be reviewed under the act even if the acquisition of the employers own securities were made not subject to the notification requirements, as the Commission proposes to do here.

The Commission has considered exempting employee trust acquisitions either by expanding the intraperson exemption in § 802.30 or by changing the definition of "hold" in § 801.1(c). It rejects both of those solutions for the reasons stated below.

In most circumstances an acquisition is exempt where a controlled entity acquires voting securities of another entity under the same control. However, § 802.30 limits this exemption to circumstances where control is exercised by reason of holding securities (not the right to appoint directors or trustees). The reason for this exception to the exemption is that the rules do not require filing a notification prior to making an acquisition of the right to appoint directors (or trustees), only prior to an acquisition of assets or voting securities. Expanding the intraperson exemption to include ESOPs would permit a person to avoid the reporting process entirely by first acquiring the right to appoint directors (which is not reportable), and then acquiring the voting securities of the then controlled entity. It is therefore not advisable to expand that exemption.

It would be possible to exempt some acquisitions by ESOP trusts by altering the "hold" provisions of § 801.1(c). This rule could be altered to declare that beneficiaries hold voting securities within a trust if the beneficiaries (in the case of an ESOP, the employees) have the right to vote those securities. That solution, however, is inadequate because it would not exempt acquisitions of an employer's voting securities pursuant to an ESOP where the employer is not a publicly held company. Closely-held companies are required to accord voting rights to employees in such plans only "with respect to a corporate matter which (by law or charter) must be decided by more than a majority vote of outstanding common shares votes". 26 U.S.C. 409A(e)(3). Consequently, altering the "hold" provisions will not exempt acquisitions by employee trusts that do not require review.

The Commission proposes instead to create a new exemption for employee trusts based on the kind of acquisition and the mixture of ownership rights between employers, employees and trustees. The provision limits the exemption to trusts that are part of qualified stock bonus, pension or profit sharing plans as defined in the Internal Revenue Code in order explicitly to accommodate those plans that are most likely to make acquisitions large enough to be reportable. It exempts acquisitions of an employer's voting securities by a trust established for employees if the employer has the right to appoint and remove the trustees. This further limitation to trusts that are controlled by the employer, according to the criteria of § 801.1(b), ensures that any acquisition of voting securities of other persons by the trust will be reportable as if made by the employer. Accordingly acquisitions which are likely to lessen competition will remain subject to the notification requirements of the act.

Because all acquisitions of employer voting securities by ESOPs are exempt, there is no need to aggregate such acquisitions pursuant to § 801.13. Such aggregation is avoided by listing § 802.35 in § 801.15(a)(2). The proposed text of § 801.15 below also contains amendments described in proposal 5.

H. The Commission proposes to add new § 802.35 and revise § 801.15 (a)(2) and (b) set forth below. New language is indicated by arrows: (►New language◄). Deleted language is indicated by brackets [deleted language].

►§ 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 of the trust; and,

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

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

* * * * *

(a) * * *

(2) Sections ►802.2(b),◄ 802.6(b)(1), 802.8, 802.31, ►802.35, ◄802.50(a)(1), 802.51(a)(1), 802.63 and 802.70.

(b) Assets or voting securities the acquisitions of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under section 7A(c)(9) and §§ ►802.2(a), 802.3, ◄ 802.50(a)(2), 802.50(b), 802.51(b) and 802.64 unless the limitations contained in section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held, and

* * * * *

8. Section 802.70(b) Acquisitions Subject to Prior Approval

The Commission proposes to delete paragraph (b) of § 802.70. Paragraph (b) exempts 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. Although the principle of this rule is sound—to eliminate duplicative notification requirements—the practical effects can be troublesome to both the enforcement agencies and the parties subject to an order. This rule, which is applicable to only a few transactions each year, can in some instances reduce the opportunity for premerger review of acquisitions. At the same time the automatic exemption can create a barrier to voluntary settlements of antitrust actions where companies would prefer to have their future acquisition in other markets subject to the normal premerger procedures rather than the extraordinary procedures of an order. As a consequence the Commission believes the administration of the premerger program would be better served by eliminating the exemption.

Section 802.70(b) exempts an entire acquisition from the requirements of the act if, pursuant to an order entered in an action brought by the Federal Trade Commission or the Department of Justice, the acquiring person is required to obtain approval of the Federal Trade Commission or a federal court prior to making an acquisition. If the transaction must receive approval (typically after an opportunity for public comment), then a separate review of the acquisition under the premerger program is unnecessary. However, it is not certain that the court or the Federal Trade Commission will evaluate the potential anticompetitive effects of all portions of an acquisition under the authority of the order. Consider, for example, a diversified company engaged in both lumber and cement businesses. As a result of acquisitions in the cement business, such a company might become subject to a prior approval order requiring it to submit all future cement acquisitions for review. Although all such acquisitions would be reviewed, the company—if proposing a cement and lumber acquisition—might argue that the authority of a court order extends only to that portion of the acquisition that has a competitive effect on the cement industry. Even without accepting this limited view of its authority, a court might, as a matter of judicial economy, confine its review of the cement and lumber acquisition under the order to determining that the transaction does not reduce competition in the cement industry. In such circumstances, the combined effect of the exemption and the limited review would be to eliminate, for the lumber portion of the acquisition, the procedural advantages afforded by the Hart-Scott-Rodino act and by the judicial order. That result seems entirely inappropriate for the effective enforcement of the antitrust laws.

Nevertheless, the antitrust enforcement agencies have insisted on their authority to review all portions of a transaction, under a prior review order, not merely those portions relevant to the order. This insistence can be an obstacle to obtaining consensual orders with companies because of the public disclosure procedures that are a part of prior review orders.The agencies insist that they must review all portions under the order because § 802.70(b) can automatically deprive them of authority to review, using routine premerger procedures, any portion of a transaction that is subject to a prior review order. 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 (unless the acquiring person can show a specific need for confidentiality). 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 prospect of broad disclosures of business information can provoke a company unnecessarily to resist an order settling an antitrust matter. In contrast privacy is required for documents and information filed in a routine premerger notification. A procedure that does not require public disclosure of unrelated portions of transactions could facilitate reaching agreement on the terms of prior review orders.

Two approaches to this problem have been considered: (1) To require redundant 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 routine premerger notification procedues. 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.

Because the overall burden of duplicate filings is small (fewer than a dozen transactions were exempt from premerger notification requirements under § 802.70(b) in 1984), the Commission believes the administration of the notification program and the enforcement of the antitrust laws will be enhanced by eliminating the exemption contained in § 802.70(b).

These considerations do not apply to divestitures subject to prior approval because in those orders the Federal Trade 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.

L Accordingly the Commission proposes to amend § 802.70 to delete paragraph (b) and restructure the remaining portions of the section as set forth below. Deleted language is indicated by brackets: [deleted language].

§ 802.70 Acquisitions subject to order.

An acquisition shall be exempt from the requirements of the act if [

(a)] 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 [; or

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

9. Section 803.5 Affidavit Requirements of the Acquiring Persons

The Commission proposes to modify the notice requirement in § 803.5(a). 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). When first promulgated, the rule required the acquiring peron 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. The original rule still can be inadequate in some circumstances. It does not require the acquiring person to state how many securities will be held as a result of an acquisition, only how many shares are to be acquired: thus the acquired person does not always have a basis for determining if the acquisition will require it to file a notification.

The Commission now proposes to incorporate the 1978 formal interpretation in its rules, to alter the rule to require the acquiring person to state the number of voting securities that would be held as a result of the acquisition and to describe the wording that the Commission will consider to be adequate notice of an intention to make a reportable acquisition. In addition the Commission proposes to establish a similar affidavit requirement for owners of acquisition vehicles who are required to report transactions pursuant to proposed § 801.5.

Affidavits in § 801.30 Transactions

In view of some disputes about what constitutes an adequate notice under paragraph (a), the Commission takes this opportunity to clarify the purposes and meaning of that rule. 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.

To Inform the Acquired Person

The principal purpose of § 803.5(a) is to inform the issuer of its obligation to file a Notification and Report Form with the antitrust enforcement agencies. In the transactions covered by this rule, voting securities are to be acquired from persons other than the business entity that issued the securities (or an entity within the same person as the issuer): thus the issuer has no reason to know that some or all of its shares are being acquired. Section 803.5(a) cures this by requiring the acquiring person to serve the notice before filing its notification.

The amendments to § 803.5(a) require the acquiring person to include in its notice information on which the acquired person can determine its obligation to file a notification. As originally promulgated the rule did not fully meet this objective because it required that the acquiring person state only the number of voting securities it intended to acquire. The obligation to file notifications rests, however, on the total value or the total percentage of voting securities held as a result of the acquisition. The formal interpretation resolved this problem in the case of a notice from a person who could not determine the number of securities it intended to acquire by requiring it to state which of the four notification thresholds it would cross as a result of the acquisition. This required the acquiring person to add, pursuant to § 801.13(a), securities already held with those to be purchased to determine if the acquiring person would meet or exceed the $15 million or the 15, 25, or 50 percent of voting securities thresholds of § 801.1(h) that trigger the notification process. In addition to incorporating this threshold option, the amendments to § 803.5(a)(1)(iii) would require equivalent information about the number of voting securities to be acquired. The proposal would delete the requirement that the notice include nonvoting securities (because they do not affect the notification obligation) and require the acquiring person to state the total number of voting securities that would be held as a result of the acquisition. That information will enable the acquired person to verify if the acquisition will obligate it to file a notification.

Evidence of Acquiring Person's Intent

The antitrust screening process initiated by the acquiring persons 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 which the person intends to acquire 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 specificity is a greater indication of the ripeness or seriousness of the plan to acquire than a more general statement of an intention to acquire.

Because the acquired person is entitled to be reasonably certain that a reportable acquistion will be made, the Commission proposes to narrow the descriptions of an acquiring person's intention that it will consider as complying with the notice requirements of proposed § 803.5. The Commission does not accept a statement in a notice that the acquiring person intends to make an acquisition that "may exceed" a given reporting threshold. That statement does not specify a current intention to acquire any shares. While the Commission has previously allowed persons who state a present intent to make a reportable acquisition to also file for a higher threshold using "may exceed" language, proposed example 2 makes clear the Commission will no longer construe "may exceed" language as providing any notice of an intention to acquire voting securities. Similarly, language used in other public filings or in public offering documents may fail to express an intention to acquire a reportable quantity of voting securities for purposes of § 803.5(a). For instance, a tender offer is often made for "up to 50 percent of the issuer's voting securities," or an SEC Form 13D will often state purchases of the issuer's stock will "not exceed 25 percent" or will be for "not more than 15 percent" of the issuer's stock. Language such as this may be sufficient for compliance with the securities laws, but does not state with sufficient certainty for antitrust notice purposes an acquiring company's intention to meet or exceed the specific threshold mentioned or any specific threshold. A statement that an acquiring person will acquire "up to 50 percent of the acquired person's voting securities" does not express an intention to meet or exceed the 50 percent threshold. It does not state an intention to meet even the lowest notification threshold, because it does not express an intention to acquire a single share of stock. Under the terms of proposed § 803.5 an acquiring person must attach a notice that either states the exact number of shares to be acquired or declares in plain language that the acquiring person has a good faith intention to meet or exceed a specific notification threshold.

The requirements of this rule should be easy to satisfy. Acquiring persons can, for instance, state that they "intend to acquire at least 15 percent of X's voting securities" or that they intend to "acquire voting securities, which, when aggregated with voting securities of company X currently held, will result in our holding 50 percent or more of X's voting securities." If an acquiring person cannot plainly state its intention to acquire a reportable quantity of shares, then it cannot file a Notification and Report Form; instead, it must wait to file until its intent can be stated with the requisite definitiveness.

The requirement that the acquiring person make known to the acquired person the specifics of an acquisition plan provides a final indication of a serious intent to acquire. This requirement parallels the requirement that agreements to merge be executed

(§ 803.5(b)) and tender offers be publicly announced (§ 803.5(a)(2)) prior to filing a notification. In each case the seriousness of the acquiring person is attested to by its willingness to declare openly and in writing its specific acquisition plan.

Affidavits in § 801.5 Transactions

When an acquisition vehicle acquires either voting securities or assets the acquired entity may be unaware of its obligation to file a Notification and Report Form listing revenues derived from product markets in which the owners of the acquisition vehicle do business. To make sure that acquired persons become aware of their obligation to file notifications in response to filings by owners pursuant to § 801.5, the Commission proposes to add a new affidavit requirement to the provisions of § 803.5. The proposed new paragraph (c) would require owners of acquisition vehicles to comply with the terms of § 803.5(a) in § 801.30 transactions or § 803.5(c)(3) in other transactions. In addition, owners must inform the acquired entity: that the acquisition is being made by an acquisition vehicle: that pursuant to § 801.5 the owner is treated as an acquiring person: and the extent of the acquisition that is attributed to the acquiring person. Based on this information the acquired person will be able to determine its obligations to file notifications in response to those of owners and, in the case of non § 801.30 transactions, to file affidavits pursuant to § 803.5(b).

Because acquisition vehicles are sometimes not fully formed until the time an acquisition is made proposed § 803.5(c)(1)(i) permits a person to file if it has a "good faith intention to be an owner at the time of the acquisition." This good faith intention is tested by compliance with the other provisions of § 803.5, paragraphs (a) and (b), and by communication of the intention to become an owner to the acquired entity.

]. The Commission proposes to amend § 803.5 paragraph (a)(1) by revising subparagraph (iii); adding examples 2, 3, and 4, and designating the unnumbered example as example 1: and adding a new paragraph (c), as set forth below. New language is indicated by arrows: (►new language◄). Deleted language is indicated by brackets: [deleted language].

§ 803.5 Affidavits required.

(a) (1) * * *

(iii) The specific classes of voting [and nonvoting] securities of the issuer, 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:◄

* * * * *

(2) * * *

Examples►*s*◄: * * *

►In examples 2–4 assume that one percent of B's shares are valued at $15 million.

2. 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 B's sharesa. "A"'s notice to the acquired person would meet the requirements of § 803.5(a)(iii) if it states inter alia: "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 up to 50 percent or more of the voting securities of Company "B"'. The Commission would accept this notice only for the 15 percent threshold.

3. "A" states, inter alia, that it "has a good faith intention to acquire 1,000,000 shares of Company B's voting securities." If 1,000,000 shares represents 23 percent of B's outstanding voting securities, the statement will be deemed a notification for the 15 percent threshold.

4. "A" states inter alia that it will acquire "up to 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 a notification threshold. "A"'s filing will be considered deficient within the meaning of § 803.10(c)(2).◄

* * * * *

►(c) *Section 801.5 transactions.* In any transaction where an owner of an acquisition vehicle is required, pursuant to § 801.5, to file a notification and report form, the notification required by the act from each such owner shall contain an affidavit, attached to the front of the notification, attesting:

(1) That the owner has communicated to the acquired entity in accordance with the procedures established by paragraph (a) of this section:

(i) That it is an owner of an entity that proposes to make a reportable acquisition, or has a good faith intention to be an owner at the time of the acquisition:

(ii) That, because the acquiring entity is an acquisition vehicle, the owner is treated by these rules as an acquiring person: and,

(iii) The portion of the acquisition that will be treated as if made by the owner, and, further,

(2) If the transaction is an acquisition to which § 801.30 applies, that the owner has also communicated all the information required by paragraph (a) of this section: or,

(3) If the transaction is not an acquisition to which § 801.30 applies, that a contract, agreement in principle or letter of intent to merge or acquire has been executed by or on behalf of the acquisition vehicle and that the owner believes that entity has a good faith intention to consummate the transaction.◄

10. Section 803.9 Incorporation by Reference

The Commission proposes to reduce the burden of filing by expanding the extent to which persons may incorporate by reference documents and information submitted in previous filings. The proposed rule would permit incorporation by reference in three situations: (1) When SEC Forms, annual reports and other documents submitted in response to items 4(a) and 4(b) of a prior filing are still current: (2) when a person has previously filed to acquire voting securities of the same issuer, and (3) when an acquiring person is filing for a secondary acquisition.

The proposal strikes a balance between the burden on parties filing notifications and the obligations of the antitrust enforcement agencies to act quickly on those notifications. To complete an antitrust review of proposed transactions within the short statutory deadlines, the enforcement agencies must have immediate access to the necessary documents and information. In the case of materials incorporated by reference such access requires adequate and conveniently located storage space and sufficient personnel to index, store, copy and promptly retrieve the incorporated material. The Commission believes that the proposed rule is feasible with existing personnel.

The proposed rule builds upon the agencies' successful experience with the incorporation by reference rules established by the formal interpretations of April 10, 1979, and April 7, 1981, and by § 803.2(e) of the rules (promulgated July 29, 1983). It would replace those rules with a new, more comprehensive rule, proposed § 803.9.

Paragraph (a) of the proposed rule specifies the circumstances in which incorporation by reference would be permitted. All of paragraph (a) is subject to the limitations set forth in paragraph (b).

Paragraph (a)(1) would permit a person to incorporate by reference documents previously submitted in response to items 4(a) and 4(b) of the Notification and Report Form. This provision would be broader than existing rule § 803.2(e). It would allow persons to incorporate, in addition to annual reports, other financial documents called for by item 4(b). Relatively modest enlargement of the filing and retrieval system established under § 803.2(e) should be sufficient to handle this expansion.

Paragraph (a)(2) would permit documents and information to be incorporated by reference when a person acquires additional voting securities of the same issuer. The proposal would change the provisions of existing rule § 803.2(e) by increasing from 90 days to one year the period in which such incorporation would be allowed. This expansion seems manageable since filings for different thresholds of the same issuer are ordinarily reviewed by the same unit within the Commission, and these units have had few problems with existing § 803.2(e).

Paragraph (a)(3) adds a new procedure. It would permit acquiring persons in a secondary acquisition (see § 801.1) to incorporate by reference documents or information submitted with, or incorporated by reference in, the filing for the primary acquisition. Again, this provision appears feasible because both acquisitions are generally reviewed by the same unit.

Paragraph (b) would place certain limits on incorporation by reference. Although these are explained in more detail than in existing § 803.2(e), only the exclusion of cash tender offers represents a change from current policy.

Paragraph (b)(1) does not permit incorporation by reference in a notification for a cash tender offer because the enforcement agencies are authorized less time to review such transactions. See § 803.10. It is the experience of the Commission that the agencies frequently need all of the shortened waiting period to review cash tender offers. That review could be hampered by adding the time required to retrieve, copy and distribute previously filed documents or information.

Paragraph (b)(2) would require that the incorporated documents or information still be accurate and current. For example, documents could not be incorporated in response to items 4(a) and 4(b) unless they are the most recent prepared and do not refer to data more than fifteen months old. See § 801.11(b)(2).

Paragraph (b)(3) would require that the document or information have been submitted with a notification for a transaction whose waiting period expired within one year of the beginning of the waiting period for the notification which incorporates documents or information by reference. The agencies keep whole filings or selected essential parts of them as long as the filings are effective. Under § 803.7 a notification is effective for one year after the expiration of the waiting period.

Paragraph (b)(4) would prohibit incorporation by reference of documents or information submitted with a notification that has been withdrawn. The agencies do not necessarily have complete copies of such filings.

Paragraph (b)(5) similarly would not permit incorporation of materials that have been returned pursuant to § 21 of the Federal Trade Commission Act, 15 U.S.C. 57b–2. Again the agencies do not ordinarily retain copies of all such materials.

Under paragraph (b)(6) of the proposed rule, persons could not incorporate affidavits, certifications or notices required by § 803.5 or § 803.6, because these documents are unique to each transaction.

Paragraph (c) discusses certain mechanical issues. Under this paragraph, parts of documents could not be incorporated by reference. A party must be able to incorporate an entire previous document or must submit a new one. Parties may, however, incorporate portions of non-documentary information if they clearly and unmistakably indicate precisely what information is being incorporated by reference.

K. Accordingly, the Commission proposes to remove rule § 803.2(e), whose provisions are included in the new rule, and add a new rule § 803.9 as set forth below. New language is indicated by arrows: (►new language◄). Deleted language is indicated by brackets: [deleted language]

§ 803.2 Instructions applicable to Notification and Report Form

* * * * *

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

►§ 803.9 Incorporation by reference.

(a) A person may, subject to the limitations of paragraph (b) and in accordance with the procedures of paragraph (c), incorporate by reference documents or information it has submitted as part of a previous notification in the following circumstances:

(1) In any transaction, a person responding to items 4(a) and 4(b) of the Notification and Report Form may incorporate by reference documents submitted pursuant to these items in an earlier notification;

(2) In any acquisition of voting securities by a person who has previously filed notification at a lower threshold for an acquisition of voting securities of the same issuer, that person may incorporate by reference any document or information submitted with, or incorporated by reference in, the previous filing; or,

(3) In any secondary acquisition, an acquiring person may incorporate by reference any document or information previously submitted with, or incorporated by reference in, its notification for the primary acquisition.

(b) Notwithstanding paragraph (a) of this rule, incorporation by reference of a document or information shall not be permitted if:

(1) The notification is for a cash tender offer;

(2) The document or information is no longer responsive because of the passage of time, a change in circumstances, or for any other reason;

(3) The document or information was submitted with a notification for a transaction whose waiting period expired more than one year before the beginning of the waiting period of the transaction whose notification incorporates the document or information;

(4) The document or information was submitted with a notification that has been withdrawn;

(5) The document or information has been returned pursuant to a request for the return of documents; or

(6) The document or information to be incorporated is an affidavit, certification or notice pursuant to § 803.5 and § 803.6 of these rules.

(c)(1) A person who incorporates by reference an entire document or information submitted with a prior notification must insert at the appropriate place on the Notification and Report Form a reference containing the date the information or document was submitted and the names of the acquiring and acquired persons in that notification.

(2) A person who incorporates by reference a portion of the non-documentary information submitted in a prior notification must also unmistakably indicate precisely what information is being incorporated by reference, but in no case may a person incorporate by reference less than an entire document.

Examples: 1. Within the past year "A" filed a notification to acquire 15 percent of the voting securities of corporation B. Now "A" proposes to acquire 25 percent of the voting securities of corporation C. When "A" files its Notification and Report Form for the acquisition of C's voting securities it may, under paragraph (a)(1) of this rule, incorporate by reference documents submitted in response to items 4(a) and 4(b) of the Notification and Report Form filed for the acquisition of B's voting securities, provided that none of the limitations of paragraph (b) of the rule apply.

2. Corporation A acquires 15 percent of the voting securities of corporation B after both "A" and "B" file Notification and Report Forms as required. Within one year of the expiration of the waiting period, "A" proposes to acquire additional voting securities of B, after which "A" will hold over 25 percent of B's voting securities. Both "A" and "B" must file a Notification and Report Form for this acquisition. Subject to the limitations of paragraph (b) of this rule, both "A" and "B" may incorporate by reference information or documents from the previous filing.

3. Within the past year "A" acquired 15 percent of the voting securities of corporation B. It then acquired over 50 percent of the voting securities of corporation C. "A", "B", and "C" filed the required Notification and Report Forms. Subsequently, "A" discontinued manufacturing several products. "A" now proposes to acquire 25 percent of B's voting securities. In its notification for the acquisition of 25 percent of B's voting securities, "A" may not simply incorporate by reference its responses to items 5, 6, 7, 8 and 9 of the Form filed for the acquisition of 15 percent of B's voting securities. Under paragraph (b)(2) of the rule "A" must, at a minimum, amend its response to item 5 by deleting the revenues and product codes applicable to the discontinued products. In addition, to reflect the acquisition of C, "A" must make the appropriate additions to items 5, 6, 7, 8 and 9.

4. "A" proposes to acquire 50 percent of the voting securities of corporation C and files a Notification and Report Form for this acquisition. C holds either more than 15 percent or more than $15 million of the voting securities of corporations D, E, and F. Under § 801.4 of these rules, "A" must file Notification and Report Forms for the secondary acquisition of the voting securities of corporations D, E and F. In these Forms, "A" may incorporate by reference, subject to the limitations in paragraph (b), any document or information submitted with its filing for 50 percent of the voting securities of C. Notices, affidavits and certifications, however, must be separately executed for every acquisition for which a Notification and Report Form is filed.

5. "A"'s waiting period to acquire 15 percent of the voting securities of corporation X expired fourteen months ago. Six months later, that is eight months ago, "A" filed notification to acquire 15 percent of the voting securities of corporation B. "A" now proposes to acquire 25 percent of the voting securities of B. In its notification to acquire 15 percent of the voting securities of B, "A" responded to items 4(a) and 4(b) by incorporating the documents which it submitted with its filing for the voting securities of X. "A" cannot incorporate these documents in its notification for 25 percent of the voting securities of B, since the documents were submitted with its filing whose waiting period expired more than one year ago. As in example 2, however, subject to the limitations of paragraph (b) of this rules, "A" may incorporate by reference any other information and documents submitted with the notification for 15 percent of the voting securities of B. ◄

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

The Commission proposes to amend § 803.10(a), which determines when the waiting period begins for transactions covered by the act and rules. The current rule does not make completely clear 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 premerger rules. The Commission's staff has consistently taken the position that the waiting period does not begin until all venturers who are required to file have done so. It is possible, however, to read the rule to permit each individual venturer's waiting period to begin as soon as that venturer files.

This latter interpretation could hamper review of joint ventures by the antitrust agencies. Separate waiting periods for individual venturers would mean that in some instances one venturer's waiting period might expire before another venturer's filing alerted the antitrust agencies to the need to issue requests for additional information to all venturers. To avoid this result, the Commission proposes to amend § 803.10(a) to state explicitly that in the case of acquisitions covered by § 801.40, the waiting period begins when all parties required to file a notification have done so.

Although the Commission is persuaded of the value of changing the language in the rule, the Commission believes that its staff has correctly interpreted the existing rule and it rejects the arguments to the contrary based on the language of that rule. Section 803.10 currently provides, in relevant part, that the waiting period for all acquisitions, other than those subject to § 801.30, begins on the "date of receipt of the notification . . . from: . . . all persons required by the act and these rules to file notification." Although this language suggests, and the Commission staff has consistently stated, that the waiting period begins only when all venturers required to file have done so, a few parties have argued that another interpretation is possible. They assert that the "all persons" language of § 803.10 refers only to those persons required to file notification in connection with a particular acquisition. They note, in addition, that § 801.40 and the Statement of Basis and Purpose treat each individual venturer's acquisition of stock of the joint venture corporation as a discrete acquisition for some purposes. Since in such an acquisition only the venturer is required to file (the joint venture itself need not file), they contend that the "all persons" requirement is satisfied whenever an individual venturer files notification. Thus, according to the argument, each venturer's waiting period begins as soon as it files its notification.

While this argument has support in some language of the rules, it is 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. For this reason, the Commission staff has consistently maintained that the waiting period for acquisitions subject to § 801.40 begins when all acquiring persons that are required to report to report have done so.

Furthermore, contrary to arguments by private persons the rules do not always treat the formation of a joint venture as a series of isolated acquisitions. Rather, for some purposes, the rules treat the formation of a joint venture as a single transaction. For instance, whether a particular venturer meets the size-of-person test in a § 801.40 transaction is determined not only on the basis of its size and the size of the joint venture corporation, but also by the size of the other venturers. See § 801.40(b). Similarly, the rules require he venturers, but not the joint venture corporation itself, to file notification. This approach also indicates that it is the relationships among the venturers rather than the relationships between each individual venturer and the joint venture that are of likely competitive significance. Consequently, the Statement of Basis and Purpose indicates taht it is "the parents of the new corporation [who] will provide the information necessary to evaluate the competitive impact of the combination." 43 FR 33496 (July 31, 1978). Thus, while the rules treat each acquisition of stock of the joint venture as a discrete acquisition for some purposes, the rules also treat the formation of a joint venture as a single transaction for other purposes. Accordingly, there has been ample support for the staff interpretation that the existing "all persons" language in § 801.10(b) requires all contributors to a joint venture to file their notifications before the waiting period begins. Nevertheless, to avoid any possible ambiguity the Commission proposes to amend the rule to make this requirement explicit.

If this change is made, the Commission does not see any need to amend either § 803.10(b), which explains when the waiting period ends, or § 803.20(c), which sets out the rules for an extended waiting period. The application of those sections to acquisitions subject to § 801.40 should be clear once the meaning of § 801.10(a) becomes indisputable. For example, it should be clear that for 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 materials requested is received from all contributors to the joint venture corporation who received a request.

L. The Commission proposes to revise § 803.10(a) by redesignating the present paragraph (a)(2) as (a)(3) and by adding a new paragraph (a)(2), as set forth below. New language is indicated by arrows: (► new language ◄).

§ 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 a notification;

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

* * * * *

12. The Premerger Notification and Report Form

The Commission proposes to simplify the Premerger Notification and Report Form. The seven changes described below are the product of both the comments of interested parties and our own review. We believe each change will reduce the burden of the Form without hampering the agencies' evaluation of reported transactions.

The Commission welcomes suggestions for additional changes and comments addressing two generic issues: (1) Whether the Form calls for information that companies have normally already collected; and (2) whether the Form asks for data in the way companies normally keep it. Although much of the Form has been designed to use information on hand, the Commission would be interested in further opportunities to do so.

a. Description of Transaction

The Commission proposes to consolidate into one question the three items [2(a)-(c)] which request a description of the transaction. At present, item 2 (a) asks 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 involves a tender offer, the terms of the offer. Item 2(b) calls for the scheduled consummation date and item 2(c) a description of the manner in which the transaction is to be carried out, including scheduled major events such as stockholder's meetings, other requests for government approval or tender offer dates. Since parties often repeat information when responding to these items, the Commission proposes to combine them into one question. These changes should simplify the Form without diminishing the information obtained.

Appendix to Part 803—[Amended]

M. Accordingly, in the Appendix to Part 803 we propose to remove items 2(b) and 2(c), redesignate items 2(d)-2(f) as items 2(b)-2(d) respectively, and reword the instruction for item 2(a) as set forth below. Here, as well as in the other six parts of this section, new language is indicated by arrows: (► new language ◄). Deleted language is indicated by brackets: [deleted language].

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, and a description of the assets or voting securities to be acquired by and/or the consideration to 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 voting securities are to be acquired from a holder other than the issuer (or an entity included 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)—State the scheduled consummation date of the transaction.

Item 2(c)—Describe the manner in which the transaction is to be carried out. The description should include the expected dates of any major events required in order to consummate the transaction (e.g., stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers).]

b. Description of Voting Securities to be Acquired

The Commission proposes to allow persons who intend to acquire 100 percent of the acquired person's voting securities to respond to item 2(e) by stating that intent and providing the dollar value of the acquisition. Item 2(e) requires responses to eight subsections which 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 Statement of Basis and Purpose points 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). Commentors have noted that the detailed responses are likely to be unnecessry if the party is acquiring 100 percent of the voting securities of a company. In this case, there is little doubt as to how much control the acquiring person will have. The same is true where the parties will merge the two companies or where two companies will consolidate and form a new company. In these instances, therefore, the Commission proposes to eliminate the detailed responses required by item 2(e).

However, to enable the Commission to monitor compliance with the act, parties would be required to give full responses to item 2(e) if, prior to the acquisition, the acquiring person would hold 15 percent or more than $15 million of the acquired person's voting securities. Since holdings of this magnitude would normally require a filing, disclosure of this information in item 2(e) will alert the agencies to the that the purchaser believed that the or purchases were exempted by the act or rules. The agencies may independently evaluate whether an exemption applied.

N. Accordingly, the Commission proposes to revise the instruction for newly redesignated item 2(d) as follows:

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

c. Index to Ancillary Documents

The Commission proposes to delete item 2(f)(ii) which asks for an index of ancillary documents related to the 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 Statement of Basis and Purpose states 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 necessary. Usually, the second request does not focus on issues related to third-party agreements, subleases, union contracts or other documents listed in the index. Furthermore, when this type of information is needed, it can be asked for descriptively in a second request. Since the index can be lengthy and time consuming to prepare, the Commission proposes to drop this item.

O. Accordingly, the Commission proposes to remove item 2(f)(ii) in the instructions and Form:

[Item 2(f)(ii)—Index to ancillary documents. Furnish an index containing a brief description sufficient to identify each ancillary document or class of documents related to this agreement, such as those relating to personnel matters (e.g., union contracts, employment agreements), third-party financing agreements, leases, subleases and other documents relating to the transfer of realty, or other similar documents related to this transaction]

d. List of Subsidiaries

The Commission proposes to allow parties to omit from the list required by item 6(a) every subsidiary which has total assets of less than $10 million. At present, item 6(a) requires persons filing notification to provide the name and mailing address of each entity included within the person filing notification. The instructions give parties the option of not listing subsidiaries with total assets of less than $1 million. Some commentors have questioned whether a list of subsidiaries is at all helpful to the agencies in conducting their antitrust review. Others have asked whether the names of small subsidiaries are necessary for the agencies to conduct their review. One comment objected to the necessity of providing the information in the Form, suggesting instead that parties be allowed to indicate where the information is contained in an attachment to the Form.

The agencies must be able to determine the names and addresses of all significant subsidiaries of the parties involved in the acquisition. In many instances, the names of the subsidiaries give the agencies an opportunity to better understand the acquisition, and enable the agencies to seek information from public sources, most of which is only provided by company 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 foreign operations of the party is not readily obtainable. On the other hand, the Commission recognizes that at some point the subsidiaries may be so small that even their names are unlikely to produce information relevant to the agencies' antitrust review. The Commission believes that the $1 million cut-off provided in item 6(a) can be raised to $10 million without significantly affecting the ability of the agencies to review the transaction. This belief is, in part, based on the fact that items 6(b) and 6(c) currently are subject to a $10 million cut-off and these cut-off levels have not adversely affected the agencies' ability to conduct their antitrust review. The Commission also is willing to allow parties to provide information by referencing a document submitted with a filing so long as the information provided in the attachment is complete, up-to-date and accurate (see Proposal e. infra). Filings referencing attachments which are not complete, up-to-date and accurate will not be deemed substantially compliant and the waiting period will not begin until the correct materials are received by the agencies. See § 803.10(c)(2).

P. Accordingly, the Commission proposes to revise the instruction for item 6(a) to read:

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 [$1]—►$10◄) million may be omitted.

e. Shareholders and Holdings of Person Filing Notification

The Commission proposes to allow documentary responses to items 6(b) and 6(c) consistent with the approach taken in item 6(a) above.

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 comment stated that the Commission should permit parties to respond to these items by referencing a document filed with the Form rather than including a response on the Form. The Commission is of the view that a response which references a document is adequate so long as the information contained in the document is complete, up-to-date and accurate. If the document 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 corrected materials are filed with both agencies.

Q. Accordingly the Commission proposes to revise the language in the instructions under item 6 to read:

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 Item 6 by referencing a document furnished with this Form if the information so referenced is a complete response to this item and is up-to-date and accurate.◄

f. Geographic Information in Overlapping SIC Codes.

The Commission proposes to delete the requirement that parties provide geographic information arranged by the state, county and city or town of establishments deriving revenue in certain overlapping SIC codes.

At present, 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. Item 7(c)(iv) currently requires parties to provide more detailed geographic information for SIC major groups 52–62 and 64–89 (see attachment 1).

In most of these major groups it is necessary, for antitrust analysis, to determine with some specificity the 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 more detailed breakdown of geographic information, since the relevant geographic market is often local in character rather than an entire state or region of the country. The Commission believes that acquisitions involving security brokers, insurance agents, investment offices and other businesses falling within certain codes can be adequately reviewed without the more specific information currently required. In the Commission's experience, acquisitions involving overlaps in certain codes either do not involve local markets or involve local markets but nonetheless can adequately be reviewed if the parties specify only the states in which revenue is derived. Therefore, the Commission proposes to change 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 (see attachment 2).

R. The Commission proposes to revise the instruction for item 7(c)(iv) to read:

Item 7(c)(iv)—for each 4-digit industry within SIC major groups [52–62 and 64–84 (retail trade, finance, insurance other than insurance carriers, and real estate, and services] ►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:

Renumber the old item 7(c)(v) as item 7(c)(vi):

[Item 7(c)(v)] ►Item 7(c)(vi)◄ for each 4-digit industry within SIC major group 63 (insurance) listed in item 7(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

Substitute a new instruction for item 7(c)(v):

►Item 7(c)(v)—for each 4-digit industry within SIC major groups 62, 64–67, 72, 73, 76, 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, the portion thereof) in which the establishments were located which derived revenues in the most recent year, and◄

g. Prior Acquisition

The Commission proposes to change item 9 of the Form by requiring the acquiring person to provide information about acquisitions made within five years of filing rather than the ten years currently required.

At present, where both the acquiring and acquired person in the acquisition for which a notification is being filed derived $1 million in revenue in a 4-digit SIC code, the acquiring person must list all acquisitions which it has made over the last ten years in which the acquired person derived revenue in that same 4-digit SIC code. A filing person need only list 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.

The purpose of item 9 is to assist the agencies in identifying any 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 comments suggested modifications of item 9. One comment simply suggested raising the $1 million cut-off to $10 million. 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 where the parties compete in a small geographic area or where one of the parties to the acquisition has an extremely large share of a market.

Another comment suggested that the ten-year period be reduced to five years. This suggestion would significantly reduce the burden because it would cut in half the number of years the parties would have to search for information about prior acquisitions. The Commission believes that this change can be made without adversely affecting the agencies' ability to conduct a thorough antitrust review. The Commission believes that an accurate account of the acquiring person's acquisitions over the past five years will adequately put it on notice of possible trends toward concentration in the affected industry.

S. Therefore, the Commission proposes to reword the instruction for item 9 to read as set forth below.

Item 9—*Previous acquisitions* (to be completed by acquiring person)—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 [ten] ►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 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.

Note.—This attachment will not appear in the Code of Federal Regulations.

Attachment 1

SIC major groups in which parties are currently required to provide addresses arranged by state, county and city or town.

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.
Major Group 62. Security and commodity brokers, dealers, exchanges, and services.
Major Group 64. Insurance agents, brokers and service.
Major Group 65. Real estate.
Major Group 66. Combinations of real estate insurance, loans, law offices
Major Group 67. Holding and other investment offices.

on I. Services

Major Group 70. Hotels, rooming houses, camps, and other lodging places.
Major Group 72. Personal services.
Major Group 73. Business services.
Major Group 75. Automotive repair, services, and garages.
Major Group 76. Miscellaneous repair services.
Major Group 78. Motion pictures.
Major Group 79. Amusement and recreation services, except motion pictures.
Major Group 80. Health services.
Major Group 81. Legal services.
Major Group 82. Educational services.
Major Group 83. Social services.
Major Group 84. Museums, art galleries, botanical and zoological gardens.
Major Group 86. Membership organizations.
Major Group 88. Private households.
Major Group 89. Miscellaneous services.

Note.—This attachment will not appear in the Code of Federal Regulations.

Attachment 2

SIC major groups where, under the proposed revision of the Form, only state by state breakdowns will be required.

Major Group 62. Security and commodity brokers, dealers, exchanges, and services.
Major Group 64. Insurance agents, brokers, and services.
Major Group 65. Real estate.
Major Group 66. Combinations of real estate, insurance, loans, law offices.
Major Group 67. Holding and other investment offices.
Major Group 72. Personal services.
Major Group 73. Business services.
Major Group 76. Miscellaneous repair services.
Major Group 79. Amusement and recreation services, except motion pictures.
Major Group 81. Legal services.
Major Group 82. Educational services.
Major Group 83. Social services.
Major Group 84. Museums, art galleries, botanical and zoological gardens.
Major Group 86. Membership organizations.
Major Group 88. Private households.
Major Group 89. Miscellaneous services.

13. Changes 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 indicates that it would be helpful to make several amendments to the examples appearing elsewhere in the premerger rules.

T. Therefore, the Commission proposes to revise 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, as set forth below. New language is indicated by arrows: (►new language◄). Deleted language is indicated by brackets: [deleted language].

§ 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.

§ 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 [$6] ►$150◄ 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 [$7] ►$80◄ 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 [$10] ►$200 million◄ limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this rule, "B" would hold the previously acquired assets for the purpose 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.

§ 801.30 Tender offers and acquisitions of voting securities for 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.

§ 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 [an aggregate] $6 million in each of the next three years. Under paragraph (c), the assets of the new corporation are [$24] ►$80◄ million. Under paragraph (b), only "A" must file notification [and only then if] ►since◄ "A" meets [a] ►the◄ criterion of section 7A(a)(3)—that is, [if] it will be acquiring [15 percent or $15 million] ►one third◄ of the voting securities of the new entity ►for $20 million◄. N need not file notification; see § 802.41.

§ 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 [$10] ►$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.

By direction of the Commission. Commissioner Bailey voted to seek public comments, but expressed serious reservations concerning the proposed large increase in certain dollar thresholds for transactions to be subject to premerger reporting. The increase from $25 million to $200 million would have eliminated eleven of twelve mergers in the affected category where investigational clearance was actually sought via the FTC/Justice Department liaison process in 1982 and 1983, and all three of the mergers where second requests were actually issued. She observed that while the Notice states none of these cases resulted in enforcement actions, she does not necessarily agree that the existing rate even of clearances and/or second requests represents the appropriate level of antitrust concern with the mergers at issue.

Emily H. Rock,

Secretary.

[FR Doc. 85-22382 Filed 9-23-85; 8:45 am]

BILLING CODE 6750-01-M

Exhibit C

FEDERAL TRADE COMMISSION

16 CFR Part 803

Antitrust Improvements Act, Notification and Report Form for Certain Mergers and Acquisitions

AGENCY: Federal Trade Commission.

ACTION: Promulgation of Final Rule Revision.

SUMMARY: This final rule revises 16 CFR Part 803 Appendix, the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions (the "Form"). This Form must be completed and submitted by persons required to report mergers or acquisitions as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"). The revised Form will require that 1982 revenue data be provided in response to certain questions on the Form relating to product lines that previously asked for 1977 data. Certain other related minor changes have been made on the Form.

EFFECTIVE DATE: March 28, 1986.

ADDRESS: All completed Forms, including any documents required to be supplied in response to any item on the Form, must be delivered to: Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580, and Director of Operations, Antitrust Division, Room 3218, Department of Justice, Washington, D.C. 20530, as specified by 16 CFR 803.10(c)(1985).

FOR FURTHER INFORMATION CONTACT: John M. Sipple, Jr., Senior Attorney, or Wayne E. Kaplan, Attorney, Premerger Notification Office, Bureau of Competition, Room 301, Federal Trade Commission, Washington, D.C. 20580. Telephone: (202) 523-3894.

List of Subjects in 16 CFR Part 803

Antitrust, Reporting and recordkeeping requirements.

The authority for 16 CFR Part 803 continues to read:

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

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

This change to the existing OMB clearance, Control No. 3084-0005, has been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget.

Regulatory Flexibility Act

The proposed revision will not expand the coverage of the premerger notification rules in a way that would significantly 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 this revision, is therefore inapplicable.

Background Information

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires all persons contemplating certain mergers or acquisitions to file notification with the Federal Trade Commission ("the Commission") and the Antitrust Division of the Department of Justice and to wait designated periods of time before consummating such proposed transactions. Congress empowered the Commission, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division ("the Assistant Attorney General"), to require "that the notification . . . be in such form and contain such documentary material and information . . . as is necessary and appropriate" to enable the agencies "to determine whether such acquisitions may, if consummated, violate the antitrust laws." (15 U.S.C. 18a(d) (1985)).

Pursuant to that section, the Commission, with the concurrence of the Assistant Attorney General, developed the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions. The Form is designed to provide the Commission and the Assistant Attorney General with the information and documentary material necessary and appropriate for an initial evaluation of the potential anticompetitive impact of significant mergers, acquisitions and certain similar transactions. The Form is not intended to elicit all potentially relevant information relating to an acquisition. Completion of the Form by all parties required to file will ordinarily permit both agencies to determine whether the waiting period should be allowed to expire or be terminated early upon request, or whether a request for additional information should be made under section 7A(e) of the Act and 16 CFR 803.20.

All acquiring and acquired persons required by the Act to file notification must complete the Form, or a photostatic or other equivalent reproduction, in accordance with the attached instructions and the premerger notification rules.

The Form was first promulgated on July 31, 1978, 43 FR 33552, and became effective on September 5, 1978. It was revised to require data for 1977 as the base year in 1980. (45 FR 14205 (March 5, 1980)). Subsequently, new versions of the Form were approved by the Office of Management and Budget on December 29, 1981, February 23, 1983, September 14, 1984, and September 30, 1985. The most recent version has been in use since then and it was published in the Federal Register on November 12, 1985. (50 FR 46633).

The primary changes resulting from this revision concern the revenue data that must be submitted in response to Item 5 of the Form. Other changes reflect new reference materials cited in the Form or more precise identification of terms developed by the Bureau of the Census.

Item 5 of the Form is designed to elicit economic data classified by Standard Industrial Classification ("SIC") codes with respect to all those lines of commerce in which the reporting person derives any dollar revenues. Such revenue data is required by industry (4-digit SIC code), by product class (5-digit SIC based code), and by product (7-digit SIC based code). More specifically, item 5(a) requires that the reporting person provide 1977 revenue data for each 4-digit industry in which that filing person was engaged. Item 5(b)(i) requires that the reporting person engaged in manufacturing provide 1977 aggregate revenues for each 7-digit code product from which the reporting person derived any revenues. Item 5(b)(ii) requires the reporting person to identify each manufactured product that has been added or deleted since 1977. For those products added, the reporting person must provide the total revenue attributable to the added product for the most recent year. Item 5(b)(iii) requires that the reporting person engaged in manufacturing provide aggregate revenues for the most recent year derived from each 5-digit product class. Item 5(c) requires that the reporting person engaged in non-manufacturing industries provide 4-digit code revenue data for the most recent year.

When originally promulgated the premerger notification rules required revenue data for two time periods, 1972 and the most recent year for which the requested information is available. The use of the 1972 "base year" was designed to coincide with the then most recent quinquennial economic census and the *Annual Survey of Manufactures*. These publications of the Bureau of the Census serve as the most readily available and reliable statistical sources of industry components and market universes to which individual company product and revenue data can be compared. When the original rules were promulgated the Commission and the Antitrust Division of the Department of Justice stated their intention to revise item 5 to require submission of 1977 revenue data as soon as the Bureau of the Census published the *1977 Census of Manufactures*. (43 FR 33528 (July 31, 1978)). Accordingly, the Commission amended item 5 on March 5, 1980, when it promulgated the revision in the Federal Register. (45 FR 14205 (March 5, 1980)). The revision became effective on publication, but the published notice provided for a sixty-day transitional period during which either 1972 or 1977 revenue data could be submitted.

The Bureau of the Census has now completed its publication of final paperbound reports for the *1982 Census of Manufactures*. Since most companies within the United States submit data to the Bureau of the Census for the economic censuses, reporting persons presumably have gathered, compiled and assembled 1982 revenue data in accordance with the SIC code format for the *1982 Census of Manufactures*. Furthermore, the Bureau of the Census has now completed the *Numerical List of Manufactured and Mineral Products, 1982 Census of Manufactures and Census of Mineral Industries* (MC 82 R-1) ("*1982 Numerical List*"). That publication is necessary for reference to final "5-digit" product class and "7-digit" product codes for 1982 and is currently available from the Government Printing Office. Because of this, and the fact that the 1982 aggregate data is now available to the Commission and the Antitrust Division of the Department of Justice, item 5 is hereby being revised to require 1982 data instead of 1977 data. As in the 1980 change to the 1977 base year, the change is effective immediately, with a sixty-day transitional period during which either 1977 or 1982 revenue data may be submitted.

The Commission is aware that the Bureau of the Census proposed extensive changes in the SIC codes and SIC based codes in 1982, and that those proposed changes were not implemented because of budget restrictions. Thus, although the Bureau of the Census collected data in anticipation of those changes, it published the data using codes that are in some instances different than the codes it used to collect the information.

Since the Commission and the Antitrust Division use the universe revenue figures published by the Bureau of the Census as the basis upon which to compare revenue data supplied by reporting persons in response to item 5, it is important that reporting persons submit information using the codes published by the Bureau of the Census. For this reason, the Commission has determined to require reporting persons to submit revenue information on the basis of the codes published by the Bureau of the Census in the *1982 Census of Manufactures*. Accordingly, reporting persons will be required to convert the 1982 revenue data they submitted to the Bureau of the Census from the collected codes to the codes published by the Bureau of the Census. The *1982 Numerical List*, which is one of the two basic reference publications used to prepare responses to item 5, contains two parallel columns, "Product code published" and "Product code collected," which provide a basis for determining when the codes used to collect information differ from those used to publish the information. When the "Product code published" and the "Product code collected" differ, reporting persons will be able to comply, in most cases, by changing the code they used to submit information to the Bureau of the Census to the code used by the Bureau of the Census to publish the information. In a few extremely rare instances, the "Product code published" is derived from two or more collected codes. The Bureau of the Census has identified these codes by placing an asterisk in the "Product code collected" column in the *1982 Numerical List*. Reporting persons that have codes in this category may be able to comply by reviewing underlying records compiled in accordance with the 1982 census reports and retabulating such data according to the published codes.

The Commission has determined that any inconvenience resulting from this requirement is unavoidable in light of the antitrust agencies' need to be able to compare quickly an individual company's submission with published census universe data. The use of census data is currently the only feasible basis on which the agencies can perform a preliminary antitrust analysis within the time limits imposed by the Act.

At the request of the Bureau of the Census, we are also revising references in the Instructions to the Form to 5-digit product class and 7-digit product codes (presently referred to as SIC codes) which are technically SIC based codes. The Standard Industrial Classification developed by the Office of Management and Budget classifies establishments only to the 4-digit industry level by their primary type of activity.

The Commission believes that the notice and comment period ordinarily required by the Administrative Procedure Act ("the APA"), 5 U.S.C. 553(b) is unnecessary here. Section 553(b)(B) exempts from the notice and comment requirements of the APA promulgation of a rule where the agency for good cause finds that the standard procedure would be "impracticable, unnecessary, or contrary to the public interest." Promulgation of the proposed revision falls within this exemption for several reasons.

The public was afforded the opportunity to comment on the original rules and Form in two notice and comment periods provided pursuant to the rulemaking requirements of the APA. The rulemaking culminated in the promulgation and publication of the premerger rules and Form, and was accompanied by a Statement of Basis and Purpose. (43 FR 33450 (July 31, 1978)). Since the amendment does not depart from or alter the substance of the prior rulemaking (i.e., it does not change the type or amount of information required by the Form), further opportunity for comment seems unnecessary. *See generally, Texaco, Inc. v. Federal Energy Administration*, 531 F.2d 1071 (Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976); *Durkin v. Edward S. Wagner Co.*, 115 F. Supp. 118 (D.N.Y. 1953), *aff'd*, 217 F.2d 303 (2d Cir.), *cert. denied*, 348 U.S. 964 (1954).

Additionally, the agencies gave notice of their intention to revise item 5 in the original promulgation of the rules, as previously stated, in response to numerous comments received during the two comment periods of the rulemaking. Several comments opposed the requirement that 1972 data be supplied on the grounds that the compilation of 1972 data would be unduly cumbersome, burdensome and expensive. For the second time, the Commission is changing the requirements of item 5 consistent with its earlier notice. The change will lessen the compliance burden by requiring more recent revenue data that is generally more easily retrievable and readily available to reporting persons than 1977 data. The Commission finds that a separate notice and comment period at this time would be unnecessary and not in the public interest and, therefore, is not required by the APA.

Section 553(d) of the APA requires that 30 days' notice be provided to the public before a rule becomes effective, but provides an exception from this requirement where good cause is found. (5 U.S.C. 553(d)(3)). Rather than delay the effective data of the new requirements by 30 days, the Commission has determined in the public interest to accommodate all reporting persons by instituting a 60-day transitional period (as was done in the prior changeover from the 1972 base year to the 1977 base year) during which reporting persons may submit either 1977 or 1982 revenue data in response to items 5(a), 5(b)(i) and 5(b)(ii). Thereafter, the Commission and the Antitrust Division of the Department of Justice will accept only 1982 revenue data. Forms which do not provide 1982 data after the 60-day period will be treated as deficient under section 803.10(c)(2) of the premerger notification rules. (16 CFR 803.10(c)(2)).

The Commission, with the concurrence of the Assistant Attorney General, hereby revises the Appendix to 16 CFR part 803.

PART 803—[AMENDED]

Appendix [Amended]

In 16 CFR Ch. I, the Appendix to Part 803 is amended by removing the current Instructions to the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions ("Instructions"), pages I–VI, in its entirety and substituting the following new Instructions, pages I–VI, and by deleting pages 6, 7, 8 and 10 of the Notification and Report Form for Certain Mergers and Acquisitions and substituting the following new pages 6, 7, 8 and 10.

BILLING CODE 6750-01-M

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

INSTRUCTIONS

GENERAL

The Answer Sheets (pp. 1-18) 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.

The term "documentary attachments" refers to materials supplied in responses to Item 2(d)(ii), 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 301, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580, phone (202) 523-3894.

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) Volume II, "Industry Series" (MC82-1-20A-39D), *1982 Census of Manufactures*.

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 2302 (CIR MQ-23X) SIC 3281 (CIR MQ-34E)
SIC 3312, 3315, 3316 and 3317 (CIR MA-33B)
SIC 3357 (CIR MQ-33L) SIC 3431 (CIR MQ-34E)

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), 801.2(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, NW., Washington, DC 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, NW., Washington, DC 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 the 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 and a description of the assets or voting securities to be acquired by and/or the consideration to be received by each party. If 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)—State the scheduled consummation date of the transaction.

Item 2(c)—Describe the manner in which the transaction is to be carried out. The description should include the expected dates of any major events required in order to consummate the transaction (e.g., stockholders' meetings, filing of requests for approval, other public filings, termination of tender offers).

Item 2(d)(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 of estimated total value of the assets to be acquired in the transaction.

Examples of general classes of assets other than cash and

Privacy Act Statement—Section 18a(a) 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 without having provided this information may, however, render a person liable to civil penalties up to $10,000 per day.

securities and 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(d)(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(d)(i) and the dollar value or estimated dollar value at the time they were acquired.

Item 2(e)—*Voting securities to be acquired*. Furnish the following information separately for each issuer whose voting securities will be acquired in the acquisition.

Item 2(e)(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(e)(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(e)(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(e)(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(e)(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(e)(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(e)(vii)—Percentage of each class of securities listed under 2(e)(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(e)(viii)—Dollar value (or estimated dollar value) of securities to be held as a result of the acquisition (see 801.13).

Item 2(f)(i)—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 2(f)(ii)—Index to ancillary documents. Furnish an index containing a brief description sufficient to identify each ancillary document or class of documents related to the agreement, such as those relating to personnel matters (e.g., union contracts, employment agreements), third party financing agreements, leases, subleases, and other documents relating to the transfer of realty or other similar documents related to this transaction.

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

ITEM 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 1 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

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 $1 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

V

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 62 and 64 89 (retail trade finance insurance other than insurance carriers and real estate and 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 and

Item 7(c)(v)—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 ten 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

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(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)(iii))

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 (calculated on the accrual basis) for each of the lines of insurance listed on page 18 of the Answer Sheets

Item (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 18 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

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 (MC 82-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.")

DOLLAR REVENUES BY INDUSTRY

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

6

NAME OF PERSON FILING NOTIFICATION | DATE

DOLLAR REVENUES BY MANUFACTURED PRODUCTS

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

7