

state region are plants which have been closed for less than 12 months, Lehigh may still acquire another cement facility in that region, without prior Commission approval: *Provided*, That the Lehigh plants closed for less than 12 months are not, without prior Commission approval, reopened for the balance of the 10-year acquisition ban period or for a year if the ban has less than a year to run.

Second, again with limited exceptions, Lehigh may not, without prior approval of the Commission, acquire a cement plant or cement distribution terminal located within a 300-mile radius of certain Lehigh cement plants. This 300-mile circle treatment applies to all Lehigh plants (other than the facility located at Buffington, Indiana) located outside the five enumerated states, whether presently owned by Lehigh or subsequently acquired by it. Once again, if a Lehigh plant ceases manufacturing cement for over 12 months, the region within 300 miles of the closed plant is not subject to the moratorium unless and until the plant resumes operation. Similarly, the 300-mile moratorium does not apply to a Lehigh plant that has been closed for less than 12 months at the time of an acquisition provided that the closed plant is not, without prior Commission approval, reopened for the balance of the 10-year acquisition ban period or for a year if the ban has less than a year to run.

The moratorium provisions apply only to the acquisition of cement facilities that have been operating at any time within the preceding 12 months (in the case of cement manufacturing plants) or three months (in the case of cement distribution terminals). If a plant or terminal has been closed longer than 12 or three months, respectively, the order does not prohibit Lehigh from acquiring it. These prohibitions also extend to acquisitions of equity interests in business entities which own cement plants or cement distribution terminals in the areas described above.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Carol M. Thomas,
Secretary.

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BILLING CODE 6750-01-M

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: These proposed rules would amend the premerger notification rules, which require the parties to certain mergers or acquisitions to file reports with the Federal Trade Commission and the Department of Justice and to wait a specified period of time before consummating such transactions. These reporting and waiting period requirements are intended to enable the antitrust enforcement agencies to determine whether a proposed merger or acquisition might violate the antitrust laws if consummated and, where appropriate, to seek a preliminary injunction in federal court to prevent consummation. Experience with the present premerger notification rules has disclosed a need to clarify or reformulate certain provisions and to add other provisions to enable the rules better to fulfill their purposes. These proposed revisions are intended to clarify and improve the effectiveness of the rules and of the Notification and Report Form.

DATES: Comments must be received on or before September 28, 1981.

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

FOR FURTHER INFORMATION CONTACT: Roberta S. Baruch, Attorney, or Thomas F. Hancock, Attorney, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580. Telephone: (202) 523-3894.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

The proposed amendments to the Hart-Scott-Rodino premerger notification rules are largely technical, designed to resolve confusion and reduce unnecessary reporting. They would not materially expand the coverage of the premerger notification rules, nor would they have any significant economic impact upon any entities affected by the rules. Therefore, pursuant to section 605(b) of the Administrative Procedure Act, 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Pub. L. 96-354 (September 19, 1980), the Federal Trade Commission has certified that these proposed rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. Section 603 of the Administrative Procedure Act, 5 U.S.C. 603, requiring an

initial regulatory flexibility analysis of proposed rules is therefore inapplicable.

Background

Section 7A of the Clayton Act ("the Act"), 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain acquisitions of assets or voting securities to give advance notice to the Federal Trade Commission (hereafter referred to as "the Commission") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to as "the Assistant Attorney General") and to wait certain designated periods before the consummation of such acquisitions. The transactions to which the advance notice requirement is applicable and the length of the waiting period required are set out respectively in subsections (a) and (b) of section 7A. The amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions under the antitrust laws.

The purposes of the Act have been summarized as follows:

The legislative history suggests several complementary 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. Third, Congress provided an opportunity for the enforcement agencies to seek a court order enjoining the completion of those transactions which the agencies deemed to present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy where a challenge by one of the enforcement agencies proved successful. Thus the Act requires that the agencies receive prior notification of significant acquisitions between sizeable parties, provides certain tools to facilitate a prompt but thorough investigation, assures an opportunity to seek a preliminary injunction before the parties are legally free to complete the transaction, and eliminates the problem of unscrambling the assets when one of the agencies obtains an order enjoining consummation of the acquisition. (Third Annual Report to Congress by the Federal Trade Commission pursuant to section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, dated December 31, 1979, at p. 2.)

Section 7A(d)(1) of the Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General and by rule 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. Section 7A(d)(2) of the Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with 5 U.S.C. 553, the authority (A) to define the terms used in the Act, (B) to exempt additional persons or transactions from the Act's notification and waiting period requirements, and (C) to prescribe such other rules as may be necessary and appropriate to carry out the purposes of section 7A.

On December 15, 1976, the Commission issued proposed rules and a proposed Notification and Report Form to implement the Act. This proposed rulemaking was published in the Federal Register of December 20, 1976, 41 FR 55488. Because of the extensiveness of public comment, it became clear to the Commission that some substantial revisions would have to be made in the original rules. On July 25, 1977, the Commission determined that additional public comment on the rules would be desirable and approved revised proposed rules and a revised proposed Notification and Report Form. The revised rules and Form were published in the Federal Register of August 1, 1977, 42 FR 39040. Additional changes in the revised rules and Form were made after the close of the comment period. The Commission formally promulgated the final rules and Form and issued an accompanying Statement of Basis and Purpose on July 10, 1978. The Assistant Attorney General gave his formal concurrence on July 18, 1978. The final rules and Form and the Statement of Basis and Purposes were published in the Federal Register of July 31, 1978, 43 FR 33451, and became effective on September 5, 1978.

The rules are divided into three parts which appear at 16 CFR Parts 801, 802, and 803. Part 801 defines a number of the terms used in the Act and rules and explains which acquisitions are subject to the reporting and waiting period requirements. Part 802 contains a number of exemptions from these requirements. Part 803 explains the procedures for complying with the Act. The Notification and Report Form, which is completed by persons required to file notification, is an appendix to Part 803 of the rules.

Two changes have been made in the premerger notification rules and the Notification and Report Form since they were first promulgated. The first was an increase in the minimum dollar value

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

Proposed Changes in the Premerger Notification Rules

Authority: The Federal Trade Commission proposes these amendments to the premerger notification rules pursuant to section 7A(d) of the Clayton Act, 15 U.S.C. 18a(d), as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390.

1. Inclusion of "Estate of a Deceased Natural Person" Within the Definition of the Term "Entity" (§ 801.1(a)(2)).

Section 801.1(a) of the rules defines a "person" as an ultimate parent entity and all entities which it controls. The term "entity," which does not appear in the Act, is used throughout the rules and in the Notification and Report Form to refer to the component parts of the person to which the provisions of the Act and rules apply. Section 801.1(a)(2) contains a list of the types of organizational units which are included within the term "entity." The Commission proposes to add "estate of a deceased natural person" to the list of such units. Such an estate is a legally recognized unit possessing some of the same characteristics as other units already listed under the rule, including especially the ability to buy, sell and hold assets and voting securities. The Commission believes the change to be necessary to eliminate any confusion which may have existed previously over whether an estate can be a person within the meaning of the Act in situations where the estate of a deceased natural person was involved as an acquiring or an acquired party in a reportable transaction.

In connection with this change, the Commission also proposes to make two conforming changes in §§ 801.11(d) and 803.6(a) of the rules. Section 801.11 explains the method for determining the assets of a person for purposes of the size-of-person test. Section 801.11(d) stipulates that no assets other than

investment assets, voting securities, and other income-producing property shall be included in determining the size of a natural person. This subsection would be amended to apply also to the estate of a deceased natural person.

Section 803.6(a) lists, for various categories of reporting persons, who may certify the Notification and Report Form on behalf of the person filing notification. This section would be amended to add a new subparagraph (5), to provide that any duly authorized legal representative may certify the filing where the person filing notification is the estate of a deceased natural person. The scope of the term "duly authorized legal representative" includes such commonly used designations as "administrator," "administratrix," "executor," and "executrix" as well as any less commonly used terms for individuals who may serve the same function.

PART 801—COVERAGE RULES

PART 803—TRANSMITTAL RULES

It is proposed that §§ 801.1(a)(2) and 801.11(d) be amended by revising them and § 803.6(a) by adding subparagraph (5) to read as follows:

§ 801.1 Definitions.

(a) * * *

(2) *Entity.* The term "entity" means any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, club or other group organized for any purpose, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such; or any joint venture or other corporation which has not been formed but the acquisition of the voting securities or other interest in which, if already formed, would require notification under the act and these rules: *Provided, however,* that the term "entity" shall not include any foreign state, foreign government, or agency thereof (other than a corporation engaged in commerce), nor the United States, any State thereof, or any political subdivision or agency of either (other than a corporation engaged in commerce).

§ 801.11 Annual net sales and total assets.

* * * * *

(d) No assets of any natural person or of any estate of a deceased natural

person, other than investment assets, voting securities and other income-producing property, shall be included in determining the total assets of a person.

§ 803.6 Certification.

(a) * * *

(5) In the case of the estate of a deceased natural person, by any duly authorized legal representative of such estate.

* * * * *

2. Conversion (§ 801.1(f))

The Commission proposes that the definition of "conversion" in § 801.1(f)(3) of the rules should be broadened.

Conversion is presently defined as the exchange, without the payment of additional consideration, of voting securities, as defined in § 801.1(f)(1), which do not presently give the owner or holder the right to vote for directors of the issuer, for securities which do so entitle the owner or holder.

The present definition is too narrow because it covers only cases where voting securities which do not give the owner or holder a present right to vote for directors are exchanged for those which do give this right. Occasionally, voting securities are created which entitle the owner or holder to vote for directors but which are also convertible into other securities with different voting rights. Under the present definition, such an exchange would not be a conversion, because before the exchange the securities to be exchanged have present voting rights. As a result, the special provisions of § 801.30 would not be applicable to such a transaction. Section 801.30 applies to certain transactions, including conversions, where the acquired person does not directly participate in and may be hostile to the acquisition. To prevent the acquired person from using the provisions of the Act to block the transaction, this section provides that the acquiring person's filing by itself begins the waiting period. It appears, however, that the exercise of a right to exchange such securities in these circumstances ought to be covered by § 801.30, because, as in the other kinds of acquisitions which are covered, the acquired person may be unaware of, and may even be hostile to, the exchange. Under the proposed new definition, therefore, whether a transaction is a conversion turns on whether it is the exercise of a right inherent in the ownership of any securities to exchange them for other securities which presently have certain voting rights. The use of the word "exercise" in the definition is intended to distinguish conversion from the automatic maturation of an inchoate

right, such as, for example, if preferred shares become entitled to vote because dividends are not paid.

The proposed definition eliminates all references to the "payment of additional consideration." This language serves no present function and may tend to be confusing. Such references have also been eliminated from the examples following § 801.1(f).

It is proposed that § 801.1(f)(3) and examples 1 and 2 be revised and example 3 be added to read as follows:

§ 801.1 Definitions.

* * * * *

(f) * * *

(3) *Conversion.* The term "conversion" means the exercise of a right inherent in the ownership or holding of particular voting securities to exchange such securities for securities which presently entitle the owner or holder to vote for directors of the issuer or of any entity included within the same person as the issuer.

Examples: 1. The acquisition of convertible debentures which are convertible into common stock is an acquisition of "voting securities." However, § 802.31 exempts the acquisition of such securities from the requirements of the act, provided that they have no present voting rights.

2. Options and warrants are also "voting securities" for purposes of the act, because they can be exchanged for securities with present voting rights. Section 802.31 exempts the acquisition of options and warrants as well, since they do not themselves have present voting rights and hence are convertible voting securities. Notification may be required prior to exercising options and warrants, however.

3. Assume that X has issued preferred shares which presently entitle the holder to vote for directors of X, and that these shares are convertible into common shares of X. Because the preferred shares confer a present right to vote for directors of X, they are "voting securities." (See § 801.1(f)(1).) They are not "convertible voting securities," however, because the definition of that term excludes securities which confer a present right to vote for directors of any entity. (See § 801.1(f)(2).) Thus, an acquisition of these preferred shares issued by X would not be exempt as an acquisition of "convertible voting securities." (See § 802.31.) If the criteria in § 7A(a) are met, an acquisition of X's preferred shares would be subject to the reporting and waiting period requirements of the act. Moreover, the conversion of these preferred shares into common shares of X would also be potentially reportable, since the holder would be exercising a right to exchange particular voting securities for different voting securities having a present right to vote for directors of the issuer. Because this exchange would be a "conversion," § 801.30 would apply. (See § 801.30(a)(6).)

* * * * *

3. Acquiring and Acquired Persons in Mergers and Consolidations (§ 801.2).

Two of the most basic concepts in the Act and the rules are those of acquiring and acquired person. For example, the size-of-transaction test in section 7A(a)(3) of the Act, which determines whether a transaction is of a reportable size, provides that an acquisition will be reportable if the acquiring person will hold (a) 15% or more of the voting securities or assets of the acquired person, or (b) an aggregate total amount of the voting securities and assets of the acquired person in excess of \$15 million. Similarly, many of the rules depend for their application on whether the filing party is an acquiring or acquired person. In order to apply the provisions of the Act and of the rules and to complete the Notification and Report Form properly, therefore, a filing party must determine whether it is an acquiring or an acquired person, or both.

The terms acquiring and acquired person are defined, respectively, in paragraphs (a) and (b) of § 801.2. An acquiring person is "[any] person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly * * *" and, for most purposes, the acquired person is the one "within which the entity whose assets or voting securities are being acquired is included * * *" Paragraphs (c), (d), and (e) of § 801.2 concern the application of these concepts in specific circumstances.

Section 801.2(c) presently provides that a person may be an acquiring and an acquired person in a single transaction. The example following the subsection illustrates such a situation: corporation A (an entity within the person "A") plans to transfer certain of its assets to corporation B (an entity within person "B") in return for voting securities of B. With respect to the transfer of assets, "B" is an acquiring person and "A" is an acquired person; with respect to the transfer of voting securities, "A" is an acquiring person and "B" is an acquired person. In the transaction consisting of the exchange of assets for voting securities, therefore, "A" and "B" are both acquiring and acquired persons.

The Act appears to contemplate that a reportable acquisition will have one acquiring person and one acquired person. The preceding example is, therefore, more accurately described as incorporating two acquisitions, one in which "B" acquires assets from "A" and one in which "A" acquires voting securities from "B." Present paragraph (c) does not state explicitly that a person is both acquiring and acquired

because it occupies these roles in separate acquisitions which comprise a single transaction, although this can be inferred from the example which follows this subsection. The Commission proposes to amend subsection (c) to make this explicit.

It should be noted that proposed new § 801.2(c) draws a distinction between an acquisition and a transaction. An acquisition is characterized by the presence of only one acquiring and one acquired person. A transaction is a set of one or more related acquisitions which are considered together for reporting purposes. This distinction not only clarifies paragraph (c) and its relationship to paragraphs (a) and (b) of § 801.2, but is also useful in clarifying the treatment of mergers under the rules.

Paragraph 801.2(d) concerns the treatment of mergers and consolidations under the rules. It presently states that such transactions are covered by the Act and provides that the parties to all mergers and consolidations are always both acquiring and acquired persons.

The analysis of mergers and consolidations under the rules has been a source of some confusion among reporting persons. One cause of this confusion is the fact that the Act, the rules, and the Notification and Report Form contemplates that all reportable transactions are acquisitions either of assets or of voting securities. Technically, however, mergers and consolidations are neither, but have some characteristics of both. The reporting requirements are to some extent different for acquisitions of assets and voting securities. Some reporting persons have therefore been uncertain how to report a merger or consolidation.

The second source of confusion in present subsection 801.2(d) is the provision that the parties to all mergers and consolidations are always both acquiring and acquired persons. This means that in any merger all parties are acquiring and acquired persons, no matter the form of the actual transaction or the consideration that changes hands. This dual designation sometimes has a significant effect on the reporting responsibilities of the parties to such transactions. Acquiring persons must supply information on all their operations, whereas acquired persons, when less than the entire person is being acquired, report on the operations of the acquired subsidiary or assets only. Persons which are both acquiring and acquired must respond separately in both capacities. (See § 803.2(b)(1).)

Parties to mergers and consolidations were designated both acquiring and acquired persons in the present rules for

several reasons. First, it was not clear when the present rules were written that mergers could be distinguished from consolidations, and in the case of the latter the acquiring and acquired person cannot be meaningfully designated. Second, no way was found to define the acquiring and acquired person for all mergers. Finally, it was felt that in most reportable transactions involving mergers the receipt of consideration by the acquired person would itself be a reportable acquisition. Both parties, therefore, would generally fill the roles of acquiring and acquired person.

The present wording of § 801.2(d) has caused confusion most often in cases where one corporation seeks to acquire a subsidiary of another by merger. If, for example, corporation A (an entity in person "A") wishes to acquire a subsidiary, Y, of corporation B (an entity in person "B"), the transaction may take one of several forms. A may acquire the voting securities of Y from B, or Y may be merged with A's subsidiary, X. These forms of acquisition are substantially equivalent, and which one is chosen frequently depends on tax or other considerations. The present rules, however, require treatment of this transaction as a stock acquisition different from its treatment as a merger. If A acquires Y by acquiring its stock for cash, "A" will be an acquiring person only and "B" an acquired person only. If the transaction is carried out by merger, however, both "A" and "B" will always be both acquiring and acquired persons under the present rules. Reporting persons have been confused by the fact that two ways of structuring equivalent transactions can have such an effect on their treatment under the rules.

This confusion is aggravated by the apparent inconsistency of this result with another provision of the rules which states that cash and certain other assets are disregarded for purposes of the size-of-transaction test. (See § 801.21.) If the consideration for A's acquisition of the voting securities of Y is its own voting securities, "A" and "B" are both acquiring and acquired persons. This is so because both parties occupy each of these roles in reportable acquisitions as provided for by § 801.2(c). If, however, A acquires the voting securities of Y for cash, "A" reports only as an acquiring person and "B" only as an acquired person. Although "B" is technically an acquiring person and "A" an acquired person in the acquisition of A's assets (cash) by B, that acquisition is not reportable because of § 801.21, which provides that acquired cash is disregarded for purposes of the size-of-transaction test.

When cash is the only consideration in a merger, by contrast, both parties are still acquiring and acquired persons under present § 801.2(d).

The Commission proposes to deal with these two problems in revised § 801.2(d). This new section relies on the distinction between an acquisition and a transaction to clarify and simplify the treatment of mergers under the rules. Mergers, like other transactions, frequently involve more than one acquisition. Proposed new § 801.2(d) also distinguishes mergers from consolidations in determining which parties are acquiring persons, acquired persons, or both.

Proposed paragraph (d)(1) of § 801.2 establishes that mergers and consolidations are subject to the Act, and specifies two elements of the analysis of mergers under the Act and the rules. First, paragraph (d)(1)(ii) sets up a mechanism for determining the acquiring party in such transactions. Mergers are governed by state corporate law. One feature common to most, if not all, state statutes is that documents which must be filed with state authorities to effectuate a merger will specify, among other things, the participating corporation which will survive the transaction. This common feature is the basis for a rule determining the acquiring party. In a merger, the acquiring party is the person, as defined by the rules, which after consummation will include the corporation designated the survivor in filings made in accordance with state law.

Paragraph (d)(1)(ii) also provides that the party so identified will be deemed to have made an acquisition of voting securities. This is the second element in the analysis of mergers. As has been noted, such transactions have elements of both an acquisition of assets and an acquisition of voting securities. It is appropriate, therefore, to eliminate the ambiguity in the present treatment of mergers by opting to treat mergers in all cases as involving an acquisition of voting securities.

Proposed paragraph (d)(2) completes the analysis of mergers by enabling the parties to all such transactions to determine whether they are acquiring or acquired persons, or both. A party will be an acquiring person under proposed paragraph (d)(2)(i) if, as a result of the transaction, it will hold assets or voting securities it did not hold previously. The acquiring party determined in accordance with paragraph (d)(1)(ii) of this section is therefore the acquiring person in an acquisition of voting securities. All other parties to that

acquisition are acquired persons under proposed paragraph (d)(2)(ii) because, as a result of the transaction, the assets or voting securities of entities included within them will be held by another person.

The transfer of the consideration in the acquisition just described is analyzed separately and may be a separately reportable acquisition. In this acquisition, the acquiring and acquired persons exchange roles. Depending on the nature and amount of this consideration, its acquisition may or may not be reportable and may be an acquisition of assets or of voting securities. The analysis of the reporting obligations of the parties with respect to the acquisition of voting securities and the analysis of their obligation with respect to the acquisition involved in the transfer of the consideration will determine for the transaction taken as a whole whether the parties must report as acquiring persons, acquired persons, or both. The analysis of mergers under new § 801.2(d) will thus have the same result as that of any other transaction under § 801.2(c).

In a consolidation the participants all lose their pre-acquisition identities and the resulting entity is new. Since acquiring and acquired persons cannot readily be identified in such transactions, § 801.2(d)(2)(iii) designates all parties both acquiring and acquired persons. Under revised § 801.2(d) then, a party is designated both an acquiring and an acquired person only if it occupies both roles in reportable acquisitions involved in a merger or if it is a party to a consolidation.

The examples following revised § 801.2(d) illustrate its application. Example 1 illustrates a "triangular" merger in which corporation A proposes to acquire Y, a subsidiary of corporation B, by merging Y into A's own subsidiary, X, which will survive. The consideration for the acquired corporation is cash and the voting securities of an unrelated person. Since "A" (the person of which A is the ultimate parent entity) will include the surviving corporation, X, after the consummation of the transaction, it is the acquiring person in an acquisition of voting securities. Since "B" is the person whose assets or voting securities will be acquired, it is an acquired person. But, since cash and the securities of another person are not considered assets of the person from which they are acquired (§ 801.21), this acquisition is not separately reportable. In the transaction as a whole, "A" is an acquiring person only and "B" an acquired person only.

Example 2 illustrates the analysis of a similar transaction in which the

consideration for Y includes the voting securities of the acquiring party, A. For the same reasons, "A" is an acquiring person and "B" is an acquired person. In addition, "A" is an acquired person, because its voting securities will be held by another person as a result of the transaction, and "B" is an acquiring person with respect to those voting securities. Since these voting securities are less than 15% of the outstanding voting securities of A and are worth less than \$15 million, however, the acquisition of them is not reportable. "A" is therefore still an acquiring person only and "B" an acquired person only. Example 3 shows that the result is the same when B's acquisition of the consideration for Y is exempt. Example 4 shows a case in which the consideration for Y is assets the receipt of which is also a reportable acquisition. In this transaction, "A" is an acquiring and "B" an acquired person in an acquisition of voting securities, and "B" is an acquiring and "A" an acquired person in an acquisition of assets. Both will therefore report in both capacities. Finally, example 5 illustrates a consolidation in which all parties will lose their separate legal identities as a result of the transaction. In these circumstances, all persons party to the transaction are both acquiring and acquired persons.

Present § 801.2(e) states that when a minority shareholder of an acquired person receives the voting securities of the acquiring person in exchange for its shares, the acquisition of these voting securities is a separate transaction which is separately subject to the Act. If the size-of-person and the size of transaction tests are met in this latter transaction, the shareholder must report as an acquiring person and the issuer of the securities, as an acquired person. The proposed amendment would extend § 801.2(e) to situations in which the shareholder of an acquired person receives assets instead of voting securities. While this kind of transaction is not likely to occur frequently, it is clear that it would be covered by the Act. The proposed change merely clarifies this requirement by making it explicit in the rules.

It is proposed that § 801.2(c), (d) and (e) be amended by revising them to read as follows:

§ 801.2 Acquiring and acquired persons.

* * * * *

(c) For purposes of the act and these rules, a person may be an acquiring person and an acquired person with respect to separate acquisitions which comprise a single transaction.

(d)(1)(i) Mergers and consolidations are transactions subject to the act.

(ii) In a merger or consolidation, the person which, after the consummation, will include the corporation in existence prior to consummation which is designated as the surviving corporation in the plan or agreement of merger or consolidation required to be filed with state authorities to effectuate the transaction shall be deemed to have made an acquisition of voting securities.

(2)(i) Any person party to a merger or consolidation is an acquiring person if, as a result of the transaction, such person will hold any assets or voting securities which it did not hold prior to the transaction.

(ii) Any person party to a merger or consolidation is an acquired person if, as a result of the transaction, the assets or voting securities of any entity included within such person will be held by any other person.

(iii) All persons party to a transaction as a result of which all parties will lose their separate pre-acquisition identities shall be both acquiring and acquired persons.

Examples: 1. Corporation A (the ultimate parent entity included within person "A") proposes to acquire Y, a wholly owned subsidiary of B (the ultimate parent entity included within person "B"). The transaction is to be carried out by merging Y into X, a wholly owned subsidiary of A, with X surviving, and by distributing the assets of X to B, the only shareholder of Y. The assets of X consist solely of cash and the voting securities of C, an entity unrelated to "A" or "B". Since X is designated the surviving corporation in the plan or agreement of merger or consolidation and since X will be included in "A" after consummation of the transaction, "A" will be deemed to have made an acquisition of voting securities. In this acquisition, "A" is an acquiring person because it will hold assets or voting securities it did not hold prior to the transaction, and "B" is an acquired person because the assets or the voting securities of an entity previously included within it will be held by A as a result of the acquisition. B will hold the cash and voting securities of C as a result of the transaction, but since § 801.21 applies, this acquisition is not reportable. "A" is therefore an acquiring person only, and "B" is an acquired person only.

2. In the above example, suppose the consideration for Y consists of \$8 million worth of the voting securities of A, constituting less than 15% of A's outstanding voting securities. With regard to the transfer of this consideration, "B" is an acquiring person because it will hold voting securities it did not previously hold, and "A" is an acquired person because its voting securities will be held by B. Since these voting securities are worth less than \$15 million and constitute less than 15% of the outstanding voting securities of A, however, the acquisition of these securities is not

reportable. As in the above example, "A" will report as an acquiring person only and "B" as an acquired person only.

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

4. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued at \$16 million. "B" is thus an acquiring person and "A" an acquired person in a reportable acquisition of assets. "A" and "B" will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

5. Corporations A (the ultimate parent entity in person "A") and B (the ultimate parent entity in person "B") propose to consolidate into C, a newly formed corporation. All shareholders of A and B will receive shares of C, and both A and B will lose their separate pre-acquisition identities. "A" and "B" are both acquiring and acquired persons because they are parties to a transaction in which all parties lose their separate pre-acquisition identities.

(e) Whenever voting securities or assets are to be acquired from an acquiring person in connection with an acquisition, the acquisition of voting securities or assets shall be separately subject to the act.

4. Secondary Acquisitions in Tender Offers and in Mergers and Consolidations (§ 801.4)

The term "secondary acquisition" is defined in § 801.4(a) of the premerger notification rules as an acquisition in which the acquiring person, by obtaining control of an issuer holding voting securities of another issuer which it does not control, becomes the holder of the latter issuer's voting securities. Thus, if corporation B (included in person "B") holds a minority interest in the voting securities of corporation X (included in person "X") and corporation B is acquired by corporation A (included in person "A"), there are two separate transactions, each of which may be reportable. A's acquisition of B is the primary acquisition, and in it "A" is the acquiring and "B" is the acquired person. A's resulting acquisition of the voting securities of X is a secondary acquisition in which "A" is the acquiring and "X" the acquired person. "A" must observe separate reporting and waiting period requirements for both transactions if both the primary and the secondary acquisition independently meet the size criteria of the Act and neither is exempt. Section 803.10(b) of

the rules currently specifies that the waiting period with respect to all reportable secondary acquisitions is 30 days, and § 803.20(c) states it can be extended by a request for additional information ("second request") directed to either party. The waiting period is extended for an additional 20 days after responses to second requests are received from all parties to which they have been issued in the secondary acquisition.

The treatment of tender offers under the Act and the rules differs in several respects from that of other transactions. Section 7A(b)(1)(B), for example, provides that, unless extended, the waiting period for a cash tender offer will be 15 days while that for all other transactions is 30 days. Section 7A(e)(2) states that, in the case of a cash tender offer, if the running of the waiting period is suspended by the issuance of a second request, it will begin again after the receipt of the acquiring person's response. In all other transactions, the waiting period will begin to run again only when all parties receiving second requests have responded. In addition, § 803.20(c)(1) of the rules establishes that a request for additional information directed to the acquired person in a tender offer does not affect the running of the waiting period. Finally, section 7A(e)(2) of the Act specifies that in the case of a cash tender offer the waiting period continues for 10 days after responses to second requests have been received, while in all other transactions it continues for 20 days.

Congress had a two-fold purpose in including these provisions in the Act. First, they were intended to lessen the impact of the waiting period requirements on cash tender offers where, it was felt, delay was more likely to jeopardize the transaction. Second, these provisions were intended to maintain a policy of neutrality between the offeror and the target in tender offers by preventing hostile targets from using the notification and waiting period requirements to delay consummation and thus perhaps to affect the outcome of the transaction. (See 122 Cong. Rec. H 10294, Sept. 16, 1976, Statement of Chairman Rodino.)

Under the present rules, when a secondary acquisition occurs in connection with a cash tender offer, the waiting period for the primary acquisition ends after 15 days, unless extended by a second request. Since consummation of the cash tender offer will automatically result in consummation of the secondary acquisition, however, both transactions are required to await the end of the 30-day waiting period for the secondary

acquisition. When any tender offer results in a secondary acquisition, and a request for additional information is made to both parties to the secondary acquisition, the waiting period will not begin again until both parties have responded, and neither the primary nor the secondary acquisition can be consummated until 20 days after this date. Thus, when a tender offer results in a reportable secondary acquisition, the rules applicable to the latter may, as a practical matter, supersede the special provisions applicable to the former.

The Commission was aware that these problems might arise when the current rules were promulgated. It was not known how frequently secondary acquisitions would occur, however, and it was felt that some of them might be of antitrust significance. The Commission therefore adopted a conservative approach to balancing the need for review of all acquisitions, including secondary acquisitions, which might be of enforcement concern against the need to minimize the impact of the rules on tender offers. Experience since the promulgation of the present premerger notification rules has shown that secondary acquisitions do not occur frequently and are not often a source of significant antitrust concern. The Commission proposes therefore to amend § 801.4 to make the waiting period requirements for secondary acquisitions coincide with those for tender offers whenever the primary acquisition is a tender offer.

Proposed new § 801.4(c) provides that when a tender offer results in a reportable secondary acquisition, the same waiting period requirements applicable to the primary acquisition shall also be applicable to the secondary acquisition. That is, if the primary acquisition is a cash tender offer, the waiting period for a secondary acquisition will be 15 days. And if second requests are issued in connection with the secondary acquisition only, the waiting period will continue for 10 days after the response of the acquiring person has been received. When any tender offer is the primary acquisition and one or more requests for additional information are made in connection with the resulting secondary acquisition, a response by the acquiring person will cause the waiting period to begin running again. A second request directed to the acquired person in such a secondary acquisition will not affect the running of the waiting period in that transaction.

The effect of the proposed amendment in terms of the example outlined above will be as follows. If A proposes to

acquire B by cash tender offer, and "A" files simultaneously for this primary transaction and for the secondary acquisition of the voting securities of X, the waiting period for both transactions will end at the same time, unless either or both are extended by second requests. A second request issued to A in connection with either the primary or the secondary acquisition, or both, will extend the waiting period for the transaction in connection with which the request is issued until ten days after A's complete response to the request for that transaction is received. In addition, if the primary acquisition is either a cash or a non-cash tender offer and a second request is issued to both parties to the secondary acquisition, a response to the second request by A is sufficient to start the waiting period running again. Finally, a request directed only to X will not affect the running of the waiting period in the primary acquisition or in the secondary acquisition.

Questions have occasionally arisen concerning secondary acquisitions in mergers and consolidations. Since the application of the rules in this area is somewhat complex, the Commission proposes to add examples 4, 5, and 6 to § 801.4 to illustrate the treatment of secondary acquisitions in these contexts.

It is proposed that § 801.4 be amended by adding paragraph (c) and examples 4, 5, and 6 to read as follows:

§ 801.4 Secondary acquisitions.

- * * * * *
- (c) Where the primary acquisition is—
- (1) A cash tender offer, the waiting period procedures established for cash tender offers pursuant to sections 7A(a) and 7A(e) of the act shall be applicable to both the primary acquisition and the secondary acquisition;
 - (2) A non-cash tender offer, the waiting period procedures established for tender offers pursuant to section 7A(e)(2) of the act shall be applicable to both the primary acquisition and the secondary acquisition.

Examples: * * *

4. In the previous examples, assume A's acquisition of B is accomplished by merging B into A's subsidiary, S, and S is designated the surviving corporation. B's voting securities are cancelled, and B's shareholders are to receive cash in return. Since S is designated the surviving corporation and A will control S and also hold assets or voting securities it did not hold previously, "A" is an acquiring person in an acquisition of voting securities by virtue of § 801.2 (d)(1)(ii) and (d)(2)(i). A will be deemed to have acquired control of B, and A's resulting acquisition of the voting securities of X is a secondary acquisition. Since cash, the only consideration paid for the voting securities of B, is not considered

an asset of the person from which it is acquired, by virtue of § 801.2(d)(2) "A" is an acquiring person only. The acquisition of the minority holding of B in X is therefore a secondary acquisition by "A," but since "B" is an acquired person only, "B" is not deemed to make any secondary acquisition in this transaction.

5. In example 4 above, suppose the consideration paid by A for the acquisition of B is \$20 million worth of the voting securities of A. By virtue of § 801.2(d)(2), "A" and "B" are each acquiring and acquired persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although "B" is now also an acquiring person, unless B gains control of A in the transaction, B still makes no secondary acquisitions of stock held by A. If the consideration paid by A is the voting securities of one of A's subsidiaries and B thereby gains control of that subsidiary, B will make secondary acquisitions of any minority holdings of that subsidiary.

6. Assume that A and B propose through consolidation to create a new corporation, C, and that both A and B will lose their corporate identities as a result. Since no participating corporation in existence prior to consummation is the designated surviving corporation, "A" and "B" are each both acquiring and acquired persons by virtue of § 801.2(d)(2)(iii). The acquisition of the minority holdings of entities within each are therefore potential secondary acquisitions by the other.

5. Acceptance for Payment is the Consummation of an Acquisition (§ 801.33).

The Commission believes it is necessary to make clear when consummation occurs in a tender offer, in order to avoid possible inadvertent violations of the Act. Normally in a tender offer, shareholders wishing to tender their shares send them to a depository designated by the tender offeror. At the depository, the shares are held in escrow until the offeror purchases them or until the offer ends. Because most tender offers are subject to some limiting conditions, the mere receipt of the tendered shares by the depository does not normally give the offeror full beneficial ownership of them or oblige the offeror to pay to the tendered shareholder the consideration specified in the offer. At the end of the tender offer, the offeror usually decides (subject to the terms of the offer and applicable securities law requirements) how many of the shares, if any, it will accept. The term "acceptance for payment" denotes the final stage in a tender offer in which the offeror obtains an unconditional right to some or all of the tendered shares and becomes legally committed to pay the tendering shareholders for them. When a tender offer is of a reportable size and the offer ends during the waiting period, it might

appear that the offeror could accept some or all tendered shares for payment without violating the Act on the premise that the acquisition would not be consummated if the shares were left in the depository until the waiting period ends or is terminated. The Commission believes, however, that acceptance for payment under these circumstances constitutes consummation of the acquisition.

To clarify this point, the Commission proposes new § 801.33, which states that the acceptance for payment of voting securities tendered in a tender offer is the consummation of an acquisition which may be subject to the Act. Thus, the offeror cannot, either during or after expiration of the offer, accept for payment a number of shares sufficient to trigger the requirements of the Act unless the reporting and waiting period requirements have already been complied with. The offeror may accept any tendered shares for payment, without complying with the Act, so long as these shares, when added to its prior holdings, do not reach or exceed a new reporting threshold. (See § 801.1(h).)

It is proposed to add § 801.33 to read as follows:

§ 801.33 Consummation of an acquisition by acceptance of tendered shares for payment.

The acceptance for payment of any shares tendered in a tender offer is the consummation of an acquisition of those shares within the meaning of the act.

6. Determination of the Assets of a Joint Venture or Other Corporation for the Purpose of Applying Certain Exemptions. (§ 801.40)

Section 801.40 of the rules establishes the manner in which the reporting requirements of the Act will be applied to the formation of a joint venture or other corporation. This section analyzes the transaction by which a joint venture or other corporation is formed as acquisitions of the voting securities of the new corporation by two or more contributors. To be reportable, the acquisition by a particular contributor must meet the size criteria of the Act. For purposes of applying the size-of-person test of section 7A(a)(2) to the contributors, as well as in all other acquisitions, a balance sheet test is required by § 801.11 of the rules. The values of the assets of the joint venture or other corporation (the acquired person), however, is determined in accordance with § 801.40(c) and includes not only those asset which would appear on a balance sheet but also assets which any person contributing to the formation of the joint

venture has agreed to transfer or for which an agreement has been secured for the joint venture to obtain. The assets of the joint venture corporation at the time of its formation also include any amount of credit which any person has agreed to extend and any obligation of the joint venture which any person has agreed to guarantee.

Section 801.40(b) specifies how the size-of-person test is to be applied to the formation of a joint venture corporation. The first sentence of this section indicates that all exemptions in the Act and rules apply in the formation of a joint venture corporation. Several exemptions, in particular § 802.20(b), § 802.50, and § 802.51, depend for their application on a test which is similar to the size-of-person test. Section 802.20(b), for example, exempts certain transactions in which the acquiring person would not acquire control of an issuer with annual net sales or total assets of \$25 million or more. It is unclear, however, whether a reporting person in trying to apply exemptions to the formation of a joint venture or other corporation should use the balance sheet test of § 801.11 or the special assets test of § 801.40(c). By its present language, § 801.40(c) is limited in its application to "the purposes of § 801.40(b)," which are to apply the size-of-person test to the formation of the new corporation.

To clarify this point, the Commission proposes to amend § 801.40(c) to make explicit that the provisions of this section are to be used in determining the assets of a joint venture or other corporation for all purposes in connection with its formation. This proposed change would incorporate into the language of the rule the position already taken by the Commission in the Statement of Basis and Purpose to § 802.20, which says that § 801.40(c) is used to apply the minimum dollar value exemption in this context. See 43 FR 33491.

It is proposed that § 801.40(c) be amended by revising it to read as follows:

§ 801.40 Formation of a joint venture or other corporation.

* * * * *

(c) For purposes of paragraph (b) of this section and determining whether any of the exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or

other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

* * * * *

7. Exemption for Transaction Requiring Approval by the Civil Aeronautics Board (§ 802.6)

Certain transactions involving the acquisition or consolidation of control of air carriers or persons substantially engaged in the business of aeronautics require approval by the Civil Aeronautics Board ("CAB") prior to consummation. 49 U.S.C. 1378. These transactions do not fall under any of the existing exemptions in the Act or rule. The Commission has concluded that the premerger notification rules should be amended so as to exempt from the reporting and waiting period requirements of the Act transactions which are entirely subject to CAB jurisdiction.

Through its authority to intervene in CAB proceedings, the Department of Justice has an opportunity to evaluate and present its views concerning any potential for anticompetitive impact on the air transportation and aeronautics industries arising out of a proposed transaction. The filing and waiting period obligations under § 7A do not appreciably add to the Department's enforcement capabilities.

Because the Department of Justice is not automatically included in CAB proceedings, however, the Commission proposes a qualified exemption whereby such transactions will be exempt as long as the parties provide to the Department copies of all information and documentary materials submitted to the CAB. Parties would not be required to submit copies to the FTC because the Commission lacks jurisdiction over regulated air carriers. 15 U.S.C. 45(a)(2).

An acquisition requiring CAB approval may be part of a larger transaction involving the acquisition of assets or voting securities to which are attributable substantial sales or revenues in markets other than air transportation or aeronautics. In such instances the CAB has jurisdiction over only that part of the transaction affecting air transportation or aeronautics. For example, in a transaction involving two air carriers which are also competitors in another market, the CAB would consider only the possible effects on air transportation. Anticompetitive effects arising out of the unregulated portions of

the transaction would be left to the antitrust jurisdiction of the courts.

Where both parties have substantial sales or revenues (greater than \$10 million each) attributable to activities outside the jurisdiction of the CAB, the transaction would not be eligible for this exemption. In such cases the complete transaction must be reported to both the Federal Trade Commission and the Department of Justice under section 7A just like any other reportable merger or acquisition. This procedure assures that all unregulated mergers and acquisitions will receive antitrust analysis consistent with the purposes of the Act.

A conforming change is being made in § 802.53 because of the redesignation of present § 802.6 as § 802.6(a).

PART 802—EXEMPTION RULES

It is proposed to redesignate the existing text of § 802.6 as § 802.6(a), to add paragraph (b) and an example, and to revise § 802.53 to read as follows:

§ 802.6 Federal agency approval.

* * * * *

(b) Any transaction

(1) which requires approval by the Civil Aeronautics Board prior to consummation, pursuant to section 408 of the Federal Aviation Act, 49 U.S.C. 1378, and

(2) in which annual sales or revenues of \$10 million or less from any business other than aeronautics or air transportation as defined in section 101 of the Federal Aviation Act, 49 U.S.C. 1301, are attributable to

(i) The acquiring person, or

(ii) In an acquisition of voting securities, the issuer together with all entities which it controls, or

(iii) In an acquisition of assets, the assets to be acquired,

shall be exempt from the requirements of the act if copies of all information and documentary material filed with the Civil Aeronautics Board are contemporaneously filed with the Assistant Attorney General.

Example: Assume that A (an entity included within person "A") proposes to acquire 100% of the voting securities of B (an entity included within person "B") for \$100 million. A and B are both air carriers, but A also derives \$11 million in revenues annually from the operation of a hotel and B also derives \$12 million annually from a commercial data processing business. This transaction requires CAB approval because it involves a consolidation into one person of the ownership of two air carriers previously owned separately. 49 U.S.C. 1378. But since the acquiring person and the issuer whose stock will be acquired each derive more than \$10 million in revenues from businesses other than aeronautics or air transportation, the

exemption does not apply. If the parties meet the size-of-person test, they will have to comply with the provisions of the act and the rules.

§ 802.53 Certain foreign banking transactions.

An acquisition which requires the consent or approval of the Board of Governors of the Federal Reserve System under section 25 or section 25(a) of the Federal Reserve Act, 12 U.S.C. 601, 615, shall be exempt from the requirements of the act if copies of all information and documentary material filed with the Board of Governors are contemporaneously filed with the Federal Trade Commission and Assistant Attorney General at least 30 days prior to consummation of the acquisition. In lieu of such information and documentary material or any portion thereof, an index describing such material may be provided in the manner authorized by § 802.8(a).

8. Exemption for Acquisitions Involving Insured Banks or Other Financial Institutions (§ 802.8)

Section 7A(c)(7) of the Act completely exempts from the reporting and waiting period requirements "transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842)."

Section 18(c) of the Federal Deposit Insurance Act requires written approval from the appropriate regulatory agency prior to consummation of specified acquisitions involving insured banks. Before approving a specified transaction, the responsible agency must, in most instances, seek a report from the Attorney General regarding the competitive factors involved, and the transaction will not be approved if it will have a detrimental effect on competition, absent a showing of countervailing public benefits. Section 3 of the Bank Holding Company Act requires approval of the Federal Reserve Board before any bank holding company can make a specified acquisition. No application for approval will be granted if the proposed acquisition will substantially lessen competition unless there is a showing of overriding benefits to the public resulting from it.

Parties to transactions subject to the two sections discussed above must submit certain material to the appropriate government regulatory agency. In these cases, the agency sends copies of the materials to the Antitrust Division of the Department of Justice for its review. The Federal Trade Commission does not have jurisdiction over banks and savings and loans, 15

U.S.C. 45(a)(2); therefore, only the Department reviews the competitive impact of these transactions. Because the Justice Department receives all the submitted materials directly from the regulatory agency, Congress exempted these transactions entirely from the reporting and waiting period requirements of the Act in section 7A(c)(7).

Materials submitted to the appropriate regulatory agency pursuant to section 4 of the Bank Holding Company Act, sections 403 and 408(e) of the National Housing Act, and section 5 of the Home Owners' Loan Act are not forwarded on a regular basis to the Department of Justice. Accordingly, Congress granted transactions subject to these provisions a qualified exemption in section 7A(c)(8) of the Act. This section provides an exemption for:

transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), sections 403 and 408(e) of the National Housing Act (12 U.S.C. 1728 and 1730(a)), or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction * * *

The qualification contained within this exemption assures that, in all transactions subject to the above provisions, the antitrust enforcement agencies will receive the information necessary to assess the competitive consequences of the proposed transaction.

Subsequent to enactment of section 7A of the Clayton Act and the promulgation of the present rules, Congress passed the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3683. Of particular interest are Titles VI and VII, known respectively as the Change in Bank Control Act and the Change in Savings and Loan Control Act. Essentially, both titles require that persons, *i.e.*, non-insured banks or other institutions, contemplating acquisitions of banks or savings and loans must notify the appropriate regulatory agency 60 days prior to consummation and provide it with specified information. See 12 U.S.C. 1817(j)(6); 12 U.S.C. 1730(q)(6). The transaction may be consummated only if within the 60 day period the parties have not received written notification from the regulatory agency that it has disapproved the transaction or is extending the time period for up to another 30 days. Although extensive information must be

submitted to the regulatory agencies pursuant to each of these sections, those materials are not routinely forwarded to the Department of Justice for review.

The Commission has determined that transactions subject to approval by the appropriate regulatory agency pursuant to the Change in Bank Control Act and the Change in Savings and Loan Control Act should be exempt from the reporting requirements of section 7A to avoid duplicative filing obligations. The exemption proposed, however, is a qualified one, patterned after the exemption provided in section 7A(c)(8). The qualification is necessary since copies of the material submitted to the appropriate regulatory agency are not automatically forwarded to the Justice Department. The proposed rule requires only that an index or copies of materials be submitted to the Department of Justice, however, since, as discussed above, the Federal Trade Commission lacks jurisdiction over banks and savings and loan associations. This new exemption includes a provision exempting a covered acquisition from all requirements of the Act, including the filing requirements, if the agency finds that its approval is necessary to prevent the failure of one of the financial institutions involved. This provision is designed to cover situations in which the approving agency must act quickly to prevent the collapse of a bank or other institution and mirrors a provision in present § 802.8 (to be redesignated section 802.8(a)).

It is proposed that the existing text of section 802.8 be redesignated section 802.8(a) and that paragraph (b) be added to read as follows:

§ 802.8 Certain supervisory acquisitions.

* * * * *

(b)(1) A merger, consolidation, purchase of assets, or acquisition which requires agency approval under 12 U.S.C. 1817(j) or 12 U.S.C. 1730(q) shall be exempt from the requirements of the act if copies of all information and documentary materials filed with any such agency are contemporaneously filed with the Assistant Attorney General at least 30 days prior to consummation of the proposed acquisition. In lieu of providing all such information and documentary material, or any portion thereof, an index describing such information and documentary material may be provided in the manner authorized by § 802.8(a).

(2) A transaction described in paragraph (b)(1) of this section shall be exempt from the requirements of the act, including specifically the filing requirement, if the agency whose

approval is required finds that approval of such transaction is necessary to prevent the probable failure of one of the institutions involved.

9. Partial Exemption for Acquisitions in Connection with the Formation of Certain Joint Venture or Other Corporations (§ 802.42).

Section 7A(c)(8) reflects Congressional recognition that certain transactions already are subject to the notification and review requirements of other regulatory agencies and that issues relating to competition are relevant to that review. In the formation of certain joint venture corporations, however, some contributors may be required by the present rules to file notification notwithstanding that one or more other contributors are exempt under section 7A(c)(8). Under § 801.40 of the rules the formation of a joint venture or other corporation is analyzed as an acquisition of the voting securities of the newly formed corporation by each contributor, and each acquisition is separately subject to the Act. In the case of the formation of a joint venture corporation in which one participant is exempt under section 7A(c)(8) but another participant is not, the non-exempt participant is therefore required to file under the present rules if its acquisition of the voting securities of the joint venture corporation meets the size criteria of the Act and is not otherwise exempt.

The Commission has tentatively concluded that it would be consistent with the purposes of the Act to relieve the non-exempt contributors to the joint venture corporations described above, who otherwise are subject to the Act, from the requirement of filing a Notification and Report Form. The Commission believes that the information required to be submitted by the exempt participant to the regulatory agency and by section 7A(c)(8) to the antitrust agencies is generally sufficient to enable the latter to make an initial evaluation of the participation of all parties in the joint venture corporation.

The Commission therefore proposes new § 802.42, which exempts contributors to the formation of joint venture corporations such as those described above from complying with certain provisions of the rule. This proposed exemption is limited to the filing of a Notification and Report Form. In lieu of the Form, § 802.42(a) provides that the party must submit an affidavit claiming this exemption and attesting to a good faith intention of going forward with the transaction. Section 802.42(b) states that the party remains subject to all other provisions of the Act and the rules. The submission of the affidavit

thus initiates a 30-day waiting period. During this period, the Commission or the Assistant Attorney General may issue a request for additional information or documentary material to any non-exempt party to the acquisition, and such a request will extend the waiting period until 20 days after a response to the request is received.

The Commission is taking this approach because the extent of the analysis of the participation in the joint venture by the contributor not directly subject to the reviewing agency's authority cannot be predicted. Also, the reviewing agency may not have expertise with respect to parties not subject to its authority. In particular, the Commission invites comments as to the justification, if any, for exempting contributors to joint ventures like those described above from all the requirements of the Act, rather than from the requirement of filing a Notification and Report Form only.

It is proposed to add § 802.42 to read as follows:

§ 802.42 Partial exemption for acquisitions in connection with the formation of certain joint venture or other corporations.

(a) Whenever one or more of the contributors in the formation of a joint venture or other corporation which otherwise would be subject to the requirements of the act by reason of § 801.40 are exempt from these requirements under section 7A(c)(8), any other contributor in the formation which is subject to the act and not exempt under section 7A(c)(8) need not file a Notification and Report Form, provided that no less than 30 days prior to the date of consummation any such contributor claiming this exemption has submitted and affidavit to the Federal Trade Commission and to the Assistant Attorney General stating its good faith intention to make the proposed acquisition and asserting the applicability of this exemption.

(b) Persons relieved of the requirement to file a Notification and Report Form pursuant to paragraph (a) of this section remain subject to all other provisions of the act and these rules.

10. Acquisitions of and by Foreign Persons (§§ 802.50 and 802.51).

Section 7A(a)(1) of the Act requires that either the acquiring or the acquired person be "engaged in commerce or in any activity affecting commerce * * *". As the Statement of Basis and Purpose to § 802.50 notes, "[t]he Act thus permits coverage of a great many transactions that have some or even predominant foreign aspects." 43 FR 33497. Sections 802.50 and 802.51, respectively, exempt

certain acquisitions of and by foreign persons which would have only a relatively small impact on United States commerce. Where the effects of an acquisition on the U.S. economy are small compared with its effects in other countries, as in the transactions exempted by these sections, the Commission generally considered it appropriate to waive its jurisdiction, based on considerations of comity among nations.

On November 21, 1979, an increase in the minimum dollar value exemption contained in § 802.20 of the rules became effective. See 44 FR 60781. The purpose of this exemption is similar to one of the purposes of §§ 802.50 and 802.51, namely to eliminate the filing obligations with respect to certain relatively small transactions which because of their size are normally unlikely to have a significant anticompetitive impact. Originally, § 802.20 exempted acquisitions of 15 percent or more of the assets or voting securities of the acquired person valued at \$15 million or less unless as a result of the acquisition the acquiring person would hold more than \$10 million in assets, or voting securities which would confer control of an issuer with annual net sales or total assets of \$10 million or more. Experience indicated that additional small transactions which were not covered by original § 802.20 were usually without substantive antitrust interest. Amended § 802.20 accordingly exempts acquisitions of 15 percent or more of the assets or voting securities of the acquired person valued at \$15 million or less where as a result of the acquisition the acquiring person would not hold more than \$15 million in assets or gain control of an issuer with annual net sales or total assets of \$25 million or more.

Some of the same reasons which justified expanding the § 802.20 minimum dollar value exemption apply to certain provisions in §§ 802.50 and 802.51. The Commission therefore proposes to amend these sections to coincide with amended § 802.20. Specially, proposed § 802.50(a) would exempt acquisitions by a U.S. person of foreign assets unless sales in or into the U.S. of \$25 million or more are attributable to such assets. New § 802.50(b) would exempt acquisitions by a U.S. person of a foreign issuer unless the foreign issuer (or an entity controlled by it) holds assets located in the U.S. with an aggregate book value of \$15 million or more, or had sales in or into the U.S. of \$25 million or more in its most recent fiscal year. Amended § 802.51(b) would exempt an acquisition

by a foreign person of a foreign issuer which does not confer control of an issuer with assets located in the U.S. with an aggregate book value of \$15 million or more, or confer control of a U.S. issuer with annual net sales or total assets of \$25 million or more. Finally, proposed new § 802.51(c) would exempt acquisitions by a foreign person of assets located in the U.S. valued at less than \$15 million.

Section § 802.50(b) presently excludes from the calculation of the value of assets located in the United States the value of "investment assets and voting or nonvoting securities of another person" (emphasis added). Investment assets are defined in § 801.1(j)(2) of the rules as "cash, deposits in financial institutions, other money market instruments, and instruments evidencing government obligations." The Statement of Basis and Purpose to § 802.50 states that the purpose of disregarding these assets is "[t]o exclude assets that do not reflect a substantial business presence in the United States and generally have little competitive significance." 43 FR 33497

Section 802.51(b) exempts acquisitions of the voting securities of a foreign issuer as long as the foreign acquiring person does not obtain control of an issuer which holds assets located in the United States of a specified value exclusive of "investment assets." This provision makes no mention of "voting or nonvoting securities of another person." Paragraph (c) exempts acquisitions of assets located in the United States below a specified amount, exclusive of "investment assets." Subsection (d) exempts any acquisition involving both a foreign acquiring person and a foreign acquired person if the aggregate assets or both located in the United States, exclusive of "investment assets," is less than \$110 million. Again, there is no reference to "voting or nonvoting securities of another person," as there is in § 802.50(b)(1).

The Commission has determined that §§ 802.51(b)(1) and (d) should be amended so as to exclude from the determination of the dollar amount of assets located in the United States, in addition to "investment assets," the value of any voting or nonvoting securities of another person held by the acquired person. Both of these subsections define tests for determining whether a sufficient nexus with the United States exists in a particular foreign acquisition to warrant imposition of a filing obligation. In order to provide a more accurate reflection of the business presence of the acquired

person in the United States, the Commission has determined that §§ 802.51(b)(1) and (d) should be amended to include the same exception as that provided in § 802.50(b)(1).

In determining whether an acquisition is exempt under § 802.51(c), one need not include the value of any voting or nonvoting securities of another person which are to be acquired because § 801.21(b) must be applied in the determination of the value of such assets. That section excludes such securities from the determination of the value of assets when acquired. Section § 802.51(c) need not, therefore, be amended, since it is already consistent with § 802.50(b)(1).

It is proposed that §§ 802.50(a)(2) and (b) and 802.51(b), (c) and (d) be amended by revising them to read as follows:

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

(a) *Assets.* In a transaction in which assets located outside the United States are being acquired by a U.S. person:

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

(b) *Voting securities.* An acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either:

(1) Holds assets located in the United States (other than investment assets and voting or nonvoting securities of another person) having an aggregate book value of \$15 million or more; or

(2) Made aggregate sales in or into the United States of \$25 million or more in its most recent fiscal year.

§ 802.51 Acquisitions by foreign persons.

An acquisition by a foreign person shall be exempt from the requirements of the act if:

(b) The acquisition is of voting securities of a foreign issuer, and will not confer control of:

(1) An issuer which holds assets located in the United States (other than

investment assets and voting or nonvoting securities of another person) having an aggregate book value of \$15 million or more, or

(2) A U.S. issuer with annual net sales or total assets of \$25 million or more;

(c) The acquisition is of less than \$15 million of assets located in the United States (other than investment assets); or

(d) The acquired person is also a foreign person, the aggregate annual sales of the acquiring and acquired persons in or into the United States are less than \$110 million, and the aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets and voting or nonvoting securities of another person) are less than \$110 million.

11. Acquisitions Requiring the Approval of a Federal Court in a Bankruptcy Proceeding (§ 802.70).

Section 802.70 of the premerger notification rules exempts two types of acquisitions from the provisions of the Act. Paragraph (a) exempts acquisitions from an entity required to divest the subject voting securities or assets by order of the Federal Trade Commission or any federal court in an action brought by the Commission or the Department of Justice. Paragraph (b) exempts acquisitions where the acquiring person or entity is subject to an order of the Commission or any federal court which requires prior approval of such an acquisition by the court, the Commission, or the Department of Justice, and such approval has been obtained. These types of acquisitions were exempted by the Commission because the information required by the Notification and Report Form would substantially duplicate information already in the enforcement agencies' possession, and because these acquisitions by their nature already are subject to careful antitrust scrutiny by at least one of the agencies.

The language of present § 802.70(b) would, however, appear also to cover an acquisition of, by, or from a corporation or other person in bankruptcy, since the acquisition would normally require bankruptcy court approval. The inclusion of these acquisitions among those exempted was inadvertent. The goals of a court administering the estate of a bankrupt debtor are in some cases to rehabilitate the debtor and always, insofar as possible, to maximize the payment of the claims of creditors. The court has no statutory responsibility to consider antitrust issues relating to any dispositions of the debtor's property involved in a plan of reorganization or liquidation.

The Commission believes that acquisitions pursuant to an order of a bankruptcy court should not be granted a blanket exemption from the requirements of the Act. These transactions do not necessarily meet the criterion of section 7A(d)(2) that they be unlikely to violate the antitrust laws. This has been the Commission's position since the promulgation of the present rules. In connection with present § 802.63, which exempts certain acquisitions by creditors in foreclosure or upon default, several public comments received during earlier rulemaking proceedings suggested that sales under the supervision of a bankruptcy court should also be exempt. In the Statement of Basis and Purpose, the Commission responded as follows:

These recommendations were rejected. Purchases at bankruptcy sales may pose antitrust concerns, as may subsequent dispositions of property acquired pursuant to a credit relationship. A bankruptcy court has no responsibility to consider antitrust issues relating to dispositions of the debtor's property. 43 FR at 33502.

The Commission proposes to amend paragraph (b) of § 802.70 to make clear that acquisitions exempted thereunder are limited to those subject to an order and requiring prior approval in connection with actions initiated by the Commission or the Department of Justice.

The overall impact of this proposed amendment on bankruptcy proceedings should be minimal. Many acquisitions pursuant to an order from a bankruptcy court will be small and will either fail to meet the size criteria of the Act or be exempt under § 802.20 of the rules. In the absence of an antitrust concern, timing problems resulting from the necessity to observe the waiting period in reportable transactions may usually be mitigated by requests for early termination of the waiting period under § 7A(b)(2) and § 803.11.

It is proposed to amend § 802.70(b) by revising it to read as follows:

§ 802.70 Acquisition subject to order.

* * * * *

(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.

12. Incorporation by Reference (§ 803.2).

On April 10, 1979, the Commission staff issued a formal interpretation of the rules, pursuant to § 803.30, specifying under what circumstances incorporation by reference of information or documentary materials from an earlier filing would be permitted in a subsequent filing. The staff took the position that the incorporation by reference could be permitted only in a very narrow set of circumstances. This position was based on practical considerations associated with the review of premerger notification filings. Such filings are often sent for review to litigating divisions with particular familiarity with the parties to the acquisition or the product market or industries involved. These litigating groups are sometimes the regional offices of the enforcement agencies. If incorporation by reference were permitted, the staff believed that the documents might not be available to the offices of the enforcement agencies which must review subsequent filings. In view of the severe time constraints imposed on this review by the act, effective analysis appeared to be impossible unless all required documentary materials accompany each filing. In only one case did it seem appropriate to depart from this principle, namely where parties to a single transaction structured to occur in stages file for a higher notification threshold shortly after having filed for a lower threshold.

On January 25, 1980, the Commission received a petition from the International Telephone and Telegraph Corporation ("the ITT petition") requesting a reduction in the number of documents filed with the Notification and Report Form. The ITT petition also requested the Commission "[t]o permit incorporation by reference of previous filings of documents rather than require duplicative filings of the same documents." The petition asserts that assembling the documents requested is burdensome and unnecessary. It suggests as an alternative that sets of documentary attachments be kept in a central repository for reference in connection with subsequent filings by the same person.

Recently the United States General Accounting Office ("GAO") took the position that the restrictions on incorporation of certain documents by reference imposed by the April 10, 1979, formal interpretation constituted unnecessary duplication within the meaning of the Federal Reports Act, 44 U.S.C. 3512. In particular, GAO maintained that a person should not have to file documents required by item

4(a) of the Notification and Report Form which had been submitted by that same person with an earlier filing. On April 7, 1981, the Federal Trade Commission staff issued another formal interpretation reflecting GAO's position on incorporation by reference in the Notification and Report Form.

Accordingly, the Commission proposes that new paragraph (e) be added to § 803.2 of the rules embodying the basic position on incorporation by reference taken by the staff in its formal interpretation dated April 7, 1981.

It is proposed to amend § 803.2 by adding paragraph (e) to read as follows:

§ 803.2 Instructions applicable to notification and report form.

* * * * *

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

13. Statement of Reasons For Noncompliance (§ 803.3).

Section 7A(b)(1)(A) of the Act provides that the waiting period shall begin on the date of receipt by the Commission and the Assistant Attorney General of completed notification or, if such notification is not completed, on the date of receipt of the notification to the extent completed and a statement of the reasons for noncompliance. Section 7A(e)(2) of the Act similarly provides, with respect to a response to a request for additional information, that the waiting period shall begin to run again on the date of receipt of either a completed response or the response to the extent completed accompanied by a statement of reasons for noncompliance.

The legislative history of the Act states that substantial reasons for noncompliance must be given; otherwise the Commission or the Department of Justice may institute an enforcement action under section 7A(g) of the Act. The legislative history explains some of the reasons for requiring an explanation of the filing person's noncompliance. The late Senator Philip Hart stated in this respect:

The submission of (the statement of reasons for noncompliance) is clearly not a substitute for compliance with the

notification obligation. The explanation will, however, serve two salutary purposes. First, it will tend to reduce the disagreement between the agencies and the persons subject to the Act since the antitrust authorities will be informed of the reasons underlying noncompliance. Second, the explanation will be useful in any civil penalty proceeding that may be brought under subsection (g)(1). 122 *Cong. Rec.* S 15417 (daily ed. Sept. 8, 1976), 43 FR 33509.

The Commission promulgated § 803.3 to implement the statutory provision for the statement of reasons for noncompliance. The Statement of Basis and Purpose explains that this rule was promulgated "to focus on the information necessary to determine whether the filing person actually cannot supply the required information or documents, or whether the failure is based on a mere unwillingness to comply or misunderstanding of what is required by the particular item." 43 FR 33508-33509. The rule also is intended to reduce the need for requests for additional information by requiring detailed explanations of reasons for noncompliance in the initial filing and to emphasize that the situations in which a person will be deemed "unable" to supply a complete response will be construed narrowly.

The Commission believes that in several respects present § 803.3 sometimes does not call for sufficient information to fulfill its purpose. One inadequacy is that the rule does not require sufficient identification of documentary materials which would be required for a complete response. Subsection (b) currently requires that the noncomplying party describe "what information would have been required for a complete response." The purpose of this provision is to identify the information or documentary materials requested but not submitted so that the significance of the noncompliance may be evaluated. Statements often have identified only generally the information needed for a complete response and have not been sufficiently detailed to permit such an evaluation. The proposed revision would expand paragraph (b) of § 803.3 to require the identification of specific documents or categories of documents which would have been required for a complete response.

Problems have also arisen in this respect with subsection (c). This subsection presently requires that the noncomplying party report "who, if anyone, has the required information, and a description of all efforts made to obtain it." This provision has proved inadequate in cases where some effort was made to obtain information in response to a request but where a

complete response was nevertheless not made. The language does not call for enough information to determine whether the effort made was adequate to discover whether additional requested documents or information exists. Specifically, it does not require the responding party to explain who searched for responsive documents and where the search was made. Another problem with this provision is that it does not require a description of the effort necessary to obtain requested materials where no effort has been made to do so since, in these circumstances, the noncomplying party has nothing to explain. In this case, too, the enforcement agencies have no way of determining whether an incomplete response nonetheless constitutes substantial compliance. The amended rule would require an explanation of who searched for responsive documents and where the search was conducted, as part of the description of all efforts made to obtain the requested information. When no effort was made, the amended rule requires an explanation of why, and what effort would be necessary to obtain the requested information.

The current rule also does not specifically require information in support of claims of privilege. Statements of reasons for noncompliance that rely on claims of attorney-client privilege therefore often have not included information sufficient to evaluate the validity of such claims.

The assertion of attorney-client privilege under the Act has been informally addressed in a letter to John W. Barnum, Esq., dated September 13, 1979. The letter, which has been placed on the public record, states that information or documentary material for which attorney-client privilege is claimed will not be given a blanket exemption from the reporting provisions of the Act. Instead, such claims will be considered individually in light of information contained in the statement of reasons for noncompliance made with regard to them. The letter sets out in some detail what information is required in such a statement to support a claim of attorney-client privilege:

The statement should identify each document by author, recipient, date and its subject matter. The statement should also state who has control of the document and where it is located and should invoke the attorney-client privilege as the reason for not supplying it.

The amended rule proposed by the Commission would incorporate these requirements in a new paragraph (d) but

would extend them to all claims of privilege.

Finally, the Commission proposes to amend the introductory paragraph to make clear that paragraphs (a) through (d) do not exclusively determine the content of a sufficient statement of reasons for noncompliance. Only if the statement contains all reasons on which the party relies to justify its noncompliance will the enforcement agencies be able to make an informed judgment whether substantial compliance has been obtained or whether an enforcement action should be initiated. It is intended that, as a result of this amendment, the party will normally be precluded from asserting additional justifications at a later date.

The Commission proposes to amend § 803.3 by revising it to read as follows:

§ 803.3 Statement of reasons for noncompliance.

A complete response shall be supplied to each item on the Notification and Report Form and to any request for additional information pursuant to section 7A(e) and § 803.20. Whenever the person filing notification is unable to supply a complete response, that person shall provide, for each item for which less than a complete response has been supplied, a statement of reasons for noncompliance. The statement of reasons for noncompliance shall contain all information upon which a person relies in explanation of its noncompliance and shall include at least the following:

(a) Why the person is unable to supply a complete response;

(b) What information, and what specific documents or categories of documents, would have been required for a complete response;

(c) Who, if anyone, has the required information, and specific documents or categories of documents, and a description of all efforts made to obtain such information and documents, including the names of persons who searched for required information and documents, and where the search was conducted. If no such efforts were made, provide an explanation of the reasons why, and a description of all efforts necessary to obtain required information and documents;

(d) Where noncompliance is based on a claim of privilege, a statement of the claim of privilege and all facts relied on in support thereof, including the identity of each document, its author, addressee, date, subject matter, all recipients of the original and of any copies, its present location, and who has control of it.

14. Affidavits Submitted With the Notification and Report Form (§ 803.5).

Section 801.30 of the rules designates those transactions where the acquired person may not be aware of an obligation to file notification at the time the acquiring person makes its filing. Section 803.5 requires that affidavits accompany the Form attesting that certain pre-notification obligations of the filing parties have been fulfilled. The Statement of Basis and Purpose states that one of the purposes accomplished by this requirement is "ensur[ing] that the acquired person is informed of its obligation to file notification when the acquired person may not otherwise be aware of that duty." 43 FR 33510.

Section 803.5(a)(1), therefore, requires the acquiring person in a transaction covered by § 801.30 to attest that the acquired person has received a notice containing certain information, specified in § 803.5(a)(1) (i)-(vi), about the proposed transaction. This information is sufficient to inform the acquired person that it may have a filing obligation.

In the past, acquired persons have occasionally asserted that they have not received notice from the acquiring person sufficient to apprise them of their duty to file notification. If true, these allegations would mean that the acquiring person's filing is incomplete and thus insufficient to begin the running of the waiting period. Without a copy of the notice received by the acquired person, however, the enforcement agency staffs are not in a position to evaluate the sufficiency of the acquiring person's notice in disputed cases, and thus to determine the adequacy of its compliance with this obligation. To prevent this problem from arising in the future, the Commission proposes to add new subsection (3) to § 803.5(a) which would require acquiring persons in transactions covered by § 801.30 to include in their premerger notification filing a copy of the notice served on the acquired person.

Section 803.5(a)(2) requires the acquiring person in an acquisition to which § 801.30 applies to attest to a good faith intention to make the acquisition. This requirement is intended to eliminate unnecessary filing obligations for acquired persons and to assure that the staffs of the enforcement agencies are not required to expend limited time and resources reviewing transactions which the parties have no present intention of completing. See Statement of Basis and Purpose to § 803.5, 43 FR 33510. Section 803.5(b) currently requires that both parties to an acquisition to which § 801.30 does not

apply attest that a contract, agreement in principle, or letter of intent, to merge or acquire has been executed. While this provision was intended to assure that the parties had reached an agreement sufficiently definite to be reduced to writing, it did not guarantee that the intention to complete the transaction was current as of the time of filing notification. The Commission therefore proposes to include in paragraph (b), as well, a requirement that the parties attest to a good faith intention to consummate the transaction.

It is proposed that § 803.5 be amended by adding paragraph (a)(3) and by revising paragraph (b) to read as follows:

§ 803.5 Affidavits required.

(a) * * *

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section.

(b) *Non-section 801.30 acquisitions.* For acquisitions to which § 801.30 does not apply, the notification required by the act shall contain an affidavit, attached to the front of the notification, attesting that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction.

15. English Versions of Foreign Language Documents. (§ 803.8).

Information called for in the Notification and Report Form or in a request for additional information is sometimes submitted in a foreign language. Occasionally, the Commission staff has had difficulty making a proper evaluation of such materials and the transactions to which they related within the time periods provided under the act, because it could not quickly obtain translations of the foreign language information and materials. The Commission proposes, therefore, to add new § 803.8 setting out the circumstances in which persons submitting foreign language documents are required to provide that information in English as well. Paragraph 803.8(a) requires that, whenever an "English language version" of any foreign language information or documentary material exists at the time of submission of the Notification and Report Form both the foreign and English language versions shall be submitted. An English version is an English language outline, summary, extract, or verbatim translation of a foreign language document. Paragraph 803.8(b) requires

that persons submitting foreign language documents or information in response to a request for additional information or documentary material also provide verbatim English translations or existing English language versions or both to the extent specified in the request.

It is proposed to add § 803.8 to read as follows:

§ 803.8 Foreign language documents.

(a) Whenever at the time of filing a Notification and Report Form there is an English language outline, summary, extract or verbatim translation of any information or of all or portions of any documentary materials in a foreign language required to be submitted by the act or these rules, all such English language versions shall be filed along with the foreign language information or materials.

(b) Documentary materials or information in a foreign language required to be submitted in response to a request for additional information or documentary material shall be submitted with verbatim English language translations, or all existing English language versions, or both, as specified in such request.

16. Responses to Second Requests: Where Submitted (§ 803.20(a)).

Section 803.20 establishes procedures governing requests for additional information or documentary material ("second requests") by the antitrust enforcement agencies. These requests have the effect of extending the waiting period. Consummation of the proposed acquisition normally cannot occur until 20 days (10 days in the case of a cash tender offer) after completed responses to the request(s) are received by the requesting agency. Section 803.20(a)(2) currently provides that second requests are returnable "at the office designated in § 803.10(c)"—that is, at the headquarters offices of the antitrust enforcement agencies in Washington, D.C.

The Commission believes that making every second request returnable to the Washington office of either the Federal Trade Commission or the Justice Department is unnecessarily inflexible and cumbersome both to the enforcement agencies and to the parties. Often a particular acquisition is assigned for investigation to a division or office which is in a different location from that of the offices designated in § 803.10(c). In such situations, valuable time may be saved by making the responses to the request returnable directly to the responsible office. In many cases, the proposed change may

also reduce the burden of compliance for the responding party.

To accomplish these objectives, the Commission proposes to amend § 803.20(a)(2) to stipulate that a response to a second request shall be returnable at whatever location is designated in the request. In situations where no location is designated, the response shall be returnable (as in the present rule) at the offices designated in § 803.10(c).

It is proposed that § 803.20(a)(2) be amended by revising it to read as follows:

§ 803.20 Requests for additional information or documentary material.

(a) * * *

(2) All the information and documentary material required to be submitted pursuant to a request under paragraph (a)(1) of this section shall be supplied to the Commission or to the Assistant Attorney General, whichever made such request, at such location as may be designated in the request, or, if no such location is designated, at the office designated in § 803.10(c), or, if such request is not fully complied with, a statement of reasons for noncompliance pursuant to § 803.3 shall be provided for each item or portion of such request which is not fully complied with.

* * * * *

17. Additional Notification Procedures Regarding Issuance of Second Requests (§ 803.20(b)).

Section 803.20(b)(2) of the rules specifies when a second request shall be effective. Currently, a second request in writing is effective upon receipt (§ 803.20(b)(2)(i)) or upon communication (i.e., reading the full text) either in person or by telephone where such communication is followed by written confirmation mailed within the waiting period (§ 803.20(b)(2)(i)). The Commission's experience has been that parties receiving second requests usually prefer to waive communication by telephone and to send an agent to obtain a written copy of it. To provide for this procedure in the rules, the Commission proposes to amend § 803.20(b)(ii). The amended subsection would specify that a request is effective when notice of its issuance is given to the person to whom the request is issued, provided that written confirmation (i.e., a copy) of the request is mailed to that person before the expiration of the initial waiting period. Such notice may be given by telephone or in person. The enforcement agencies will, of course, continue making every effort to assure that, in addition to being

notified, a party to whom a second request is issued learns of the contents of the request as soon as possible. Thus the proposed rule provides that, upon request of the individual receiving notice of the issuance of a second request, the entire contents of the second request will be read to him or her.

Section 803.20(b)(2)(ii) will continue to require that persons filing notification keep a designated individual available during normal business hours for purposes of receiving requests for clarification or amplification, requests for additional information or documentary material, or notice of the issuance of such requests. The Commission proposes that a new subsection (iii) be added to address a particular problem which arises when the individual so designated is not located in this country. The proposed new subsection would require that when a reporting person designates an individual located outside the United States pursuant to subsection (ii), at least one individual located within the United States and reachable by telephone also be designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. This proposed change is designated to facilitate communications between the requesting agency and the recipient of the request. It results from the Commission's awareness of the potential for delay inherent in the use of the mails to communicate a request for additional information where the individual designated to receive it is located in another country. The Commission believes that this change is necessary to assure that the foreign (or other reporting) person promptly receives notice of the request. Since a premerger notification filing is required only from persons which already have a significant presence in the United States, persons affected by this provision are likely already to have agents in the country who can receive this notice. Any additional inconvenience should therefore be minimal.

It is proposed that § 803.20 be amended by revising paragraph (b)(2)(ii) and adding paragraph (b)(2)(iii) to read as follows:

§ 803.20 Requests for additional information or documentary material.

* * * * *

(b) * * *

(2) When request effective.

* * * * *

(ii) In the case of a written request, upon notice of the issuance of such request, to the person to which it is directed, within the original 30-day (or, in the case of a cash tender offer, 15-day) waiting period (or, if § 802.23 applies such other period as that section provides), provided that written confirmation of the request is mailed to the person to which the request is directed, within the original 30-day (or, in the case of a cash tender offer, 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides). Notice to the person to which the request is directed may be given by telephone or in person. The person filing notification shall keep a designated individual reasonably available during normal business hours throughout the waiting period through the telephone number supplied on the certification page of the Notification and Report Form. Notice of a request for additional information or documentary material need be given by telephone only to that individual or to the individual designated in accordance with paragraph (b)(2)(iii) of this section. Upon the request of the individual receiving notice of the issuance of such a request, the full text of the request will be read. The written confirmation of the request shall be mailed to the ultimate parent entity of the person filing notification, or if another entity within the person filed notification pursuant to § 803.2(a), then to such entity.

(iii) When the individual designated in accordance with paragraph (b)(2)(ii) of this section is not located in the United States, the person filing notification shall designate an additional individual located within the United States to be reasonably available during normal business hours throughout the waiting period through a telephone number supplied on the certification page of the Notification and Report Form. This individual shall be designated for the limited purpose of receiving notification of the issuance of requests for additional information or documentary material in accordance with the procedure described in paragraph (b)(2)(ii) of this section.

* * * * *

Proposed Change in the Notification and Report Form in Response to the Petition of the International Telephone and Telegraph Corp.

On January 25, 1980, the Commission received a petition from the International Telephone and Telegraph Corporation ("ITT petition") requesting the amendment of Item 4(a) of the Form

(Part 803-Appendix). The petition specifically requests the Commission:

1(a) To delete the requirements to furnish with each notification "all registration statements" filed with the SEC by the reporting person (and by each entity within such person) since the period reflected by the most recent form 10-K, or in the alternative

(b) To require that only "the most recent registration statement" since such period be furnished; and

2. To permit incorporation by reference of previous filings of documents rather than require duplicative filings of the same documents.

The documents filed with the SEC which are required to be submitted under Item 4(a) of the Form are intended to provide financial information about the reporting person, information about its operations and those of its subsidiaries, and, occasionally, information about the reported transaction itself. The several types of documents requested often contain similar information. It is important to the antitrust review of the transaction, however, that information of this sort be as current as possible. Depending on the date of filing, the information in Form 10-K may be more than a year old. The Commission decided, therefore, to request several types of SEC documents in order to assure that the most current such information was received. Experience in reviewing filings, however, indicates that most registration statements are not a significant source of pertinent information not available in other documents. The Commission has determined, therefore, that item 4(a) need not require the submission of most registration statements.

Neither alternative suggested in the ITT petition, however, is entirely satisfactory. The petition requests either that no registration statements be required at all or that only the most recent be required. In certain circumstances such as an exchange tender offer, a registration statement is filed in connection with the transaction being reported. Such registration statements contain much valuable information and should be submitted with the premerger notification filing if they are available. It is possible, however, that under certain circumstances such statements would not be the most recent registration statement at the time the premerger notification filing is made. A requirement that the most recent

registration statement be submitted would not, therefore, assure in all cases that statements connected with the reported transaction would be provided. The Commission intends to amend Item 4(a), therefore, to specify that the only registration statement required to be submitted is that filed in connection with the specific transaction being reported, provided that such a statement is available at the time the Form is filed.

The second amendment requested by the ITT petition, that incorporation by reference of documents submitted with a previous filing be permitted, has been discussed above in connection with proposed new § 803.2(e) of the rules.

At the same time, the Commission will also revise the wording of item 4(a). This item now calls for "all of the following filed with the United States Securities and Exchange Commission within the three years prior to the date of filing of this notification * * *." This instruction requests the specified documents if any such documents have been filed with the SEC within the preceeding three years. If none have been filed in that period, no such documents need be provided. The present wording has, however, misled some reporting persons into believing that all specified documents filed at any time within the previous three years must be submitted. To prevent this problem from arising, the phrase "within the three years prior to the date of filing of this notification" will be deleted.

Appendix to Part 803 [Amended]

Revised item 4(a) on the Form (Part 803-Appendix) would read as follows:

4. * * *

(a) all of the following filed with the United States Securities and Exchange Commission (or to be contemporaneously filed in connection with this acquisition): the most recent proxy statement, most recent Form 10-K, all Forms 10-Q and 8-K filed since the end of the period reflected by the most recent Form 10-K, any registration statement filed in connection with the transaction for which notification is being filed and, if the acquisition is a tender offer, schedule 14D-1; alternatively, if the person filing notification does not have copies of responsive documents readily available, identification of such documents and citation to date and place of filing will constitute compliance;

* * * * *

By direction of the Commission.

Carol M. Thomas,
Secretary.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[A-9-FRL-1890-6]

Approval and Promulgation of Implementation Plans; State of California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: Part D of the Clean Air Act, as amended in 1977, requires that states revise their State Implementation Plan (SIP) for all areas that have not attained the National Ambient Air Quality Standards (NAAQS). As part of California's control strategy for attainment of the NAAQS for ozone (O₃), the State has revised its SIP to require additional control of volatile organic compounds (VOCs) in areas which are nonattainment for ozone. These revisions to the State's SIP control VOCs emitted from certain industrial sources, including sources covered by EPA's Group II Control Techniques Guideline (CTG) documents.

The EPA invites public comments on these revisions, the identified deficiencies, the suggested corrections and associated proposed deadlines, and whether these revisions should be approved, disapproved or conditionally approved, especially with respect to the requirements of Part D of the Act.

DATES: Comments must be received by September 28, 1981.

ADDRESSES: Comments may be sent to: Regional Administrator, Attn: Air & Hazardous Materials Division, Air Programs Branch, Stationary Source Section, Environmental Protection Agency, Region IX, 215 Fremont St., San Francisco, CA 94105.

Copies of the proposed revisions and EPA's associated Evaluation Report are contained in document file NAP-CA-33 and are available for public inspection during normal business hours at the EPA Region IX office at the above address and at the following locations: California Air Resources Board, 1102 "Q" St., P.O. Box 2815, Sacramento, CA 95812.

Public Information Reference Unit, Room 2404 (EPA Library), 401 "M" St. S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Wallace Woo, Chief, Stationary Source Section, Air Programs Branch, Air &