

[REDACTED]

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April 30, 1985

Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Washington, D.C. 20580

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Re: Request For Informal Interpretation of Section 7A(c)(4) and Rule Section 801.1(a)(2)

Gentlemen:

This letter is a request on behalf of [REDACTED] for an informal interpretation by the Commission's staff of section 7A(c)(4) of the Hart-Scott-Rodino Act and rule section 801.1(a)(2) regarding [REDACTED] acquisition of the assets of [REDACTED], through [REDACTED], the Insurance Commissioner of California (Commissioner). This request is made pursuant to section 803.30 of the Commission's rules.

As a result of an examination of the financial condition of [REDACTED] the Commissioner determined that [REDACTED] was insolvent, and that further transaction of its business would be hazardous to its policyholders, creditors, and to the public. Such insolvency is a ground for conservatorship pursuant to the provisions of California Insurance Code section 1011(1), and the Commissioner was appointed conservator of [REDACTED] on [REDACTED] 1985 by order of the Superior Court of the State of California for the County of [REDACTED] (Superior Court).

Pursuant to Article 14 of the California Insurance Code and said court order, the Commissioner, as conservator, is vested with title to all of the property and assets of [REDACTED] possesses all of [REDACTED] assets, books, records, and property, and all persons are enjoined from interfering with the conservator's possession and title thereto. CAL. INS. CODE §1011. The Commissioner is empowered with all authority and power necessary to operate the business of [REDACTED] including the right to sell, transfer, or otherwise dispose of all of its property upon such terms and conditions as the conservator deems proper. Id. §1037.

[REDACTED] and the Commissioner, as conservator, have executed an Agreement dated April 22, 1985, whereby [REDACTED] will acquire the assets of [REDACTED] from the Insurance Commissioner. All for the exemptions provided by section [REDACTED]

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7A(c)(4) and rule section 801.1(a)(2), the notification and report form would be required to be filed in order to consummate the transaction.

Section 7A(c)(4) provides that "transfers to or from a Federal agency or a State or political subdivision thereof" are exempt from the filing requirements of the Act. In addition, rule section 801.1(a)(2) provides that the term "entity" shall not include "the United States, any of the States thereof, or any political subdivision or agency of either" By excluding federal or state agencies from the definition of "entity," agencies cannot be "persons" or included within "persons." Because section 7A of the Act only covers transactions by "persons," the Act does not apply to those excluded from the definition.

The Commissioner is an agency of the State of California and thus is excluded from the term "entity," as provided by rule section 801.1(a)(2) and falls under the statutory exemption of section 7A(c)(4). By virtue of the broad powers granted to the Commissioner, as conservator, by Article 14 of the California Insurance Code and the court order, all beneficial interests of [redacted] vest in the Commissioner and, for purposes of the Act, the Commissioner is the sole owner of [redacted].

[redacted] therefore respectfully requests an informal interpretation from the Commission's staff that the above exemptions apply to [redacted] acquisition of [redacted]. Due to the time deadlines contained in the Agreement, your immediate review is requested.

Attached for your review are copies of the executed Agreement, the order of the Superior Court, and the controlling statutes of the California Insurance Code. Also attached are the referenced provisions of the Act and rules upon which [redacted]'s exemptions are based.

If you have any questions or require additional information, please contact the undersigned at [redacted].

Very truly yours,
[redacted signature]

Attachments
[redacted list of attachments]

1 " . . .

2 " . . .

3 " . . .

4 "(h) That a domestic insurer does not comply
5 with the requirements for the issuance to it of a
6 certificate of authority or that its certificate of
7 authority has been revoked;

8 or

9 "(i) That the last report of examination of any
10 person to whom the provision of this article apply shows
11 such person to be insolvent within the meaning of
12 Article 13, Chapter 1, Part 2, Division 1 of this code...."

13 In obtaining an ex parte order pursuant to this section, the
14 Insurance Commissioner need only show that he has determined and
15 found that one of the conditions enumerated exists. Financial
16 Indemnity Co. v. Superior Court, (1955) 45 Cal 2d 395, 402; Rhode
17 Island Ins. Co. v. Downey, (1940) 95 Cal. App. 2d 220.) Under the
18 insolvency and delinquency provisions of the Insurance Code, the
19 issuance of an order under Section 1011 is mandatory. (Financial
20 Indemnity Co. v. Superior Court, supra at 402.) The seized company
21 may apply for and have a full hearing after such order pursuant to
22 Section 1012. (Rhode Island Ins. Co. v. Downey, supra at 235-36.)

23 Section 1020 of the Insurance Code provides that the court
24 shall issue orders as may be necessary to, among other things,
25 prevent waste of assets, obtaining of preferences, and interference
26 with the commissioner of the conservatorship proceeding.

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THEREFORE, it is respectfully submitted that the order
prayed for should be granted as a matter of law.

Respectively submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ARTHUR C. DE GOEDE,
Assistant Attorney General
DERRY L. KNIGHT,
Deputy Attorney General

DERRY L. KNIGHT
Attorneys for Applicant

*Article 14. Proceedings in Cases of
Insolvency and Delinquency***§ 1010. Scope of provisions**

The provisions of this article shall apply to all persons subject to examination by the commissioner, or purporting to do insurance business in this State, or in the process of organization with intent to do such business therein, or from whom the commissioner's certificate of authority is required for the transaction of business, or whose certificate of authority is revoked or suspended.

History—Stats. 1935, c. 291, p. 1008.

§ 1011. Conservation order

The superior court of the county in which is located the principal office of such person in this State shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order vesting title to all of the assets of such person, wheresoever situated, in the commissioner or his successor in office, in his official capacity as such, and direct the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants, and employees from the transaction of its business or disposition of its property until the further order of said court:

(a) That such person has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge,

consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or creditors, or to the public.

(e) That such person has violated its charter or any law of the State.

(f) That any officer of such person refuses to be examined under oath, touching its affairs.

(g) That any officer or attorney in fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

(h) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked; or

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260.1

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(i) That the last report of examination of any person to whom the provisions of this article apply shows such person to be insolvent within the meaning of Article 12 (commencing with section 980), Chapter 1, Part 2, Division 1; or if a reciprocal or interinsurance exchange, within the applicable provisions of section 1870.2, 1870.4, 1871, or 1872; or if a life insurer, within the applicable provisions of sections 10510 and 10511.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1963, c. 1643, p. 2227, § 1; Stats. 1974, c. 447, § 2.

§ 1011.5 Application for consent to transfer business

The consent described in Section 1011(c) shall be obtained by filing an application with the commissioner in a form to be prescribed by him accompanied by such additional information concerning the insurer, its condition and affairs as the commissioner requires.

A fee of two thousand two hundred fifty dollars (\$2,250) shall be paid to the commissioner for the filing of the application.

History.—Stats. 1965, c. 1191, p. 3009 § 2; Stats. 1981, c. 1121, § 6.

§ 1012. Duration of order

Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business.

History.—Stats. 1935, c. 291, p. 1008.

§ 1013. Summary seizure

Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the commissioner, without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. Any

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person having possession of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued by the commissioner, shall be guilty of a misdemeanor and punishable by fine not exceeding one thousand dollars (\$1,000) or imprisonment not exceeding one year, or both such fine and imprisonment.

History.—Stats. 1935, c. 291, p. 1038.

§ 1014. Enforcement of seizure

Whenever the commissioner makes any seizure as provided in section 1013, it shall, on the demand of the commissioner, be the duty of the sheriff of any county of this State, and of the police department of any municipal corporation therein, to furnish him with such deputies, patrolmen or officers as may be necessary to assist the commissioner in making and enforcing any such seizure.

History.—Stats. 1935, c. 291, p. 1008.

§ 1015. Procedure following seizure

Immediately after such seizure, the commissioner shall institute a proceeding as provided for in section 1011 and thereafter shall proceed in accordance with the provisions of this article.

History.—Stats. 1935, c. 291, p. 1008.

§ 1016. Liquidation order

If at any time after the issuance of an order under section 1011, or if at the time of instituting any proceeding under this article, it shall appear to the commissioner that it would be futile to proceed as conservator with the conduct of the business of such person, he may apply to the court for an order to liquidate and wind up the business of said person. Upon a full hearing of such application, the court may make an order directing the winding up and liquidation of the business of such person by the commissioner, as liquidator, for the purpose of carrying out the order to liquidate and wind up the business of such person.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1937, c. 922, p. 7544, § 2.

§ 1017. Dissolution order

In his application for an order for the liquidation of a domestic corporation, or at any time thereafter, the commissioner may apply for, and the court shall make, an order dissolving such corporation.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1937, c. 932, p. 2564, § 1.

§ 1018. Notice imparted by recording of orders

The recording in the office of a county recorder of any county in the State of an order entered pursuant to section 1011, 1016 or 1017 shall impart the same notice that would be imparted by the recordation of a deed, bill of sale or other evidence of title duly executed by such person.

History.—Stats. 1935, c. 291, p. 1008.

§ 1019. Fixing of rights and liabilities

Upon the issuance of an order of liquidation under section 1016, the rights and liabilities of any such person and of creditors, policyholders, shareholders and members, and all other persons interested in its assets, including the State of California, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order in the office of the clerk of the county wherein the application was made.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1939, c. 934, p. 2632, § 1.

§ 1020. Grounds for injunctions and other orders

Upon the issuance of an order either under section 1011 or 1016, or at any time thereafter, the court shall issue such other injunctions or orders as may be deemed necessary to prevent any or all of the following occurrences:

- (a) Interference with the commissioner or the proceeding.
- (b) Waste of assets of such person.
- (c) The institution or prosecution of any actions or proceedings.
- (d) The obtaining of preferences, judgments, attachments, or other liens against such person or its assets.
- (e) The making of any levy against any such person or its assets.
- (f) The sale or deed for nonpayment of taxes or assessments levied by any taxing agency of property:
 - (1) Owned by such person.

(2) Upon which such person holds an encumbrance.

(2) Upon which such person has prior thereto commenced an action to foreclose any deed of trust or mortgage or has exercised the power of sale under any trust deed or mortgage which sale or foreclosure proceedings have not yet been completed or upon which no trustee's deed or judgment of court or sheriff's certificate of sale has been issued. "Taxing agency" as used in this section has the meaning ascribed to it by section 121 of the Revenue and Taxation Code. The injunctions or orders authorized by this subdivision may be modified, dissolved or rescinded by the court on motion of the commissioner, the State Controller, the person charged with the collection of taxes or assessments on such property, or any person beneficially interested in the property. The recording in the office of the county recorder of any county in the State of an order or injunction issued pursuant to this section, shall constitute service of such order or injunction upon any taxing agency with respect to property or interests therein located in such county.

(g) Any managing general agent or attorney in fact from withholding from the commissioner any books, records, accounts, documents or other writing relating to the business of such person; provided, however, that, if by contract or otherwise any of the same are the property of such an agent or attorney, the same shall be returned when no longer necessary to the commissioner or at any time the court after notice and hearing shall so direct.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1951, c. 25, p. 160, § 1; Stats. 1963, c. 1460, p. 3018, § 1.

§ 1021. Filing of claims: notice; time period

(a) Upon the making of an order to liquidate the business of such person, the commissioner shall cause to be published notice to its policyholders, creditors, shareholders, and all other persons interested in its assets. Such notice shall require claimants to file their claims with the commissioner, together with proper proofs thereof, within six months after the date of first publication of such notice, in the manner specified in this article.

(b) The six-month period specified in subdivision (a) shall not apply to the California Insurance Guarantee Association provided it files with the commissioner a notice of possible claim within such six-

month period and files actual claim or claims within such periods of time as may be permitted by order of court.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1970, c. 101, § 1.

§ 1022. Publication of notice

Such notice shall be published in a newspaper of general circulation, published in the county in which the proceeding is pending, not less than once a week for four successive weeks. A copy of the notice, accompanied by an affidavit of due publication, including a statement of the date of first publication, shall be filed with the clerk of the court.

History.—Stats. 1935, c. 291, p. 1008.

§ 1023. Contents of claim

A claim must set forth, under oath, on the form prescribed by the commissioner:

- (a) The particulars thereof, and the consideration therefor.
- (b) Whether said claim is secured or unsecured, and, if secured, the nature and amount of such security.
- (c) The payments, if any, made thereon.
- (d) That the sum claimed is justly owing from such person to the claimant.
- (e) That there is no offset to the claim.
- (f) Such other data or supporting documents as the commissioner requires.

History.—Stats. 1935, c. 291, p. 1008.

§ 1024. Noncomplying claims disallowed; automatic filing of life insurance claims

Unless such claim is filed in the manner and within the time provided in section 1021, it shall not be entitled to filing or allowance, and no action may be maintained thereon. In the liquidation, pursuant to the provisions of this article, of any domestic insurer which has issued policies insuring the lives of persons, the commissioner shall, within 80 days after the last day set for the filing of claims, make a list of the persons who have not filed proofs of claim with him and to whom, according to the books of said insurer, there are amounts owing under such policies, and he shall set opposite the

name of each person the amount so owing to such person. Each person whose name shall appear upon said list shall be deemed to have duly filed, prior to the last day set for the filing of claims, a claim for the amount set opposite his name on said list.

History.—Stats. 1935, c. 291, p. 1008.

§ 1025. Unliquidated or undetermined claims or demands

Claims founded upon unliquidated or undetermined demands must be filed within the time limit provided in this article for the filing of claims, but claims founded upon such demands shall not share in any distribution to creditors of a person proceeded against under section 1016 until such claims have been definitely determined, proved and allowed. Thereafter, such claims shall share ratably with other claims of the same class in all subsequent distributions.

An unliquidated or undetermined claim or demand within the meaning of this article shall be deemed to be any such claim or demand upon which a right of action has accrued at the date of the order of liquidation and upon which the liability has not been determined or the amount thereof liquidated.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1939, c. 934, p. 2632, § 2.

§ 1025.5 Procedures in lieu of separate claims filing

Notwithstanding the provisions of sections 1021 to 1025, inclusive, the commissioner may, in lieu of requiring claimants to file separate claims:

(a) File a claim himself on behalf of all claimants for return premiums.

(b) Permit any assignee of the right of the insured to a return premium by virtue of a valid assignment, as security or otherwise, made prior to an order under section 1011 or a seizure under section 1013, whichever is earlier in time in the particular case, to file one claim as assignee on behalf of all insureds having assigned rights to the assignee, which shall set forth such information as may be required under section 1023.

(c) Permit the California Insurance Guarantee Association to file one claim combining all claims assigned to the association under subdivision (b) of section 1063.4, which shall set forth such information as the commissioner may require.

History.—Stats. 1970, c. 1205, § 1.1.

§ 1026. Third party claims

Whenever any person has a cause of action against an insured and such cause is covered by a liability policy, such person, if the insurer is adjudged insolvent, may file a claim in the liquidation proceeding even if the claim is undetermined or unliquidated.

History.—Stats. 1935, c. 291, p. 1008.

§ 1026.1 Insured subrogated to rights of third party claimant

Where a claim arising out of a policy of insurance has been filed by a third party and approved by the liquidator and such claim has subsequently been paid or satisfied, either wholly or in part, by the transfer of anything of value, either voluntarily or by process, from the insured of the person in liquidation to such third party, then upon the filing with the liquidator of proof of the making and value of such transfer, to the extent and in the manner required by the liquidator, the insured shall be subrogated to the rights of the third party claimant to the extent that the claim has been satisfied and discharged, but the rights of the insured shall not exceed the face value of such claim and if the insured has theretofore filed a claim covering the same subject matter, he is entitled to only one recovery.

History.—Stats. 1941, c. 271, p. 1382, § 2.

§ 1027. Allowance of third party claims; multiple claims on one policy

A claim by a third party founded upon an insurance policy may be allowed by the liquidator without requiring such claim to be reduced to judgment, provided it can be reasonably inferred from the proof presented that the claimant would be able to obtain a judgment upon his cause of action against the insured and that such judgment would represent a liability of the person in liquidation under the policy of insurance upon which such claim is founded.

In the event several claims founded upon one policy or bond are filed, and the aggregate amount of such claims exceeds the liability limit of said policy or bond, and one or more of such claims is unliquidated and undetermined, then all of such claims shall be deemed unliquidated and undetermined; provided, however, that should one or more of said claims become determined and proved within the time provided in this article, the liquidator, upon any distribution to creditors, shall impound the distribution percentage

of the face amount of said claim or claims so determined and proved, not exceeding the policy or bond limit, and upon such claim or claims becoming liquidated as to amount, the liquidator shall release to such claimant the distribution percentage of the final liquidated value of such claims out of the funds so impounded.

History.—Stats. 1935, c. 291, p. 1008.

§ 1028. Default or collusive judgment against insured: evidentiary effect

A judgment taken by default, or by collusion, against an insured shall not be considered as evidence, in the liquidation proceeding, either of the liability of such insured to such claimant upon such cause of action or of the amount of damages to which such claimant is entitled.

History.—Stats. 1935, c. 291, p. 1008.

§ 1029. Claim amount allowed secured claimant

A claim of a secured claimant shall not be allowed in a sum greater than the excess over the value of the security of the amount for which the claim would be allowable if unsecured, unless the claimant surrenders the security to the liquidator. Upon such surrender the claim may be allowed in the full amount for which it is valued.

History.—Stats. 1935, c. 291, p. 1008.

§ 1030. Security valuation

The value of the security to be credited upon such claim shall be determined by an appraiser appointed by the liquidator and approved by the court. Such claimant shall elect to accept the security or to release it to the liquidator.

History.—Stats. 1935, c. 291, p. 1008.

§ 1030.5 Payment of final liquidation dividend

(a) The liquidator may require, as a condition of payment of the final liquidation dividend to a lender, or his assignee, who has filed a claim for an unearned premium as an assignee of the insured for valuable consideration, that such assignee of the insured shall assign to the liquidator all his right, title, and interest in any and all

debt of the insured to such assignee, pertaining to policies of the insolvent insurer, remaining unpaid after crediting the final liquidation dividend, if the amount of such unsatisfied debt is less than one hundred dollars and one cent (\$100.01).

The liquidator may also require, as condition precedent, the delivery to him of all the documents giving rise to such debt.

The liquidator, in his sole discretion, may determine whether or not it will be feasible to attempt to collect any such assigned debt. If he determines not to pursue collection of any such debt, he shall file a declaration to that effect with the liquidation court and be relieved of any further responsibility in respect to such debt.

(b) As used in this section, "insured" means a natural person who purchased insurance from the insolvent insurer for personal, family, or household purposes.

History.—Stats. 1970, c. 1205, § 13.

§ 1031. Setoffs

In all cases of mutual debts or mutual credits between the person in liquidation under section 1016 and any other person, such credits and debts shall be set off and the balance only shall be allowed or paid, but no setoff shall be allowed in favor of such other person where any of the following facts exist:

(a) The obligation of the person in liquidation to such other person does not entitle such other person claiming such setoff to share as a claimant in the assets of such person in liquidation.

(b) The obligation of the person in liquidation to such other person was purchased by, or transferred to, such other person.

(c) The obligation of such other person to the person in liquidation is to pay an assessment levied against such other person or to pay a balance upon a subscription for shares of the capital stock of the person in liquidation.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1961, c. 496, p. 1412, § 1.

§ 1032. Claims rejection

When a claim is rejected by the commissioner, written notice of rejection shall be given by mail, addressed to the claimant at the address set forth in his claim. Within 30 days after the mailing of the notice the claimant may apply to the court in which the liquidation

proceeding is pending for an order to show cause why the claim should not be allowed.

History.—Stats. 1935, c. 291, p. 1008.

§ 1033. Claims preference

(a) Claims allowed in a proceeding under this article shall be given preference in the following order:

- (1) Expense of administration.
- (2) Unpaid charges due under the provisions of Section 736.
- (3) Taxes due to the State of California.
- (4) Claims having preference by the laws of the United States and by laws of this state.

(5) All claims of the California Insurance Guarantee Association and associations or entities performing a similar function in other states, together with claims for refund of unearned premiums and all claims of policyholders of an insolvent insurer that are not covered claims.

Claims excluded by paragraphs (3) (except claims for refund of unearned premiums), (4), (5), (7), and (8) of subdivision (c) of Section 1063.1 and subdivisions (g) and (h) of Section 1063.2 shall be excluded from this priority.

(6) All other claims.

(b) Upon the issuance of an order appointing a conservator or liquidator for any person under the provisions of either Section 1011 or 1016 or both such sections, the lien of taxes due to the State of California imposed by Article 4 (commencing with Section 12491) of Chapter 4 of Part 7 of Division 2 of the Revenue and Taxation Code shall become subordinate to the reasonable administrative expenses of the proceeding under the order.

History.—Stats. 1935, c. 291; Stats. 1979, c. 234, § 1; Stats. 1981, c. 714, § 263.

§ 1034. Voidable property transfers and liens

After the issuance of an order of liquidation under section 1016, any of the following transactions occurring within four months prior to the application for such order shall be voidable by the commissioner if such transaction has the effect of giving to or enabling any creditor of such person to obtain a preference over any other creditor

of the same class, or a greater percentage of his debt than any other creditor of the same class:

- (a) A transfer of property of such person.
- (b) The creation of a lien on the property of such person.
- (c) The suffering of a judgment against such person.

History.—Stats. 1935, c. 291, p. 1008.

§ 1035. Appointment of deputies and assistants; liquidation expenses

In any proceeding under this article, the commissioner shall have the power to appoint and employ under his hand and official seal, special deputy commissioners, as his agents, and to employ such clerks and assistants and to give each of them such power as may by him be deemed necessary. The compensation of special deputy commissioners, clerks and assistants appointed to carry out the provisions of this article, and all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of such person under this article, shall be fixed by the commissioner, subject to the approval of the court, and shall be paid out of the assets of such person. In the event the property of such person does not contain cash or liquid assets sufficient to defray the cost of the services required to be performed under the terms of this article, the commissioner may at any time or from time to time pay the cost of such services out of the appropriation for the maintenance of the Division of Insurance. Any amounts so paid shall be deemed expense of administration and shall be repaid to said fund out of the first available moneys in the estate.

History.—Stats. 1935, c. 291, p. 1008; Stats. 1939, c. 834, p. 2632, § 4.

§ 1035.5 Disbursement of assets

Notwithstanding the provisions of Article 14 (commencing with Section 1010), with regard only to those insurers subject to this article:

- (a) Within 120 days of the issuance of an order directing the winding up and liquidation of the business of an insolvent insurer under Section 1016, the commissioner shall make application to the court for approval of a proposal to disburse the insurer's assets, from time to time as such assets become available, to the California

Insurance Guarantee Association and to any entity or person performing a similar function in another state.

(b) The proposal shall at least include the following provisions for:

(1) Reserving amounts for the payment of expenses of administration and the payment of claims of secured creditors (to the extent of the value of the security held) and claims falling within the priorities established in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 1033.

(2) Disbursement of the assets marshaled to date and subsequent disbursements of assets as they become available.

(3) Equitable allocation of disbursements to each of the associations entitled thereto.

(4) The securing by the commissioner from each of the associations entitled to disbursements pursuant to this section of an agreement to return to the commissioner such assets previously disbursed as may be required to pay claims of secured creditors and claims falling within the priorities established in paragraphs (1) to (5), inclusive, of subdivision (a) of Section 1033 in accordance with the priorities. No bond shall be required of any association.

(5) A full report to be made by the association to the commissioner accounting for all assets so disbursed to the association, all disbursements made therefrom, any interest earned by the association on the assets, and any other matter as the court may direct.

(c) The commissioner's proposal shall provide for disbursements to the associations in amounts estimated at least equal to the claim payments made or to be made by the associations for which such associations could assert a claim against the commissioner, and shall further provide that if the assets available for disbursement from time to time do not equal or exceed the amount of the claim payments made or to be made by the associations, then disbursements shall be in the amount of available assets. The reserves of the insolvent insurer on the date of the order of liquidation shall be used for purposes of determining the pro rata allocation of funds among eligible associations.

(d) Notice of such application shall be given to the associations in and to the commissioners of insurance of each of the states. Any such notice shall be deemed to have been given when deposited in the United States certified mails, first-class postage prepaid, at least 30 days prior to submission of such application to the court. Action on the application may be taken by the court provided the above

required notice has been given and provided further that the commissioner's proposal complies with paragraphs (1) and (4) of subdivision (b).

History.—Stats. 1977, c. 640, § 2; Stats. 1979, c. 334, § 2; Stats. 1981, c. 714, § 264.

§ 1036. Legal counsel

The Attorney General shall have the power to appoint and employ such legal counsel as may by him be deemed necessary to assist the commissioner in the performance of his duties under this article. The compensation of such legal counsel shall be fixed by the Attorney General, subject to the approval of the court, and shall be paid out of the assets of the person against whom the commissioner has proceeded under this article.

History.—Stats. 1935, c. 291, p. 1008.

§ 1037. Commissioner's powers as conservator or liquidator

Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator:

(a) Shall have authority to collect all moneys due such person, and to do such other acts as are necessary or expedient to collect, conserve or protect its assets, property and business, and to carry on and conduct the business and affairs of any such person or so much thereof as to him may seem appropriate.

(b) Shall collect all debts due and claims belonging to said person, and shall have the authority to sell, compound, compromise or assign, for the purpose of collection upon such terms and conditions as he deems best, any bad or doubtful debts.

(c) Shall have authority to compound, compromise or in any other manner negotiate settlements of claims against such person upon such terms and conditions as he shall deem to be most advantageous to the estate of the person being administered or liquidated or otherwise dealt with under this article.

(d) Shall have authority without notice, to acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with, any real or personal property of any such person at its reasonable market value, or, in cases other than acquisition, sale or transfer on the basis of reasonable market value,

X upon such terms and conditions as he may deem proper, provided, however, that no transaction involving real or personal property shall be made where the market value of the property involved exceeds the sum of one thousand dollars (\$1,000) without first obtaining permission of said court, and then only in accordance with such terms as said court may prescribe.

(e) Shall have authority to transfer to a trustee or trustees, under a voting trust agreement, the stock of an insurer heretofore or hereafter issued to him as conservator or as liquidator in connection with a rehabilitation or reinsurance agreement, or any other proceeding under this article. Such voting trust agreement shall confer upon the trustee or trustees the right to vote or otherwise represent such stock, and shall not be irrevocable for a period of more than twenty-one (21) years.

X (f) May, for the purpose of executing and performing any of the powers and authority conferred upon him under this article, in the name of the person affected by the proceeding or in his own name, prosecute and defend any and all suits and other legal proceedings, and execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate any sale or any real and personal property or other transaction in connection with the administration, liquidation, or other disposition of the assets of the person affected by such proceeding; and any deed or other instrument executed pursuant to the authority hereby given shall be valid and effectual for all purposes as though the same had been executed by the person affected by any proceeding under this article or by its officers pursuant to the direction of its governing board or authority. In cases where any real property sold by the commissioner under this article is located in a county other than the county wherein the proceeding is pending, the commissioner shall cause a certified copy of the order of his appointment, or order authorizing or ratifying the sale, to be filed in the office of the county recorder of the county in which said property is located.

(g) Shall have authority to invest and reinvest, in such manner as he may deem suitable for the best interests of the creditors of such person, such portions of the funds and assets of such person in his possession as do not exceed the amount of the reserves required by law to be maintained by such person as reserves for life insurance policies, annuity contracts, supplementary agreements incidental to life business and reserves for noncancellable disability policies, and

which funds and assets are not immediately distributable to creditors; provided, however, that no such investment or reinvestment shall be made which exceeds the sum of one thousand dollars (\$1,000) without first obtaining permission of said court, and then only in accordance with such terms as said court may prescribe.

The enumeration, in this article, of the duties, powers and authority of the commissioner in proceedings under this article shall not be construed as a limitation upon the commissioner, nor shall it exclude in any manner his right to perform and to do such other acts not herein specifically enumerated, or otherwise provided for, which he may deem necessary or expedient for the accomplishment or in aid of the purpose of such proceedings.

History.—Stats. 1935, c. 291, p. 1009; Stats. 1939, c. 934, p. 2623, § 5; Stats. 1955, c. 1649, § 1.

§ 1038. Service of application for conservation or liquidation

Any application under section 1011 or 1016 shall be served upon the person named in such application in the manner prescribed by law for personal service of summons or as provided by section 1039.

History.—Stats. 1935, c. 291, p. 1008.

§ 1039. Service in case of evasion

In lieu of the service required by section 1038, service may, upon application to said court, be made in such manner as the court directs whenever it is satisfactorily shown by affidavit (a) in the case of a corporation, that the officers of the corporation upon whom service is required to be made as above provided, have departed from the State or keep themselves concealed therein with intent to avoid the service, or, (b) in the case of a Lloyd's association or interinsurance exchange, that the individual attorney in fact or the officers of the corporate attorney in fact can not be served because of such departure or concealment, or, (c) in the case of a natural person, that the natural person upon whom service is required to be made, as above provided, has departed from the State or keeps himself concealed therein with intent to avoid the service.

History.—Stats. 1935, c. 291, p. 1008.

6750-01)

Title 16—Commercial Practices

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER II—RULES, REGULATIONS, STATEMENTS AND INTERPRETATIONS UNDER THE HART-SCOTT-RODINO ANTI-TRUST IMPROVEMENTS ACT OF 1976

PREMERGER NOTIFICATION; REPORTING AND WAITING PERIOD REQUIREMENTS

AGENCY: Federal Trade Commission.

ACTION: Promulgation of final rules.

SUMMARY: The purpose of this document is formally to promulgate final rules implementing title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, relating to premerger notification. The document consists of final rules, including a Notification and Report Form, and a statement of basis and purpose. Under the statute, the Federal Trade Commission was directed to promulgate, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, rules implementing a premerger notification program. The effect of the final rules is to implement such a program, by explaining the coverage of the program, certain exemptions from the program, and the means by which persons must comply with their obligations under the program.

EFFECTIVE DATE: August 30, 1978.

FOR FURTHER INFORMATION CONTACT:

Malcolm R. Pfunder, Associate Director for Premerger Notification, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20583, telephone: 202-823-3894.

SUPPLEMENTARY INFORMATION:

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Commission and the Assistant Attorney General advance notice and to wait certain designated periods before consummation of such plans. The transactions to which the advance notice requirement is applicable and the length of the waiting periods required are set out in the act, the complete text of which is reprinted below.

The rules are divided into three parts. Part 301 defines a number of the terms used in the act and the rules and explains which acquisitions are

subject to reporting and waiting period requirements. Part 302 contains a number of exemptions from these requirements. Part 303 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 303 of the rules. The amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions, but instead provides the enforcement agencies with advance notice of, and information about, certain transactions, and with an opportunity to seek a preliminary injunction in Federal district court to prevent consummation of any such transactions which may, if consummated, violate the antitrust laws.

Section 7A of the Clayton Act provides:

"Sec. 7A. (a) Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if—

"(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

"(2) (A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of \$10,000,000 or more are being acquired by any person which has total assets or annual net sales of \$10,000,000 or more;

"(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of \$10,000,000 or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 or more; or

"(C) any voting securities or assets of a person with annual net sales or total assets of \$100,000,000 or more are being acquired by any person with total assets or annual net sales of \$10,000,000 or more; and

"(3) as a result of such acquisition, the acquiring person would hold—

"(A) 15 per centum or more of the voting securities or assets of the acquired person, or

"(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of \$15,000,000.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

"(b) (1) The waiting period required under subsection (a) shall—

"(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the 'Assistant Attorney General') of—

"(1) the completed notification required under subsection (a), or

"(2) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

"(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).

"(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the FEDERAL REGISTER a notice that neither intends to take any action within such period with respect to such acquisition.

"(3) As used in this section—

"(A) The term 'voting securities' means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

"(B) The amount of percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

"(C) The following classes of transactions are exempt from the requirements of this section—

"(1) acquisitions of goods or realty transferred in the ordinary course of business;

"(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

"(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

"(4) transfers to or from a Federal agency or a State or political subdivision thereof;

"(5) transactions specifically exempted from the antitrust laws by Federal statute;

"(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all informa-

§ 1040. Removal of insurer's principal office; change of venue

At any time after an order is made under section 1011 or 1016, the commissioner may remove the principal office of the person proceeded against to the City and County of San Francisco or to the city of Los Angeles. In event of such removal, the court wherein the proceeding was commenced shall, upon the application of the commissioner, direct its clerk to transmit all of the papers filed therein with such clerk to the clerk of the City and County of San Francisco or of the county of Los Angeles as the case may require. The proceeding shall thereafter be conducted in the same manner as though it had been commenced in the county to which it had been transferred.

History.—Stats. 1935, c. 291, p. 1008.

§ 1041. Custodianship of moneys

The commissioner shall be the custodian of all moneys collected by him or coming into his possession in the course of any proceeding under this article, but he may deposit any money, or any part thereof, in a bank approved by said court.

History.—Stats. 1935, c. 291, p. 1008.

§ 1042. Subpoena of witnesses

The commissioner and a special deputy commissioner appointed pursuant to section 1035 shall have the power to subpoena witnesses and examine them under oath upon any subject relating to the affairs and business of any person affected by proceedings under this article. The penalties provided in Chapter 2, Title 3, Part 4 of the Code of Civil Procedure shall apply to any witness who fails or refuses to appear in accordance with such subpoena, or to testify in connection therewith.

History.—Stats. 1935, c. 291, p. 1008.

§ 1043. Mutualization, reinsurance, or rehabilitation

In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into rehabilitation agreements. No commissioner who acts as conservator of such person or who mutualizes, merges or reinsures the business of such person or who enters into rehabilitation

RULES AND REGULATIONS

Indirectly. "Entity" is defined in § 801.1(a)(1), and comprehends natural persons, corporations, partnerships, ventures, unincorporated associations, trusts, and several other types of entities. "Control" is defined in § 801.1(a)(2) and means, in most cases, total ownership of 50 percent or more of the voting stock. Control is effective directly if the voting stock is held without intermediaries; it is effective indirectly if direct control is exercised by controlled entities, agents, or nominees. An "ultimate parent entity" is defined in § 801.1(a)(3), and means an entity that is not controlled by other entities. A "person" thus is visualized as a collection of entities headed by an ultimate parent entity and linked together by control relationships. These entities are referred to as being "included within" a person.

Examples illustrate the rule. Example No. 1 illustrates the most common case, that of a corporation with subsidiaries. Examples 2, 3, and 4 illustrate less common cases involving foreign governments, natural persons and entities included within two persons. Section 801.1(a) also notes an exception, in § 801.1(a)(4), in which the term "entity" is assigned a different meaning in connection with percentage calculations.

BACKGROUND INFORMATION TO § 801.1(a)

Section 7A begins, "(N)o person acquires . . ." Although section 7 of the Clayton Act reaches only corporate acquisitions, Congress did not limit the definition of person to be applied to corporations. See 122 Cong. H. R. 5293 (daily ed. Sept. 19, 1976) (H. R. 5293); 122 Cong. H. R. 5133 (daily ed. Sept. 7, 1976) (H. R. 5133) (comparison of House and Senate versions with final compromise version). The definition of person accordingly covers the variety of organizations named in the definition of "entity." For purposes of the size-of-person test of section 7A(a)(2), "person" could mean just the particular entity which is acquiring or transferring the stock. If such a limited definition were adopted, the ultimate parent entity would be able to evade requirements of the act by manipulating the entity to be involved in an acquisition. For example, a large corporation could evade the size-of-person test of section 7A(a)(2) merely by arranging to have a small subsidiary participate in an acquisition. In order to give effect to the size-of-person test, "person" must mean the entire enterprise.

The rules solve this dilemma by including the term "entity" to serve in the first capacity, that of defining the organizational units (such as corporations, etc.) to which the act ap-

plies. The rules reserve the term "person" for the larger concept, used in the size-of-person test of section 7A(a)(2). See the Statement of Basis and Purpose to § 801.12, which also explains the exception in the definition provided in that rule.

The original rules did not employ the term "entity," and instead expressed the two meanings of "person" by using a more complex definition. The revised rules introduced the present definitional system. The final definition reformulates the language for clarity and to remove potential ambiguities, but does not alter the substance of the definition.

SECTION 801.1(a)(3) ENTITY

The term "entity" does not appear in the act, but in the rules is part of the definition of the term "person," the basic unit to which the act applies. Section 801.1(a) defines a "person" as an ultimate parent entity and all entities that it controls directly or indirectly. "Entities" thus constitute the component parts of persons. The definition of "entity" sets forth a list of organizational units that can be included within a person.

The proviso at the end of the definition excludes the governments of foreign nations, the United States and the several States, as well as their agencies and political subdivisions, from qualifying as entities. Hence, these units are not subject to the act. However, corporations controlled by such units and engaged in commerce are entities, and may be subject to the requirements of the act.

BACKGROUND INFORMATION TO § 801.1(a)(3)

The need to introduce the term "entity" is explained in the statement of basis and purpose to §§ 801.1(a)(1) and 801.12. Revised § 801.1(a)(2) marked the initial appearance of the term, although the original rules had achieved a similar result by means of a more complex definition of "person." See the FEDERAL REGISTER notice accompanying the revised rules, 42 FR at 39042 (August 1, 1977).

The final definition differs only slightly from the revised version. The reference to an entity's domicile was deleted as unnecessary. The reference to joint ventures not yet formed has been conformed to the language of final § 801.40; the reason for its presence in the definition is explained in the statement of basis and purpose to that rule.

Foreign states, foreign governments, and their agencies are excluded from the definition of entity, but foreign governmental corporations engaged in commerce are entities. The definition draws this distinction because the activities of corporations engaged in

commerce are invariably commercial activities, over which a U.S. court may have jurisdiction, whereas actions taken directly by States or governments are less likely to be subject to U.S. jurisdiction. Furthermore, the principle of comity, which seeks to assure amicable relations among nations, militates against the United States requiring a foreign state to comply with the reporting and waiting requirements of the act. By contrast, the principle of comity is less compelling with respect to the activities of governmental corporations. The distinction is generally supported by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 160-2-1811, which distinguishes between "commercial activities" of foreign states and agencies, which are not immune from the jurisdiction of the United States, and their noncommercial activities, which retain their immunity, 28 U.S.C. 1605(a)(2).

Similarly, the definition also excludes the States of the United States. The effect of the exclusion is that acquisitions by States are not subject to the act, because the act applies only to acquisitions involving persons. See Section 7A(a). The same is true of asset acquisitions from any of these political units. Stock acquisitions from them are not excluded under this rule, since the issuer of the stock, not the State or government, would be the acquired person. State-owned and U.S.-owned corporations are included within the definition of entity, for reasons similar to those applying to foreign governmental corporations.

SECTION 801.1(a)(3) ULTIMATE PARENT ENTITY

The term "ultimate parent entity" does not appear in the act. The rules employ the term in the course of defining the term "person." An "ultimate parent entity" is an entity that is not controlled by any other entity. The ultimate parent entity included within a person, therefore, is the entity that directly or indirectly controls all other entities within the person and is not itself controlled by any other entity.

An ultimate parent entity must be a unit that fits the definition of "entity" in § 801.1(a)(2). Thus, for example, a corporation engaged in commerce and wholly owned by a foreign government can be an ultimate parent entity, but the controlling government cannot, because it is not an entity. See example No. 2 to § 801.1(a)(1).

The ultimate parent entity included within a person is responsible for a person's compliance with the act and rules, under § 803.2(a). Because the concept of "person" is a creation of the act and rules and, therefore, a person may not have a generally recognized name embracing all its compo-