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. 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.

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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.

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. 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.

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. 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.


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. § 801.1(m) and § 801.5: Acquisition Vehicles. 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. § 801.11(e): Total Assets of a Newly-Formed Person. 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. § 801.12(b): Calculating Percentage of Voting Securities to be Held or Acquired. 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. § 801.13: Accumulation of Assets and Voting Securities. 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. §§ 802.1, 802.2 and 802.3: Acquisition of Assets. 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. §802.20(b): Increase in the "Controlled Issuer" Threshold. 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. §802.35: Acquisitions by Employee Trusts. 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. §802.70(b): Acquisitions Subject to Prior Approval. 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. §803.5: Affidavit Requirements of the Acquiring Person. 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. §803.9: Incorporation by Reference. 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. §803.10(a): Running of Time in §801.40 Transactions. 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. The Premerger Notification and Report Form. 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.

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. One of those actions was brought this year.

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.

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

The Antitrust Division filed four complaints in merger cases during calendar year 1985. 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.

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.

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 Runmix, 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

\(^{13}\) 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.


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

August 22, 1986, the appellate court reversed the lower court's ruling and directed the issuance of a preliminary injunction.\textsuperscript{17}

The Commission accepted final consent agreements in three merger cases in 1985.\textsuperscript{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.


\textsuperscript{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. 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. 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. The Commission upheld dismissal of a complaint against Echlin Inc., challenging Echlin's acquisition
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

Appendix B  -  Number of Filings Received and Transactions Reported by Month for the Years 1983-1985.
Appendix C  -  Transactions in Which Additional Information Was Requested for Calendar Years 1981 - 1985.

List of Attachments

Exhibit A  -  Statistical tables for 1984, presenting data profiling Hart-Scott-Rodino premerger notification filings and enforcement interest.
### Transactions

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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 reflect a liberalization of the standard for granting early termination following the decision in Heublein, Inc. v. Federal Trade Commission, 539 F. Supp. 122 (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 and Transactions Reported by Month for the Years 1983 - 1985.

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<td>180</td>
<td>98</td>
<td>210</td>
<td>110</td>
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<tr>
<td>March</td>
<td>148</td>
<td>80</td>
<td>136</td>
<td>295</td>
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<td>129</td>
<td>255</td>
<td>118</td>
<td>267</td>
<td>149</td>
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<td>May</td>
<td>139</td>
<td>81</td>
<td>107</td>
<td>286</td>
<td>156</td>
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<td>June</td>
<td>191</td>
<td>193</td>
<td>112</td>
<td>232</td>
<td>126</td>
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<td>July</td>
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<td>212</td>
<td>120</td>
<td>302</td>
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<td>September</td>
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<td>99</td>
<td>109</td>
<td>241</td>
<td>123</td>
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<td>October</td>
<td>155</td>
<td>200</td>
<td>132</td>
<td>350</td>
<td>195</td>
<td></td>
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<td>November</td>
<td>210</td>
<td>229</td>
<td>145</td>
<td>348</td>
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<tr>
<td>December</td>
<td>212</td>
<td>107</td>
<td>263</td>
<td>143</td>
<td>174</td>
<td></td>
</tr>
</tbody>
</table>

| Total   | 2001         | 1128              | 1400         | 3244              | 174          |

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

Transactions in Which Additional Information Was Requested for Calendar Years 1981 - 1985

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>762</td>
<td>713</td>
<td>903</td>
<td>1119</td>
<td>1450</td>
</tr>
<tr>
<td>Percent</td>
<td>10.2</td>
<td>5.9</td>
<td>5.6</td>
<td>6.3</td>
<td>5.8</td>
</tr>
</tbody>
</table>

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)(5) 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.
**Table 1**

<table>
<thead>
<tr>
<th>Transaction Range ($Millions)</th>
<th>H-S-R Transactions</th>
<th>Clearance Granted to FTC or DOJ</th>
<th>Second Requests Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number 2/</td>
<td>Percent 1/</td>
<td>Number FTC DOJ</td>
</tr>
<tr>
<td>Less than 15</td>
<td>132</td>
<td>11.8</td>
<td>1</td>
</tr>
<tr>
<td>15 up to 25</td>
<td>214</td>
<td>20.9</td>
<td>6</td>
</tr>
<tr>
<td>25 up to 50</td>
<td>291</td>
<td>26.0</td>
<td>17</td>
</tr>
<tr>
<td>50 up to 100</td>
<td>180</td>
<td>16.1</td>
<td>19</td>
</tr>
<tr>
<td>100 up to 150</td>
<td>82</td>
<td>7.1</td>
<td>8</td>
</tr>
<tr>
<td>150 up to 200</td>
<td>48</td>
<td>4.4</td>
<td>6</td>
</tr>
<tr>
<td>200 up to 300</td>
<td>59</td>
<td>5.3</td>
<td>5</td>
</tr>
<tr>
<td>300 up to 500</td>
<td>51</td>
<td>4.6</td>
<td>8</td>
</tr>
<tr>
<td>500 up to 1000</td>
<td>22</td>
<td>2.0</td>
<td>4</td>
</tr>
<tr>
<td>1000 and up</td>
<td>20</td>
<td>1.8</td>
<td>11</td>
</tr>
<tr>
<td>All Transactions</td>
<td>1119</td>
<td>100.0</td>
<td>87</td>
</tr>
</tbody>
</table>

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 801.18 (a)(4)) reported as a result of reportable primary transactions. The table does not however, exclude 13 competing offers or 92 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

1/ Percentage of total transactions.

2/ Percentage of transaction range group.

Note: Detail may not add to total due to rounding.
<table>
<thead>
<tr>
<th>Transaction Range</th>
<th>Clearance Granted by Agency</th>
<th>Clearance Granted as a Percentage of Transactions in Each Transaction Range Group</th>
<th>Total Number of Clearances Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FTC</td>
<td>DOJ</td>
<td>TOTAL</td>
</tr>
<tr>
<td>Less than 15</td>
<td>1</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>15 up to 25</td>
<td>6</td>
<td>20</td>
<td>26</td>
</tr>
<tr>
<td>25 up to 50</td>
<td>17</td>
<td>16</td>
<td>33</td>
</tr>
<tr>
<td>50 up to 100</td>
<td>19</td>
<td>14</td>
<td>33</td>
</tr>
<tr>
<td>100 up to 150</td>
<td>0</td>
<td>8</td>
<td>16</td>
</tr>
<tr>
<td>150 up to 200</td>
<td>6</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>200 up to 300</td>
<td>5</td>
<td>11</td>
<td>16</td>
</tr>
<tr>
<td>300 up to 500</td>
<td>0</td>
<td>7</td>
<td>15</td>
</tr>
<tr>
<td>500 up to 1000</td>
<td>4</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>1000 and up</td>
<td>11</td>
<td>7</td>
<td>18</td>
</tr>
<tr>
<td>All Clearances</td>
<td>87</td>
<td>88</td>
<td>175</td>
</tr>
</tbody>
</table>

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) 99 transactions reported under Section (c)(6) and 159 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 73 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 801.10 (a)(4)) reported as result of reportable primary transactions. The table also includes 113 competing offers or 82 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

Percentages also appear in TABLE 1.

Note: Detail may not add to total due to rounding.
## Table IV

**Transactions Involving the Issuance of Second Requests, 1984**

<table>
<thead>
<tr>
<th>Transaction Range (in Millions)</th>
<th>Transactions Involving the Issuance of Second Requests</th>
<th>Second Requests Issued as a Percentage of Those in Each Transaction Range Group</th>
<th>Total Number of Second Requests Issued as a Percentage of All Transactions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FTC</td>
<td>DOJ</td>
<td>TOTAL</td>
</tr>
<tr>
<td>Less than 15</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>15 up to 25</td>
<td>4</td>
<td>9</td>
<td>13</td>
</tr>
<tr>
<td>25 up to 50</td>
<td>4</td>
<td>10</td>
<td>14</td>
</tr>
<tr>
<td>50 up to 100</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>100 up to 150</td>
<td>2</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>150 up to 200</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>200 up to 300</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>300 up to 500</td>
<td>3</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>500 up to 1000</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>1000 and up</td>
<td>6</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>All Transactions</td>
<td>11</td>
<td>40</td>
<td>71</td>
</tr>
</tbody>
</table>

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); 76 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filed a complaint notification); and, (5) 9 secondary acquisitions (filed pursuant to Section 801.11(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 1.

*Note: Detail may not add to total due to rounding.*
### TABLE V
**ACQUISITIONS BY REPORTING THRESHOLD, 1984**

<table>
<thead>
<tr>
<th>Threshold</th>
<th>Premerger Filings</th>
<th>Clearance Granted to FTC or DOJ</th>
<th>Second Requests Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
<td>Number</td>
</tr>
<tr>
<td>$15 Million</td>
<td>17</td>
<td>1.5</td>
<td>1</td>
</tr>
<tr>
<td>151</td>
<td>44</td>
<td>3.9</td>
<td>1</td>
</tr>
<tr>
<td>251</td>
<td>59</td>
<td>5.1</td>
<td></td>
</tr>
<tr>
<td>501</td>
<td>665</td>
<td>59.4</td>
<td>49</td>
</tr>
<tr>
<td>Assets Only</td>
<td>327</td>
<td>29.2</td>
<td>20</td>
</tr>
<tr>
<td>Undetermined</td>
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<td>0.6</td>
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<tr>
<td>All Transactions</td>
<td>1119</td>
<td>100.0</td>
<td>47</td>
</tr>
</tbody>
</table>

**Notes:**
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 001.10 (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**

<table>
<thead>
<tr>
<th>Asset Range (in Millions)</th>
<th>H-S-R Transactions</th>
<th>Clearances Granted to FTC or DOJ</th>
<th>Percentage of Asset Range Group</th>
<th>Second Requests Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number 1/</td>
<td>Percent</td>
<td>Number FTC</td>
<td>DOJ</td>
</tr>
<tr>
<td>Less than 15</td>
<td>29</td>
<td>2.6</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>15 up to 25</td>
<td>19</td>
<td>1.7</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>25 up to 50</td>
<td>56</td>
<td>5.0</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>50 up to 100</td>
<td>68</td>
<td>6.1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>100 up to 150</td>
<td>77</td>
<td>6.9</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>150 up to 200</td>
<td>44</td>
<td>3.9</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>200 up to 300</td>
<td>67</td>
<td>6.0</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>300 up to 500</td>
<td>102</td>
<td>9.1</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>500 up to 1000</td>
<td>117</td>
<td>10.5</td>
<td>6</td>
<td>5</td>
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<tr>
<td>1000 and up</td>
<td>524</td>
<td>46.8</td>
<td>59</td>
<td>51</td>
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<tr>
<td>Assets not available</td>
<td>16</td>
<td>2/</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>All Transactions</td>
<td>1119</td>
<td>100.0</td>
<td>87</td>
<td>88</td>
</tr>
</tbody>
</table>

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); (3) 26 transactions found to be non-reportable; (4) 6 incomplete transactions (only one party in each transaction filled a compliant notification) and, (5) 9 secondary acquisitions (filed pursuant to Section 801.10 (a)(4)) reported as result of reportable primary transactions. The table does not however, exclude (a) competing offers or (b) 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**

<table>
<thead>
<tr>
<th>Sale Range ($ Millions)</th>
<th>B-S-R Transactions</th>
<th>Clearance Granted to FTC or DOJ</th>
<th>Second Requests Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
<td>FTC</td>
</tr>
<tr>
<td>Less than 15</td>
<td>61</td>
<td>5.4</td>
<td>1</td>
</tr>
<tr>
<td>15 up to 25</td>
<td>21</td>
<td>2.1</td>
<td>-</td>
</tr>
<tr>
<td>25 up to 50</td>
<td>41</td>
<td>1.7</td>
<td>1</td>
</tr>
<tr>
<td>50 up to 100</td>
<td>74</td>
<td>6.6</td>
<td>3</td>
</tr>
<tr>
<td>100 up to 150</td>
<td>51</td>
<td>4.6</td>
<td>1</td>
</tr>
<tr>
<td>150 up to 200</td>
<td>49</td>
<td>4.4</td>
<td>1</td>
</tr>
<tr>
<td>200 up to 300</td>
<td>59</td>
<td>5.1</td>
<td>4</td>
</tr>
<tr>
<td>300 up to 500</td>
<td>107</td>
<td>9.6</td>
<td>6</td>
</tr>
<tr>
<td>500 up to 1000</td>
<td>128</td>
<td>11.4</td>
<td>0</td>
</tr>
<tr>
<td>1000 and up</td>
<td>499</td>
<td>44.6</td>
<td>57</td>
</tr>
<tr>
<td>Sales not available</td>
<td>27</td>
<td>2.4</td>
<td>1</td>
</tr>
<tr>
<td>All Transactions</td>
<td>1119</td>
<td>100.0</td>
<td>87</td>
</tr>
</tbody>
</table>

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 801.10 (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>
<thead>
<tr>
<th>Asset Range ($ Millions)</th>
<th>H-S-R Transactions</th>
<th>Clearance Granted to FTC or DOJ</th>
<th>Second Requests Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number 2/</td>
<td>Percent</td>
<td>Number</td>
</tr>
<tr>
<td></td>
<td>PTC  DOI</td>
<td>PTC  DOI  TOTAL</td>
<td>PTC  DOI  TOTAL</td>
</tr>
<tr>
<td>Less than 15</td>
<td>85</td>
<td>7.6</td>
<td>1</td>
</tr>
<tr>
<td>15 up to 25</td>
<td>106</td>
<td>16.6</td>
<td>10</td>
</tr>
<tr>
<td>25 up to 50</td>
<td>213</td>
<td>20.0</td>
<td>15</td>
</tr>
<tr>
<td>50 up to 100</td>
<td>175</td>
<td>15.6</td>
<td>16</td>
</tr>
<tr>
<td>100 up to 150</td>
<td>84</td>
<td>7.5</td>
<td>6</td>
</tr>
<tr>
<td>150 up to 200</td>
<td>64</td>
<td>5.7</td>
<td>1</td>
</tr>
<tr>
<td>200 up to 300</td>
<td>66</td>
<td>5.9</td>
<td>5</td>
</tr>
<tr>
<td>300 up to 500</td>
<td>46</td>
<td>4.1</td>
<td>5</td>
</tr>
<tr>
<td>500 up to 1000</td>
<td>51</td>
<td>4.6</td>
<td>11</td>
</tr>
<tr>
<td>1000 and up</td>
<td>61</td>
<td>5.6</td>
<td>12</td>
</tr>
<tr>
<td>Assets not available</td>
<td>66 2/</td>
<td>5.9</td>
<td>1</td>
</tr>
<tr>
<td>All Transactions</td>
<td>1119</td>
<td>100.0</td>
<td>87</td>
</tr>
</tbody>
</table>

1/ The assets of the acquired entity were taken from responses to Item 2(d)(11) (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 1(c)(6) and 159 transactions reported under Section 1(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 filled a compliant notification); and, (5) 9 secondary acquisitions (filled pursuant to Section 1001.19(a)(1) reported as result of reportable primary transactions. The table does not however, exclude 1) competing offers or 92 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.
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<tr>
<th>Sales Range ($ Millions)</th>
<th>H-3-R Transactions</th>
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**Note:** Detail may not add to total due to rounding.
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**Notes:**

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 304.10(a)(4)) reported as a result of reportable primary transactions. The table does not however, exclude 1) competing offers or 2) 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.
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<th>Number of 2-Digit Intra-Industry Transactions</th>
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<td>Textile Mill Products</td>
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**Table XI**

INDUSTRY GROUP OF ACQUIRED ENTITY, 1984
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*Note: The table continues with more entries not shown here.*
### TABLE XI (continued)

**INDUSTRY GROUP OF ACQUIRED ENTITY, 1984**

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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 901.30(a)(4)) reported as a result of reportable primary transactions. The table does not however, exclude 1) competing offers or other 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.
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 further to 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, 1993.

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.


SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

With few 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 12866. The proposed rules will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in the domestic market. None of the amendments would expand the coverage of the premerger notification rules in a way that would affect small business. Therefore, pursuant to section 503(b) of the Administrative Procedure Act, 5 U.S.C. 503(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 803 of the Administrative Procedure Act, 5 U.S.C. 803, requires 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. 3061-0005). 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(b) 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 applies 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 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 unsuccessful. 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 require 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 39002. Further 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 21, 1978, 43 FR 33421, 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 39724, 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 1976 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 20, 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 25, 1981, 47 FR 39182. 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 sections 7(a)(3)(B) and 8(a)(3)(B). This discussion was premised on past 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 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
... 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 1963 (48 FR 34438 [July 29, 1963]). 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 use 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 transactions 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 if the acquisition had been made directly. Proposal 8 would eliminate a little-used exemp- tion 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 2 (concerning the exemption of certain kinds of assets); proposal 5 (concerning an increase in an exemption threshold) and proposal 7 (concerning an exemption for acquisitions by employee trust(s) 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 record-keeping requirements.
Proposed Statement of Basis and Purpose for the Commission's Revised Premerger Notification Rules
Authority
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 persons 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 preexisting 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 "none of 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 acquisitions 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...
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)(1), 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 this 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 has an interest 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 7(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, so the partnership is considered too small to be required to report its acquisitions. Moreover, a partnership does not fit § 801.1(b)(1)’s definition of a controller 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 7(a)(2) of the act. And only if the securities were valued at $15 million or less; Section 801.40 would not require a notification unless the formation of the new entity is reportable under another section of the act. In this case, it would not have to be reportable under section 7(a)(2) because it is not a partnership and does not need to be reportable for reasons discussed below.

Also, 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 loans to make the merger, the acquisition would be reportable under the notification requirements. In the example that follows, it would be reportable even though the owners of the acquisition vehicle did not have to report their asset to the acquiring entity.

Even if the formation and subsequent acquisition were reportable, the result under the existing rules would not provide a full opportunity to review the acquisition. Because the formation and acquisition transactions would be reported separately, the notification of the formation would be separated from the notification of the acquisition. The acquisition could then be made by the corporation that acquired the joint venture, making the potential anticompetitive effects of the acquisition more difficult to assess.

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 7(a)(2) of the act that persons who acquire voting securities or assets “directly or indirectly” file notifications. The authority in section 7(a)(2)(A) to “define the terms used in [the act]” including the terms “direct” and “indirect” and “hold” and the authority in section 7(a)(2)(C) to “prescribe such other rules as may be necessary and appropriate to carry out
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 § 801.5(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 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 these 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(a).

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 statutes 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 § 801.3, 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 § 801.3(c) to determine the portion of that value attributable to each in 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 securitiesush 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 § 801.30 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. and 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 unallocated 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 such intent in all acquisitions will create reporting obligations for passive investors if, for example, leveraged buyout transactions where there is no intention to alter the management of the business and no desire by those passive 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 § 801.3. For example, transfers to or from a federal agency (exempted by section 7A(c)(1)) 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:


B. The Commission proposes to amend its rules by the additions of § 801.1(n), § 801.5, and an Example 3 to § 801.20, 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 of the partnership, corporation, or other entity is chosen in furtherance of 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 

to be an acquisition vehicle when 

the entity commences active 

management of a business other than 

the business of owning voting 

securities and assets.

Examples: 1. A partnership is formed by 

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 of the partnership, which has 

no business of its own, acquires Oldco for $500 
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 acquiring and liquidating 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 parent and capital 

and the sale of the factory are incidental to 

that purpose.

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 acquired Oldco. Newco is an 

acquisition vehicle because it never had 

any business operations and is now being 

avoided 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 

shall no longer be treated as if they are 

also held by its (or their) owners.

Examples: 1. A Corporation together with B 

Corporation forms a partnership for the 
purpose of acquiring Oldco. The 

partnership forms Newco to buy the shares of 

Oldco. The partnership and Newco are an 

acquisition vehicle because, pursuant to 

§ 801.11(b), 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 totaling $20 million 

and has 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 § 801.11(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 Newco, pursuant to 

§ 801.3, is an entity which acquires the 

acquisition vehicle 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 $85 million, that is, $1 billion 

(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 below 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. A, B, C and D 

altogether for the purpose of acquiring 

Oldco. A, B, C and D corporations are each 

pursuant to § 801.3, deemed to be acquiring 

$25 million in assets and voting securities of Oldco and 

will be required to file a notification for 

acquiring Oldco. 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 also 

will 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 Otheridco. 

Because Newco I no longer a corporate 

shell with negligible business activity, its 

acquisition of Otheridco is no longer 

attributable to its shareholders pursuant to 

§ 801.3. The obligation to file a notification if 

there is one, will rest solely with Newco I.

§ 801.90 Transactions or devices for 

avoidance.

Examples: •

1. Corporations A, B, C and D each 

with annual net sales or total assets in excess of
llion, decide to buy Oldco for $100 million. Rather than create 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 incorporate 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 § 801(a)(2) of the act) was to avoid reporting the transaction; the existence of the ongoing corporation will be disregarded. Instead Littleco will be treated as if it were a business entity formed or acquired to acquire Oldco pursuant to § 801.5. "A", "B", "C" and "D" 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 clarify that a standing informal position of the staff that a newly-formed entity generally should not include funds used to make an acquisition in determining its size. Under this proposed rule, if an entity's only assets are cash, that will be used to take the acquisition and securities of the 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 assets of a person shall be the sales and assets 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 small 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 § 801.15 is designed to alert the antitrust enforcement agency to such acquisitions by requiring certain owners of newly-formed entities to file notifications.)

Similarly, 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 outstanding 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 in a person's balance sheet, except for cash that will be used to make an acquisition and securities issued by the acquiring person (or an entity within the acquired person).

The exclusion of cash, loans and securities established by proposed § 801.11(e) continues until the acquiring person has a regularly prepared balance sheet. That 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 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 vehicle. 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(e) and add a new § 801.11(i) 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 paragraphs (b), (c), and (d) of this section.

(b) 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 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 paragraph (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 $100 million in cash and purchase assets from B for $700 million. A's total assets are determined by subtracting the $100 million that it will use to acquire B's assets from the $700 million A will have at the time of the acquisition. Therefore, A has total assets of $50 million and does not meet the size-of-person criteria in section 801.5(e)(2).

2. In example 1 above, assume that A will at the time it acquires B's assets, have $50

million in sales. Then, A would have the required sales of $50 million and be deemed a newly-formed entity.)
The proposed new § 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 more voting power than 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 the 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 conclude presumptions 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...
### Calculation of Percentage of Voting Securities

#### Step 1: Calculate the Total Number of Voting Securities

First, we need to determine the total number of voting securities that qualify as outstanding. This includes:

- Common stock
- Preferred stock that is voting stock
- Voting equivalent of nonvoting securities

#### Step 2: Determine the Percentage of Voting Securities

The percentage of voting securities held by a particular holder is calculated as follows:

\[
\text{Percentage} = \left( \frac{\text{Number of Voting Securities Held}}{\text{Total Number of Voting Securities}} \right) \times 100\%
\]

#### Example

Let's assume Company X has 100 million shares of voting stock, and Company Y holds 20 million shares of that company. If Company Y's shares represent 30% of the total voting power, we can calculate the total number of voting securities and the percentage of voting securities held by Company Y as follows:

<table>
<thead>
<tr>
<th>Company</th>
<th>Voting Securities</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>X</td>
<td>100 million</td>
<td>70%</td>
</tr>
<tr>
<td>Y</td>
<td>20 million</td>
<td>30%</td>
</tr>
</tbody>
</table>

### Calculation of Percentage of Voting Power

#### Step 1: Calculate the Total Number of Voting Shares

This is similar to the above calculation, but it specifically relates to voting shares only.

#### Step 2: Determine the Percentage of Voting Power

The percentage of voting power held by a particular holder is calculated as follows:

\[
\text{Percentage of Voting Power} = \left( \frac{\text{Number of Voting Shares Held}}{\text{Total Number of Voting Shares}} \right) \times 100\%
\]

### Example

Continuing with the previous example, if Company Y's votes represent 30% of the total voting power, we can calculate the total number of voting shares and the percentage of voting power held by Company Y as follows:

<table>
<thead>
<tr>
<th>Company</th>
<th>Voting Shares</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>X</td>
<td>100 million</td>
<td>70%</td>
</tr>
<tr>
<td>Y</td>
<td>20 million</td>
<td>30%</td>
</tr>
</tbody>
</table>

### Note

These calculations are based on the assumption that the voting process follows certain rules, and they are intended to illustrate the basic principles involved in determining the percentage of voting securities and voting power held by a particular holder. In practice, specific rules and regulations may apply, and these calculations should be adjusted accordingly.
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 prior transactions) 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 exempied). 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 propone 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 $15 million in assets might involve 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 reportable, 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 § 801.20 and section 7(a)(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 asset 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 1 following § 801.13(a) and revise § 801.13(b)(2)(i) as set forth below. New language is indicated by angles: (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, (a) 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 100 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 January 1 of the same year. Under § 801.13(a)(1), "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 of $1 million and is not reportable. ->

(b) Assets. * * *

(2) * * *

(ii) Subject to the provisions of § 801.15, if the acquiring person has acquired [any assets] from the acquiring person within the 180 calendar days preceding the signing of such agreement [and such assets] are [any assets which] are presently held by the acquiring person, the acquisition of which was not previously subject to the filing and waiting requirements of the act, then only for purposes of section 7(a)(3)(B) and § 801.17(a)(1), both the acquiring and the acquiring 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
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 rely 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 ... 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 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 $750 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
transaction 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 §602.1(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 §602.1(b) 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 §602.1(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 business, 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 concentrat[ing 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 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 reduce 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 assets. 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 §602.1(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 §602.1(c)(1) to be a
which is used repeatedly and has a full 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. 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 standing 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 associated with the $15 million size-of-transaction criteria of section 7A(a)(3)(B) are overly inclusive and burdensome. Although there is much variety in the market structure of transactions affected by proposed § 802.1, for example, most competitors are engaged in businesses 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 property,” 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 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 they are 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 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 1976 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 not 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
The Commission proposes to amend its rules by revising § 802.1 and adding new §§ 802.2 and 802.3. The 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. Any 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 if 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 12 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 § 802.1(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
The acquisitions be treated as if the voting securities of an entity whose assets include solely office buildings and residential properties are exempt from the requirements of the act. The term "unimproved land" includes any real property unless the aggregate value of structures, mineral rights, reserves of timber or minerals and hydro or geothermal power accounts 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 $50,000 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 incident 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 of calculating the $15 million limitations of this section.

Example: Middleman Company agrees to acquire five used jet planes from Landing Airlines and then resell them to Flying Airlines for $100,000. Middleman then purchases 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 provision to §§ 802.31(b) and 802.51(b) 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; acquiring all other reporting requirements are:

\[ \text{§ 802.2 - Acquisitions of certain kinds of real property.} \]

(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, mineral rights, reserves of timber or minerals and hydro or geothermal power accounts 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 $50,000 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 incident 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 of calculating the $15 million limitations of this section.

Example: A corporation acquires rights to oil and gas leases valued at $10 million from company B. Sixty days later A buys coal reserves valued at $100 million. Pursuant to §§ 802.31(b) and 802.51(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 $20 million and is not exempt.

6. Section 802.23(b) - Increase in the "Controlled Issuer" Threshold

Section 802.23(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 described in §§ 802.23(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 7(a)(1)(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
assets of the acquired person valued at more than $75 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.

<table>
<thead>
<tr>
<th>Year</th>
<th>$15 million or less</th>
<th>$15 million or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>111</td>
<td>87</td>
</tr>
<tr>
<td>1982</td>
<td>102</td>
<td>87</td>
</tr>
<tr>
<td>1981</td>
<td>105</td>
<td>87</td>
</tr>
</tbody>
</table>

(Following the chart is the actual data in Table 1 of the annual report to Congress pursuant to Section 2(c) of the Hart-Scott-Rodino Antitrust Improvements Act and of 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 33430, 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 percentage 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. Although the purchase of a large but failing company will often be controlable 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 likely 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 acquired.

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 adjusting 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).

C. The Commission proposes to revise § 802.20(b) and its example.

§ 802.20(b) and its example.

§ 802.50(a)(2) and its example.

§ 802.50(b)(2) and its example.

§ 802.51(b)(2) and its example.

§ 802.52 and example 3 following paragraph (d) of § 801.2, as yet 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
§ 802.50 Acquisitions of foreign assets or of voting securities of a foreign issuer by United States persons.

(a) Assets.

(1) 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 $525 million or more during the acquired person's most recent fiscal year were attributable.

Examples:

1. After the transaction in example 1, the acquiring person initiates plans to sell to "B" a second manufacturing plant located abroad, which is consolidated with the United States assets of "A". The total assets of "A" are $250 million or more in the most recent fiscal year. The transaction would not be exempt under this paragraph.

(b) Voting Securities.

(1) An aggregate sales in or into the United States of $525 million or more in the most recent fiscal year.

Examples:

1. "A", a U.S. person, acquires voting securities of a foreign issuer. There are no assets in the United States, but the assets of the foreign issuer are $525 million or more in the most recent fiscal year. The transaction is not exempt under this section.

§ 802.51 Acquisitions by foreign persons.

(a) A U.S. issuer with annual net sales or total assets of $525 million or more.

Examples:

1. In example 1, assume that "A" acquires B's voting stock and the consolidated assets are $525 million or more. 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 $525 million, the acquisition cannot be exempt under this section.

§ 802.52 Acquisitions by or from foreign governmental corporations.

Examples:

1. The government of a foreign country X has decided to sell assets of its wholly-owned corporation, B, all of which are located in foreign country Y. 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 not exempt under this section. (If such aggregate annual sales were less than $10 million, the transaction would also be exempt under § 802.50.)

§ 802.1.2 Acquisition and acquired persons.

Examples:

1. 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 $525 million or less. Since the acquisition of the voting securities of Z is not 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)(2)(B) because the acquisitions represent an inequitable 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)(1) because the trust is not subject to 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 § 802.30, the ESOP is not within the same person as the employer, and, thus the acquisition 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 than 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 exempt by § 802.30 as an intraperson transaction.

The rationale 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 corporation, not the trustees, vote the employer securities held by the trust. 26 U.S.C. 408A(e)(2). The employer-appointed trustees retain the power to sell the employer securities 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 competing firms. In the case of an ESOP trust which already holds 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 the majority of the directors of a corporation, or in the case of an unincorporated entity, 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 employer's own securities were made subject to the notification requirements, as the Commission proposes to do here.

The Commission has considered exempting employee trust acquisitions either by expanding the intrapersonal exemption in § 802.30 or by changing the definition of "hold" in § 801.1(e). 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 the exemption to circumstances where control is exercised in the course 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 intrapersonal exemption to include ESOPs would permit the employer 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 by the employee'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 voted". 26 U.C.S. 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 nature 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 incentive for the employer to aggregate such acquisitions pursuant to §801.11. Such aggregation is avoided by listing §802.33 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 (→). 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;
  - (c) Voting securities acquired are those of that person or an entity within that person.

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

- • • • •
  - (2) Sections § 802.3(b), § 802.5(b)(1), § 802.8, § 802.31, § 802.35, § 802.50(a)(1), § 802.51(a)(1), § 802.53 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 §§ 802.21(a).

802.3, § 802.50(a)(2), § 802.50(b), § 802.51(b) and § 802.54 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 antitrust laws.

Nevertheless, the antitrust enforcement agencies have insisted on their authority to review all portions of a transaction, under a prior review order, 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, businesses. 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—that will be reviewed within the terms of the order and those that will be reviewed under routine premerger notification procedures. The latter resolution, although logically superior, could require extremely complex definitions to include all transactions that might be relevant to the order. Such definitions could result in some transactions being placed in the wrong category and quite possibly would result in others not being adequately reported under either procedure.

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.

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].

§ Section 803.5 Affidavit Requirements of the Acquiring Person

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 person to disclose in the notice to the issuer, among other things, the identity of the acquiring person and the number of securities of each class to be acquired. Because some acquiring persons could not state their intentions in terms of numbers of securities to be acquired, the Commission, by formal interpretation on December 28, 1978, permitted such persons to state instead which of the reporting thresholds of § 801.2(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 §803.30 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 has 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 Acquiring Person

The principal purpose of §803.3(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 803.3(a) cures this by requiring the acquiring person to serve the notice and its filing on the issuer as a condition to acquiring any of its voting securities.

The amendments to §803.3(a) require the acquiring person to include in its notice information on which the acquiring 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. Therefore if the calculation of this total is not made in the case of a notice from a person who could not determine the number of voting securities it intended to acquire by reporting 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 §803.3(a)(1)(ii) 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 result from acquiring all of its shares.

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" (§ 803.3(a)(2))

2. The statement of the specific number of securities it intends to acquire or the filing threshold it intends to meet or exceed (§ 803.3(a)(1)(ii)); and

3. The communication of these and other facts to the acquired person (§ 803.3(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 seriousness or seriousness of the plan to acquire than a more general statement of an intention to acquire. Because the acquiring person is entitled to be reasonably certain that a reportable threshold will be met, 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 §803.3. 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 that 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 §803.3(a). For instance, a tender offer letter 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 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 §803.3 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 voting securities, 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 consummate the transaction. This requirement parallels the requirement that agreements to merge be executed...
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. 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.

Examples:

1. Company A intends to acquire voting securities of Company B. A does not know exactly how many shares it will acquire. It knows it will definitely acquire 15 percent and may acquire 50 percent of B's shares. A's notice to the acquiring person would meet the requirements of § 803.S(a)(ii) 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.

2. 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.

3. A's notice does not comply with § 803.S 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:

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

(ii) 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:

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

(iv) That 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, the owner has also communicated all the information required by paragraph (a) of this section:

(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.
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)(1) 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 extension seems reasonable since filings for different thresholds of the same issue are ordinarily reviewed by the same unit within the Commission, and these units have had few problems with existing § 803.2(e).

Paragraph (a)(2) adds a new provision: it would permit acquiring persons to incorporate by reference a secondary acquisition (see § 803.1) into a document 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 document or information 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. Therefore, could be incorporated in a document or information required to be retrieved, copied and distributed previously filed documents or information.

Paragraph (b)(2) would require that incorporated documents or information still be accurate and current. For example, documents could not be incorporated into a document or information more than 15 months after the document or information was updated or updated. Paragraph (b)(3) would require the document or information to 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

[c] 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 the subsequent filing any documents or information in its earlier filing provided that the documents and information are the most recent available.]
A person who incorporates by reference a portion of the non-identical 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 50 percent of the voting securities of corporation C. "A", "B", and "C" filed the required Notification and Report Forms. Subsequently "A" discontinues 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 the 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 disclosing the revenues and product codes applicable to the discontinued products. In addition, to reflect the acquisition of C’s voting securities, "A" must make the additional appropriations to items 5, 6, 7, 8, and 9 of the Form.

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 notifications to acquire 15 percent of the voting securities of corporation Y. "A" now proposes to acquire 25 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 "A" submitted with its filing for the voting securities of X. "A" cannot incorporate the 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 rule, "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 another 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 filed from:”
the venturers, but not the joint venture corporation itself, to file notification. This approach also indicates that it is the relationship 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 that 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 subject to § 801.40 in which a request for additional information is issued, the extended waiting period begins on the date the additional information is requested or the documentation requested is received from all contributors to the joint venture corporation who received a request.

The Commission proposes to revise § 803.10(a) by redesignating the present paragraph (a) by redesignating the present paragraph (a) as (a)(2) and by adding a new subpart (a)(3) 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 Premer Notice and Report Form

The Commission proposes to simplify the Premer 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 on the 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, for example, 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 acquisition of any major events required to consummate the transaction, to be received from each party and, if the acquisition involves a tender offer, the terms of the offer. Item 2(c) calls for the acquisition of any major events required to consummate the transaction, to be received from each party and, if the acquisition involves a tender offer, the terms of the offer.

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(f) 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 33496 (July 31, 1978). Commentators have noted that the detailed responses are likely to be unnecessary if the parties are 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 notify the Commission 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
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that the purchaser believed that the
or purchasing agency was not required to 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 of the voting securities of the acquired person or any entity included within the person, and if neither 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 inconsistent (see § 803.11), then the parties may so state and give the total dollar value of the transaction instead of responding to item 2(d)(i) - (iv).

a. Index to Ancillary Documents

The Commission proposes to delete item 2(f)(iii) 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, subsidiaries and documents related to the transfer of reality. The Statement of
Use and Purpose states that the index "will permit the agencies to identify particular documents in a second
request." 40 FR 25365 (July 31, 1975).

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)(iii) in the instructions and Form:

1. In § 803.11 indexer to ancillary
documents. Furnish an index containing a
brief description sufficient to identify each ancillary document or pair 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 reality, or other similar documents related to this transaction.

2. List of Subsidiaries

The Commission proposes to allow
entities 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
commenters have questioned whether a list of subsidiaries is at all helpful to the
agencies in conducting their antitrust reviews. 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 § 803.11(c)(3).

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 mailing address of each entity included within the person filing notification. Entities with total assets of less than $1 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 to 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 if it and any other
person which is a party to the acquisition also derives revenue (usually referred to as "the overlapping code") 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) currently requires persons to provide more detailed geographic information for SIC major groups 52-62 and 64-69 (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 geographic market areas and investment offices and other businesses failing 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)(1) 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).

The Commission proposes to revise the instruction for item 7(c)(1) to read:

Item 7(c)(1) for each 4-digit industry within SIC major groups 52-62 and 64-69 (Retail trade, finance, insurance, and real estate and services) 72, 73, 76, and 81 (Retail trade, business, and certain services) list the state(s) in which the person filing notification is licensed to write insurance.

Substitute a new instruction for item 7(c)(2):

a. List 2-digit major-digit industry, with SIC major groups 62, 64-67, 72, 73, 76, and 81 (Retail trade, finance, insurance, and real estate and services) and certain services listed in item 7(a) above; list the state(s) in which the person filing notification is licensed to write insurance.

b. For each 4-digit industry listed in item 7(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

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 if 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 33554 (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, for each 4-digit SIC code industry listed in item 7(a) above, in which the person filing notification derived dollars of $1 million or more in the most recent year and in which the person acquired, in the ten years prior to the date of filing of entries derived dollars in that 4-digit industry. List only acquisitions made by the person filing notification in the ten years prior to the date of filing of entries derived dollars in that 4-digit industry. For each such acquisition, list all acquisitions made by the person filing notification whose filing perperson 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.

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 C. Retail Trade

Major Group 52. Building materials, hardware, garden supply, and mobile home dealers.

Major Group 53. Food stores.

Major Group 54. Automotive dealers and gasoline service stations.

Major Group 55. 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 associations.

Major Group 64. Insurance agents, brokers, and service.

Major Group 65. Real estate.

Major Group 66. Combinations of real estate, insurance, loans, and law offices.

Major Group 67. Holding and other investment offices.
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. Condemnations of real estate, insurance, loans, law offices.
Major Group 66. Holding and other investment offices.
Major Group 67. Personal services.
Major Group 68. Business services.
Major Group 70. Miscellaneous repair services.
Major Group 71. Amusement and recreation services. Except motion pictures.
Major Group 72. Legal services.
Major Group 78. Educational services.
Major Group 79. Amusement and recreation services, except motion pictures.
Major Group 80. Social services.
Major Group 81. Museums, art galleries, botanical, and zoological gardens.
Major Group 82. Private households.
Major Group 84. Miscellaneous services.

13. Changes to Conform with Prior Amendments to the Rules

On November 21, 1979 and July 28, 1983, the Commission published several changes in the merger 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 merger rules.

Therefore, the Commission proposes to revise example 1 to § 601.4, example 4 to § 601.15, example 3 to § 601.30, the example to § 601.40, and example 1 to § 601.41, as set forth below. New language is indicated by arrows. [new language] Deleted language is indicated by brackets: [deleted language].

§ 601.4 Secondary acquisitions.

(a) * * *

(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 § 601.20.

§ 601.15 Aggregation of voting securities and assets of 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 $50 million. In the most recent year, sales in the United States attributable to the mines were $50 million. In 180 days after that acquisition, "B" seeks to enter into a third mine from X, to which United States sales of ($75 million would be attributable in the most recent year. Since under § 601.13(b)(2), as a result of the acquisition, "B" would hold all the three mines of X and the $75 million limitation in § 601.20(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 secondary acquisition, "B" would hold assets of X exceeding $15 million, which would not qualify for the exemption in § 601.20(a)(2), and must observe the requirements of the act before consummating the acquisition.

§ 601.20 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 in the form of a tender offer. "B" would hold 50 percent of the voting securities of corporation C. Thus "A"'s acquisition of C's voting securities is a secondary acquisition (see § 601.4) 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 § 601.4.

§ 601.40 Formation of joint venture or other corporations.

Examples: 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 $10 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 $5 million in assets and to each meet additional contributions from time to time] $5 million in each of the next three years. Under paragraph (e), the assets of the new corporation are "(a) $50 million. Under paragraph (b), "only" file notification and only if 1. "A" meets [x]: the criterion of section 7A(a)(3) that is [x]; if it will be acquiring [15 percent or $15 million] of the voting securities of the new entity. N need not file notification. See § 601.41.

§ 602.41 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 $50 million in cash for $10 million 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 case. 1980. The only two mergers that would be affected were sitz for reasons of public interest 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 of clearance requests represents the appropriate level of antitrust concern with the mergers at issue.

Emily H. Rock.

Secretary.

[FR Doc. 85-22082 Filed 9-23-85, 8:45 am]

BILLS CG 176-01-02
Federal Trade Commission

16 CFR Part 803

Antitrust Improvements Act

Notification and Report Form for Certain Mergers and Acquisitions


Action: Final Rule Revisions.

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 1992 revenue data be provided in response to certain questions on the Form relating to product lines that previously were asked for 1977 data. Certain other related minor changes have been made on the Form.

Effective Date: March 25, 1996.

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 328, Department of Justice, Washington, D.C. 20530, as specified by 16 CFR 802.1(c)(1983).


List of Subjects in 16 CFR Part 803

Antitrust: Reporting and recordkeeping requirements.

The authority for 16 CFR Part 803 continues to read:


Supplementary Information:

Paperwork Reduction Act

This change to the existing OMB clearance, Control No. 3084-0055, has been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget.

Regulatory Flexibility Act

The proposed revisions will not expand the coverage of the premerger notification rules in a way that would significantly affect small business.

Therefore, pursuant to section 604(b) of the Administrative Procedure Act, 5 U.S.C. 555(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 602 of the Administrative Procedure Act, 5 U.S.C. 552, 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 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 the Act, 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 additional information should be made under section 7(a)(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 phonocopy or other equivalent reproduction, in accordance with the attached instructions and the premerger notification rules.

The Form was first promulgated on July 21, 1977, at 42 FR 33552, and became effective on September 5, 1977. It was revised to require data for 1977 as the base year in 1980. (45 FR 10225 (March 5, 1980)). Subsequently, new versions of the Form were approved by the Office of Management and Budget on December 29, 1981, February 22, 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 40612).

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 and definitions 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 revenues, called "Dollar SIC-based code", and 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 provide 1977 aggregate product revenue data for each 7-digit code product from which a 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)(ii) 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.

Where originally promulgated the premerger notification was 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. 443 F.R. 33325 (July 21, 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-11) ("1982 Numerical List"). That publication is necessary in preference 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 5-digit-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 by the Commission to respond 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 codes 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 included those 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)(B) is unnecessary here. Section 553(d) of the APA requires from the notice and comment requirements of the APA, promulgation of a rule where the agency finds that the standard procedure would be “unreasonably, unnecessarily, 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 referendum on the original promulgation and publication of the premerger rules and Form, and was accompanied by a Statement of Basis and Purpose. (43 FR 33320 [July 21, 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 (Emir. Ct. App.), cert. denied, 426 U.S. 941 (1976); Durkin v. Edward S. Wigner Co., 113 F. Supp. 138 (D.N.J. 1953), aff’d, 217 F.2d 303 (2d Cir.), cert. denied, 348 U.S. 904 (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 1972 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 when good cause is shown. (5 U.S.C. 553(b)(3)). Rather than delay the effective date 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 S(a), S(b)(i) and S(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 15 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 1-VI in its entirety and substituting the following new Instructions, pages 1-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 4710-01-48
**ANTI-FRAUD IMPROVEMENTS ACT**
**NOTIFICATION AND REPORT FORM**
For Certain Mergers and Acquisitions

### INSTRUCTIONS

The Answer Sheets (pp. 1-18) contain the Notification and Report Form (pp. 19-21) to be submitted in accordance with paragraph 603.43 of the Commission's rules (the rules). Each person or group of persons must file a report on any acquisition of a financial company by another company when the aggregate value of the consideration received by the acquiring entity exceeds the lesser of:

- $100 million;
- The amount of cash and other property that is not to exceed $5 million.

The rules also require that reports include the following information:

- Description of the transaction;
- Description of the financial companies involved;
- Description of the parties involved;
- Description of the consideration paid;
- Description of any other relevant information.

Completed and signed reports must be submitted to the Federal Reserve Bank of Philadelphia by the second calendar day of the month following the date of acquisition.

### GENERAL

- **Antitrust Improvements Act** (AIA) notification and report forms must be submitted in accordance with paragraph 603.43 of the Commission's rules.
- Each person or group of persons must file a report on any acquisition of a financial company by another company when the aggregate value of the consideration received by the acquiring entity exceeds the lesser of:
  - $100 million;
  - The amount of cash and other property that is not to exceed $5 million.

The rules also require that reports include the following information:

- Description of the transaction;
- Description of the financial companies involved;
- Description of the parties involved;
- Description of the consideration paid;
- Description of any other relevant information.

Completed and signed reports must be submitted to the Federal Reserve Bank of Philadelphia by the second calendar day of the month following the date of acquisition.

### ITEM 1

**Title:** The title of each item must be typed or printed in capital letters on the first line of the item.

**Paragraph:** Each item must be numbered sequentially and typed or printed on the first line after the title.

**Text:** The text of each item must be typed or printed in paragraphs with a minimum of five spaces between paragraphs.

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<table>
<thead>
<tr>
<th>Item</th>
<th>Title</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item 1</td>
<td><strong>Title</strong></td>
<td>The title of each item must be typed or printed in capital letters on the first line of the item.</td>
</tr>
<tr>
<td>Item 2</td>
<td><strong>Paragraph</strong></td>
<td>Each item must be numbered sequentially and typed or printed on the first line after the title.</td>
</tr>
<tr>
<td>Item 3</td>
<td><strong>Text</strong></td>
<td>The text of each item must be typed or printed in paragraphs with a minimum of five spaces between paragraphs.</td>
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Federal Register / Vol. 51, No. 58 / Wednesday, March 26, 1986

No. 58

Furnish one copy of each of the following documents for any single included within the person being notified who has prepared or is required to prepare or to maintain records with respect to operations conducted within the United States. (See 4031(b)(1)) All persons should be notified of the same. This notice has been prepared in connection with the transaction for which notice is being given if the acquisition is a tender offer. Schedule 1. A. The person being notified does not have any copies of this notice. The list of documents is attached to this notice.

Item 4: For the following information provided by the person being notified, furnish a copy of each of the following documents:

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Item 5(b): All notices and reports required by the person being notified and any other documents required by the person being notified.

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Item 5(c): Furnish one copy of each of the following documents for any single included within the person being notified who has prepared or is required to prepare or to maintain records with respect to operations conducted within the United States. (See 4031(b)(1)) All persons should be notified of the same. This notice has been prepared in connection with the transaction for which notice is being given if the acquisition is a tender offer. Schedule 1. A. The person being notified does not have any copies of this notice. The list of documents is attached to this notice.

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Note: In response to item 5(a), the person being notified should include any documents required to be filed with the Federal Reserve Board or the Federal Deposit Insurance Corporation, and all other documents required by law to be filed with the Securities and Exchange Commission.