[Billing Code 6750-01P]

FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rules.

SUMMARY: The Federal Trade Commission is amending the premerger notification rules, which require the parties to certain mergers or acquisitions to file reports with the Commission and with the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice and to wait a specified period of time before consummating such transactions, pursuant to Section 7A of the Clayton Act. The filing and waiting period requirements enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. The rule amendments are necessary to address public comments regarding the Interim Rules published February 1, 2001, and will increase the clarity and improve the effectiveness of the rules and the Notification and Report Form.

DATES: These final rules are effective [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Marian R. Bruno, Assistant Director, Karen E. Berg, Attorney, or B. Michael Verne, Compliance Specialist, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. Telephone: (202) 326-3100.

SUPPLEMENTARY INFORMATION:

On February 1, 2001, the Commission published Interim and Proposed Rules amending the Hart-Scott-Rodino rules ("HSR rules") contained in 16 CFR Parts 801, 802 and 803. The Interim Rules took effect upon publication and implemented amendments to Section 7A of the Clayton Act enacted on December 21, 2000 ("2000 Amendments"). The Proposed Rules set forth other changes improving and updating the HSR rules and were revised and made final effective April 17, 2002 (67 FR 11898). Interim Rule 802.21 was revised and made final in a separate rulemaking effective February 2, 2002 (67 FR 11904).

Both sets of rules invited public comments. The Commission received seventeen public comments addressing the Interim Rules (66 FR 8679) and the Proposed Rules (66 FR 8723). Some comments addressed both sets of rules, others addressed only one or the other. Eight of

the public comments pertained to the Interim Rules and are listed below. In response to these eight comments, the Commission, with the concurrence of the Assistant Attorney General, is promulgating additional amendments and revisions to the Interim Rules and Form, as described below. The Commission also received a number of comments that were not relevant to the changes promulgated by either set of rules. These additional comments remain under consideration and may be addressed by future rulemaking.

The following provided public comments on the Interim Rules to the Commission :

1. Baker & McKenzie (Clanton, David A., et al.) (3/19/01)
3. Ford Motor Company (Bolerjack, Stephen D.) (3/19/01)
8. National Association of Manufacturers ("NAM") (3/29/01)
9. O'Melveny and Myers (Beddow, David T.) (3/19/01)
12. Gibson, Dunn & Crutcher (Pfunder, Malcolm R.) (3/19/01)
13. Section of Antitrust Law of the American Bar Association (3/19/01)
15. Skadden, Arps, Slate, Meagher & Flom, LLP (Stoll, Neal R. Esq., et al.) (3/19/01)
16. Kirkland & Ellis (Sonda, James and Jachino, Dani) (3/19/01)

Part 801--Coverage Rules

Section 801.1(h): Notification threshold

The Commission is adopting the Interim Rule as final with an edit for clarification purposes, as described in the following discussion.

BACKGROUND INFORMATION TO § 801.1(h)

The Commission received six comments addressing the notification thresholds implemented by the Interim Rules. Comment 3 asserted that the dollar amount thresholds do not reflect levels of competitive significance of an acquisition and recommended their elimination. It also stated that the Statement of Basis and Purpose ("SBP") accompanying the Interim Rules offered no reason why these dollar amounts might reflect levels of acquisition that deserve agency review. Comments 3 and 8 recommended elimination of the $100 million and $500 million notification thresholds, with retention of the remaining three thresholds. Comments 13 and 15 advocated a return to the 1978 notification thresholds with only a change from $15 million to $50 million as the lowest threshold, citing as justification the same concerns indicated in Comments 3 and 8.

As explained in the SBP accompanying the Interim Rules and below, the Commission believes that these dollar thresholds are an effective solution to administrative problems relating to filing fees that parties and the agencies would otherwise face, and also that these thresholds impose little burden on parties. Thus, the Commission believes that these thresholds are appropriate

and should be retained.

The HSR statute provides that an acquisition is reportable if, as a result of the acquisition, the acquirer will hold voting securities of the acquired person valued in excess of $50 million. Under the statute, once an acquirer holds voting securities valued at more than $50 million, any additional purchase of even one voting share is reportable. As the antitrust agencies recognized in the original rulemaking proceeding in 1978, this provision would result in far more filings than are needed for effective antitrust review. At the same time, as the acquirer's holdings in the company continue to increase in size through subsequent transactions, the agencies must have some opportunities to review the later transactions. That is, there must be some points (thresholds) where these additional acquisitions become reportable.

In 1978, the agencies adopted $15 million, 15 percent, 25 percent, and 50 percent as thresholds requiring reporting of acquisitions. The 50 percent threshold is self-evident: it is the point where the acquirer attains control, as defined in the Rules, and at least veto power. The $15 million threshold reflected the basic statutory threshold for filing. The other thresholds were chosen as intermediate points representing substantial additional ownership and, often, additional practical control. At the same time, the agencies also promulgated Section 802.21 of the HSR rules to allow additional voting securities acquisitions between these thresholds to go unreported. Intermediate thresholds and Section 802.21 thus serve the interests of both the agencies and the parties, enabling the agencies to allow small minority acquisitions to proceed even where the transfer of a more significant minority interest between the parties might be of concern.

In light of the 2000 Amendments, the Commission reconsidered the appropriate Section 801.1(h) thresholds, recognizing that $50 million should be the lowest reporting threshold and 50 percent (if valued at greater than $50 million) the highest. The Commission then addressed what additional thresholds, if any, to implement. As with the 1978 Rules, it was readily apparent that intermediate thresholds are desirable. However, as outlined in the SBP that accompanied the Interim Rules, using only percentage notification thresholds would create administrative problems for both filers and the agencies. Section 802.21 allows an acquiring person in a voting securities acquisition -- assuming it has crossed the notification threshold for which it filed within a year of the end of its waiting period -- five years to acquire up to the *next* notification threshold, without another filing obligation. Thus, under Section 802.21, an acquiring person could file, indicate the 25 percent threshold, and as long as it crossed that threshold no more than a year after the end of its waiting period, take up to five years to acquire up to 49.9 percent[1] of the same issuer's voting stock without refiling, possibly crossing another

[1] For simplicity, decimal percentages are expressed herein in tenths. In reality, by indicating the 25 percent notification threshold, any number of shares representing up to, but not meeting or exceeding 50 percent, could be acquired.

post-February 1, 2001 filing fee threshold in the process.

The HSR Act, as amended, requires that an acquiring person pay a certain fee based on the value of the assets and voting securities it holds as a result of an acquisition. This means that, if the prior thresholds were retained, the acquiring person who filed to acquire 25 percent of an issuer's voting securities and paid the fee that corresponds to the value of 25 percent of those securities, could acquire the 25 percent, and acquire up to an additional 24.9 percent within five years, without filing or paying any additional fee. In this example, when acquiring person A plans to acquire 25 percent in year one, but may acquire up to 49 percent, what fee should it pay? Similarly, if, as several comments suggest, the notification thresholds were $50 million, 25 percent, and 50 percent, what fee should A pay if filing for the $50 million threshold where that filing would enable it to buy 24.9 percent, worth well over $500 million? Should the determination turn on A's intent? How would that intent be ascertained? What if its intent later changes?

The following scenario illustrates how retaining the percentage thresholds would lead to inequitable treatment for similarly situated filers. If a person filed notification at the 25 percent notification threshold to make open market purchases but did not know precisely how many shares above that threshold it intended to acquire, its fee would be based on the value of 25 percent of the issuer's voting stock. If that percentage were valued at $90 million, the fee paid would be $45,000, even if ultimately 30 percent, valued at $108 million, were acquired. On the other hand, if a person filed notification based on an agreement to acquire 30 percent of the same issuer's voting stock, valued at $108 million, a filing fee of $125,000 would be required. The substance of the acquisitions is exactly the same, but the structure penalizes the filer that is able to report with greater specificity the amount of voting securities it will hold.

The approach the Commission is adopting in these Final Rules retains Section 802.21 and the concept of allowing subsequent acquisitions without repeated filings up to the next threshold. It adopts thresholds that provide for additional review from time to time as the acquirer obtains a substantially larger investment in the acquired company, while exempting smaller additional acquisitions. It assures that notification of all reportable acquisitions and the Congressionally-mandated fee are simultaneously received, without requiring the firms or the agency to examine fine or elusive distinctions in the intent of the acquiring person. A number of informal comments received from affected parties during preparation of the Interim Rules suggested that the approach adopted here would be the most practical and sensible means of providing for intermediate thresholds. While a number of formal comments criticized the dollar thresholds, it is of note that none of them suggested an alternative approach that would also solve the administrative/filing fee questions raised in the SBP to the Interim Rules.

Several of the comments noted that if voting securities already held increase in value to an amount greater than the next dollar notification threshold, even a very small (and presumably

insignificant from an antitrust perspective) acquisition of additional shares would trigger a new filing. The Commission carefully considered these comments and it believes, based on its own experience with filings received over the last several fiscal years as well as extensive input from the private bar prior to implementing the new thresholds, that occurrence of such filing scenarios will be rare. Multiple filings would not be required for mergers and consolidations (where 100 percent of the issuer's voting securities are acquired at once), nor for asset acquisitions (where notification thresholds are inapplicable). The only situation in which multiple filings potentially may be required is where an acquiring person makes multiple acquisitions of voting stock of a large issuer and that acquiring person is unable accurately to estimate what the value of its holdings in that issuer ultimately will be. Some filers may prefer in such circumstances to indicate a higher threshold than that which will be exceeded with the initial acquisition and thereby avoid the trouble and expense of preparing another filing. For example, a party making an $80 million acquisition of a small percentage of an issuer's stock but contemplating a subsequent acquisition may opt to file for the $100 million or $500 million threshold and avoid multiple filings. Another party contemplating an $80 million acquisition of a small percentage of an issuer's stock but not expecting to make additional acquisitions would likely opt to file for the $50 million threshold and pay the lowest filing fee.

Comment 16 asserted in addition that the complexity of valuing a transaction to determine which threshold will be crossed creates a significant burden on the parties to the transactions. The acquiring person has always been confronted with accurately determining the value of assets and/or voting securities to be held as a result of an acquisition. This requirement has not changed, although its significance has increased with the creation of a tiered filing fee system based on size of transaction. The comment also noted that while some administrative problems have been solved by using the fee thresholds as filing thresholds, other problems have been created. However, the comment did not outline specific problems other than the multiple filing problem concerning an increase in value of voting securities followed by a small additional purchase -- a situation that the agencies believe is both rare and avoidable.

As to the initial reportable transaction itself, where a transaction is determined to be reportable, the acquiring person can make a valuation at the time of filing, using the appropriate methodology specified in the rules, and "lock in" the value of assets or voting securities that will be held as a result of the acquisition. This value, as long as it has been determined in good faith, may be relied on for purposes of determining the appropriate filing fee and notification threshold for this acquisition, even if events such as a sharp increase in market price or post-closing adjustments subsequently cause the final acquisition price to exceed a threshold higher than that indicated in the filing. Accordingly, the retention of the multiple dollar thresholds should not impose a substantial additional burden on a significant number of persons filing notification.

Comment 9 asserted that multiple dollar thresholds for asset acquisitions are unnecessary. Notification thresholds are inapplicable to asset acquisitions, and, in order to make that clear,

one change is being made to § 801.1(h) of the Interim Rules. The change removes the reference to assets in connection with notification thresholds. The § 801.1(h) notification thresholds, unlike the statutory filing fee thresholds, exist solely for the purpose of exempting subsequent acquisitions of voting securities that do not result in the acquiring person holding voting securities meeting or exceeding a higher notification threshold than that met or exceeded in a previous acquisition of voting securities, as provided in Rule 802.21.

The mention of "assets" in Interim Rule 801.1(h) could cause some confusion in the application of § 802.21 to acquisitions of voting securities when a previous acquisition of both assets and voting securities has been made and reported. Consider the following example: A acquires voting securities of B valued at $60 million and assets of B valued at $60 million. A would file indicating the $50 million notification threshold since it would hold less than $100 million in B voting securities, but would pay a $125,000 filing fee because it would hold in excess of $100 million in voting securities and assets of B as a result of the acquisition. A now wishes to make an additional acquisition of B voting securities. The § 802.21 exemption, which applies only to voting securities, exempts a subsequent acquisition of voting securities only when a prior *notification threshold* has been exceeded by an earlier acquisition of voting securities and the subsequent acquisition will not cause the acquiring person to meet or exceed a greater notification threshold. Thus, it is incorrect to conclude that A earlier crossed the $100 million notification threshold; rather, it only crossed the $50 million notification threshold, and whether it must file a new notification depends on whether the additional acquisition results in A holding $100 million or more of B's voting securities. The removal of the reference to assets in § 801.1(h) should clarify this point.

The Notification and Report Form is also being amended to note that Item 2(c), requiring the acquiring person to report the notification threshold which is being filed for, is applicable only to acquisitions of voting securities. Filing persons should be aware that the determination of the appropriate filing fee remains unchanged. The filing fee is still calculated based on the total aggregate value of *voting securities and assets* that will be held as a result of the acquisition. Additionally, the reference to § 801.1(h)(1) in
§ 801.21 (securities and cash not considered assets when acquired) is removed as it is no longer applicable.

After careful consideration of the options and of the comments regarding notification thresholds, the Commission has determined that the notification thresholds promulgated by the Interim Rules are appropriate and the Final Rule will be implemented with those thresholds.

Part 803--Transmittal Rules

Section 803.9 Filing fee

The Commission received three comments concerning Section 803.9. Comment 1 objected to the fact that the filing fee for an acquisition of voting securities of a foreign issuer is based on the entire value of the transaction and may reach $280,000, despite the fact that the U.S. portion of the transaction may be relatively small and the issuer's U.S. presence may measure only slightly over $50 million. The comment proposed an amendment to the rule that would limit filing fees for all acquisitions of foreign assets or voting securities to $45,000 unless more than 50 percent of the transaction's value is attributable to either assets located in the U.S. or to sales in or into the U.S.

Amending Section 803.9 in this fashion would be in direct conflict with the language of the 2000 Amendments, which clearly specifies that the filing fee is based on the aggregate total value of voting securities and assets held as a result of the acquisition.

Comment 13 suggested that examples 4 and 5 to the rule would be more appropriately paired with other rules; however, the Commission believes that the examples explain how the appropriate filing fee is determined and sees no need to remove them from this rule.

Comment 8 claimed that the language of the rule is unclear. It contended that nowhere does the rule state that filing persons must pay a filing fee each time a threshold is crossed. It further stated that only by extremely careful reading and parsing of sentences can one conclude that the agencies apparently want the full fees for crossing each threshold. As the comment does not specify what language is confusing or unclear, it is difficult for the Commission to determine what portion of the rule might need clarification. The language of the rule in its current form unambiguously lays out the filing fee requirements, and since no other comment indicated that the rule is unclear, the Final Rule will be implemented without change except as noted in the following paragraph. Two additional examples are added to further illustrate the application of the rule.

Section 803.9 is amended in the following way: 803.9(c) provides that for a reportable transaction in which the acquiring entity has two ultimate parent entities, both ultimate parent entities are acquiring persons; however, if the responses for both ultimate parent entities would be the same for Items 5 through 8 of the Notification and Report Form, only one filing fee is required in connection with the transaction. The intent of this paragraph was to require only one filing fee for those transactions where the two acquiring persons would have no significant business activities outside of the jointly-controlled acquisition vehicle. Although no comments were received on this point, we have discovered that in some instances such persons may respond differently to Item 6, i.e., the two ultimate parent entities may have different shareholders. To ensure that the intent of this section is implemented, § 803.9(c) is amended to require only that the response to Item 5 be the same for both acquiring persons in order for the transaction to qualify for one filing fee.

It should also be noted that the SBP accompanying the Interim Rules contained a typographical error which omitted the word "not" in the last sentence discussing Section 803.9. The sentence should have read: "It is currently Commission practice to refund filing fees only in such instances, but paragraph (e) is added to codify that practice and give notice that acquiring persons will not receive partial reimbursement of their fee in the event they overvalue a transaction."

Section 803.20: Requests for additional information or documentary material

Comments 12 and 13 correctly pointed out a discrepancy between the SBP and the Interim Rule. The intent was to amend this section to reflect the fact that a second request to an acquired person in a bankruptcy transaction covered by 11 U.S.C. 363(b) does not extend the waiting period. That section of the Bankruptcy Code provides that subsection (e)(2) of Section 7A of the Clayton Act, which deals with how second requests affect the waiting period, shall apply to such bankruptcy transactions in the same manner as subsection (e)(2) applies to a cash tender offer. This was correctly described in the SBP; however, a drafting error in the Interim Rule effected a different result. The Final Rule has been revised to correspond to the intent stated in the SBP. In addition, the example has been revised to more clearly illustrate the application of the rule in the case of a tender offer.

Part 803--Appendix: Premerger Notification and Report Form

Transactions Subject to Foreign Antitrust Reporting Requirements

The Form was amended by the Interim Rules to include a space for reporting persons to indicate whether the filing is subject to foreign antitrust reporting requirements and requests the voluntary submission of the name(s) of any foreign antitrust or competition authority that, based upon the knowledge or belief of the filing person at the time of the filing, has been or will be notified of the proposed transaction and the date or anticipated date of such notification.

Three comments were received regarding this change. Comment 3 stated that the determination of the countries requiring a premerger report is a substantial burden, frequently completed after HSR filings are made. It further argued that the list would be unnecessary in the great majority of filings, which do not receive more substantive review. Comment 8 argued that the listing is unnecessary, and will likely be incomplete, since the exact identity of countries to be notified is not always known at the time of filing.

Comment 13 also indicated that the burden associated with responding to this item may outweigh the probative value to the agencies. It recommended that the voluntary nature of the item be disclosed on the Form so infrequent filers will know without reference to the Instructions that their response is not mandatory. The comment further remarked that despite

the fact that a response to the item is voluntary, the risk is raised that the parties may inadvertently err in their reporting, and that the Commission has given no explanation of the steps that a party must undertake to ensure that the voluntary answer is accurate.

The Commission, as it stated in the SBP accompanying the Interim Rules, believes that early notice of multiple jurisdiction filings will allow the agencies to communicate with foreign counterparts only to the extent that statutorily protected information is not disclosed and, where appropriate, to seek consent of the parties to allow more extensive cooperation between or among antitrust authorities in conducting their investigations. This approach could in many instances reduce the burden that would be placed on the parties in providing duplicative responses to multiple jurisdictions.

The Commission recognizes that numerous foreign jurisdictions may be involved, some of which may not have been identified at the time the parties to a transaction are otherwise prepared to file their notification, and accordingly requests that the filing person *voluntarily* respond to this item based on its knowledge or belief "at the time of the filing." If a filing person chooses to respond, the obligation to provide accurate information is the same as that for any other item on the Form. If the parties answer to the best of their knowledge at the time of filing, it is highly unlikely that any penalty would result if the response later proves to be inaccurate.

Given the voluntary nature of the item, and the instruction that the person filing respond only based on its knowledge at the time of filing, the Commission believes that the potential benefit to the agencies outweighs what would be a very limited burden to the parties. This item will remain on the Form; however, the word "voluntary" in parentheses will be added to the item on the Form itself to ensure that the voluntary nature of the response to this item is clear without reference to the Instructions.

Explanation of Amount Paid / Name of Person Responsible for Fair Market Valuation

The Interim Rules introduced a new item on the Form in which the acquiring person indicates the amount of the fee paid. The acquiring person is further advised that should the fee be based on an amount that differs from the acquisition price, or if the acquisition price is undetermined and may fall within a range that straddles two filing fee thresholds, an explanation of the value reported is required to be submitted with the Form. The explanation should include discussion of adjustments to the acquisition price, a description of any exempt assets and their value, and the valuation method(s) used. In connection with the valuation of the transaction, Item 2(e) was also added, requiring that if the value of the transaction is based in whole or in part on a fair market valuation, the name of the person responsible for that valuation should be provided. The Commission received three comments regarding the attachment of the valuation explanation and the identification of the person responsible for any fair market valuation.

Comment 3 stated that the addition of these items adds additional burden for the parties and asserted that if the agencies have questions about the valuation method, they can always raise them with the reporting person. The comment suggested that there is no need to name the person performing the valuation since an officer of the filing party certifies the accuracy of all of the information in the filing. Comment 8 also noted that the information regarding the method of valuation can be obtained by calling the contact person listed in Item 1(g) of the Form.

Comment 13 asserted that although the agencies might reasonably request an explanation of the valuation to ensure that the proper filing fees are being paid, it is not clear when such disclosure must be provided and how its requirements can be satisfied. It also noted that it is unclear under what circumstances a transaction value might straddle two filing fee thresholds. For example, the comment noted that it is uncertain whether a person filing for a cash tender offer for a minimum condition (i.e., 66 2/3 percent) should be able to file based upon a valuation for the minimum condition being satisfied, or based on the assumption that 100 percent of the shares will be tendered (presumably valued at a higher filing fee threshold). The comment also observed that if the agencies are looking for a responsible person to hold accountable for any errors in the valuation, they can look to the officer who signed the certification and do not need an additional person to be identified as accountable on the Form itself.

The Commission recognizes that with the new fee schedule the valuation of transactions must be more precise than was required in the past. It does not, however, believe that the new items on the Form impose any significant burden beyond that already required to calculate the value of the transaction. When it is not apparent from the purchase agreement why a lower filing fee threshold is being indicated, the required explanation need not be lengthy or highly detailed, but merely a concise description of how the acquiring person arrived at the value it is reporting on the Form. In most cases, this explanation will quickly resolve any valuation issues staff may have identified and will eliminate the need to contact the parties for any further discussion.

The issues surrounding valuation are, and have always been, complex. How the rules governing valuation should be applied to determine the appropriate filing fee has been the subject of individual informal interpretations and widely attended public question and answer sessions. Additionally, several examples were included in § 803.9 to illustrate commonly encountered scenarios. More examples are added to the final version of this rule to address other situations which have been identified as problematic.

To address the specific questions raised by Comment 13, an example of when the value of a transaction may straddle two filing fee thresholds is when the agreed price for an acquisition of non-publicly traded voting securities is $99 million, subject to post-closing adjustments of up to plus or minus $2 million. In this situation, if the acquiring person has a reasonable basis for estimating that the adjustments will be minus $1 million, then the acquisition price is determined and the appropriate filing fee threshold is $50 million. However, since the potential acquisition

price, subject to adjustments, could have exceeded the $100 million threshold, an explanation of why the lower threshold was indicated should be attached (see § 803.9, example 7).

In the case of tender offers, if the offer is for a minimum percentage of the issuer's voting securities, but there is no cap on the offer, the transaction must be valued at the maximum that could be tendered (i.e., 100 percent). If, however, the offer is capped at a fixed amount (i.e., 50 percent plus one share), after which no further shares can be tendered, the value will be that fixed amount, even if the tender offer will be followed by a merger, which will not be reportable under Section 7A(c)(3) (see § 803.9, example 8).

The requirement to provide the name of an individual responsible for any fair market valuation is not intended to circumvent the contact person identified in Item 1(g) of the Form. It is intended, rather, to ensure that the contact person can quickly and easily locate the appropriate person in the event a question is raised by the agencies concerning the valuation. In the Commission staff's experience, the contact person often is not involved in the detailed compilation of the information on the Form, and may require an extended period of time to determine who within the acquiring person is knowledgeable about the information contained in any particular item. Providing the name of the person responsible for this item will ensure that review of the notification is not unduly delayed by valuation issues.

In summary, the Commission does not believe that any new significant burden has been introduced by the addition of these two items and they will remain on the Form submitted with the Final Rules. The agencies will continue to provide assistance in resolving the complex issues surrounding valuation through informal, and, if appropriate, formal interpretation.

Item 2(c) Notification threshold

As noted in the SBP for § 801.1(h), the Notification and Report Form is also being amended to clarify that Item 2(c), requiring the acquiring person to report the notification threshold that is being filed for, is applicable only to acquisitions of voting securities.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small businesses, except where the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

Because of the size of the transactions necessary to invoke a Hart-Scott-Rodino filing, the premerger notification rules rarely, if ever, affect small businesses. Indeed, the recent amendments to Section 7A of the Clayton Act, which these rule amendments implement, were

intended to reduce the burden of the premerger notification program by exempting all transactions valued at $50 million or less. Further, none of the rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA"), 44 U.S.C. 3501-3520, requires agencies to seek and obtain Office of Management and Budget ("OMB") approval before undertaking a "collection of information" directed to ten or more persons. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The HSR premerger notification rules and Form contain information collection requirements as defined by the PRA that have been reviewed and approved by OMB (preceding these latest HSR rule amendments)[2] under OMB Control No. 3084-0005. The Final Rules implement amendments to Section 7A of the Clayton Act, which reduce the burden of the premerger reporting program by exempting all transactions valued at $50 million or less. Because the Final Rules do not affect the information collection requirements of the premerger notification program as implemented by the Interim Rules, they have been not been resubmitted to OMB for review. The Supporting Statement that accompanied the Request for OMB Review states that the total burden imposed on the members of the public subject to the requirements of the Act, including the Final Rules, is estimated to be 192,089 hours per year (based on fiscal year 2000 filings). This constitutes an approximate 47 percent reduction from what the burden estimate would be absent the final rules and based on the number of fiscal year 2000 filings.

List of Subjects in 16 CFR Parts 801 and 803

Antitrust, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR parts 801 and 803 as follows:

PART 801 - COVERAGE RULES

1. The authority citation for part 801 continues to read:

    Authority: 15 U.S.C. 18a(d).

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[2] OMB clearance was received on May 14, 2001 and extends through May 31, 2004.

2. Amend § 801.1 by revising paragraph (h) to read as follows:

Section 801.1 Definitions

* * * * *

(h) *Notification threshold.* The term "notification threshold" means:

(1) An aggregate total amount of voting securities of the acquired person valued at greater than $50 million but less than $100 million;

(2) An aggregate total amount of voting securities of the acquired person valued at $100 million or greater but less than $500 million;

(3) An aggregate total amount of voting securities of the acquired person valued at $500 million or greater;

(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than $1 billion; or

(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than $50 million.

* * * * *

3. Amend § 801.21 by revising the introductory text to read as follows:

Section 801.21 Securities and cash not considered assets when acquired.

For purposes of determining the aggregate total amount of assets under Section 7A(a)(2) and § 801.13(b):

* * * * *

PART 803 - TRANSMITTAL RULES

4. The authority citation for part 803 continues to read:
Authority: 15 U.S.C. 18a(d).

5. Amend § 803.9 by adding examples 7 and 8 to paragraph (a) and by revising paragraph (c)

to read as follows:

§ 803.9 Filing fee.

* * * * *

(a) * * *

<u>Examples:</u>

* * *

7. "A" intends to acquire 20 percent of the voting securities of B, a non-publicly traded issuer. The agreed upon acquisition price is $99 million subject to post-closing adjustments of up to plus or minus $2 million. "A" estimates that the adjustments will be minus $1 million. In this example, since "A" is able in good faith to reasonably estimate the adjustments to the agreed-on price, the acquisition price is deemed to be determined and the appropriate filing fee threshold is $50 million. Even if the post-closing adjustments cause the final price actually paid to exceed $100 million, "A" would be deemed to hold $98 million in B voting securities as a result of this acquisition. Note, however, since the potential acquisition price subject to adjustments could have exceeded the $100 million threshold (<u>e.g.</u>, "straddles two filing fee thresholds"), an explanation of why the lower threshold was indicated should be attached. Also note that any additional acquisition by "A" of B voting stock (if the value of the stock currently held by "A" is $100 million or more) will cause "A" to cross the $100 million threshold and another filing and the appropriate fee will be required.

8. "A" intends to make a cash tender offer for a minimum of 50 percent plus one share of the voting securities of B, a non-publicly traded issuer, but will accept up to 100 percent of the shares if they are tendered. There are 12 million shares of B voting stock outstanding and the tender offer price is $10 per share. In this instance, since there is no cap on the number of shares that can be tendered, the value of the transaction will be the value of 100 percent of B's voting securities, and "A" must pay the $125,000 fee for the $100 million filing fee threshold. Note that if the tender offer had been for a maximum of 50 percent plus one share the value of the transaction would be $60 million, and the appropriate fee would be $45,000, based on the $50 million filing fee threshold. This would be true even if the tender offer were to be followed by a merger which would be exempt under Section 7A(c)(3),

* * *

(c) For a reportable transaction in which the acquiring entity has two ultimate parent entities, both ultimate parent entities are acquiring persons; however, if the responses for both ultimate

parent entities would be the same for item 5 of the Notification and Report Form, only one filing fee is required in connection with the transaction.

* * * * *

6. Amend § 803.20 by revising paragraphs (c)(1) and (c)(2) and the example thereto, to read as follows:

§ 803.20 Requests for additional information or documentary material.

* * * * *

(c) Waiting period extended. (1) During the time period when a request for additional information or documentary material remains outstanding to any person other than either (i) in the case of a tender offer, the person whose voting securities are sought to be acquired by the tender offeror (or any officer, director, partner, agent or employee thereof), or (ii) in the case of an acquisition covered by 11 U.S.C. 363(b), the acquired person, the waiting period shall remain in effect, even though the waiting period would have expired (see § 803.10(b)) if no such request had been made.

(2) A request for additional information or documentary material to any person other than either (i) in the case of a tender offer, the person whose voting securities are being acquired pursuant to the tender offer (or any officer, director, partner, agent or employee thereof), or (ii) in the case of an acquisition covered by 11 U.S.C. 363(b), the acquired person, shall in every instance extend the waiting period for a period of 30 (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 10) calendar days from the date of receipt (as determined under § 803.10) of the additional information or documentary material requested.

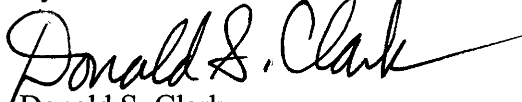
Example: Acquiring person "A" makes a non-cash tender offer for voting securities of corporation "X", and files notification. Under § 801.30, the waiting period begins upon filing by "A," and "X" must file within 15 days thereafter (10 days if it were a cash tender offer). Assume that before the end of the waiting period, the Assistant Attorney General issues a request for additional information to "A" and "X." Since the transaction is a non-cash tender offer, the waiting period is extended for 30 days (10 days if it were a cash tender offer) beyond the date on which "A" responds. Note that under § 803.21, even though the waiting period is not affected by the second request to "X" or by "X" supplying the requested information, "X" is obliged to respond to the request within a reasonable time. Nevertheless, the Federal Trade Commission and Assistant Attorney General could, notwithstanding the pendency of the request for additional information, terminate the waiting period *sua sponte* pursuant to § 803.11(c).

* * * * *

7. Revise the Appendix to part 803 to read as follows:

[INSERT FORM HERE]

By direction of the Commission.



Donald S. Clark
Secretary

TRANSACTION NUMBER ASSIGNED

16 C.F.R. Part 803 - Appendix
NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

Approved by OMB
3084-0005
Expires 08/31/02

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

•• Attach the Affidavit required by § 803.5 to this page.

FEE INFORMATION

AMOUNT PAID $________________

In cases where your filing fee would be higher if based on acquisition price or where the acquisition price is undetermined to the extent that it may straddle a filing fee threshold, attach an explanation of how you determined the appropriate fee *(acquiring persons only)*.

Attachment Number ______________

TAXPAYER IDENTIFICATION NUMBER ______________________
or SOCIAL SECURITY NUMBER of payer ______________________
(acquiring person (and payer if different from acquiring person))

CHECK ATTACHED ☐ MONEY ORDER ATTACHED ☐

WIRE TRANSFER ☐ CONFIRMATION NO.______________________

FROM: NAME OF INSTITUTION ______________________

NAME OF PAYER (if different from PERSON FILING) ______________________

IS THIS A CORRECTIVE FILING? ☐ YES ☐ NO

IS THIS ACQUISITION SUBJECT TO FOREIGN FILING REQUIREMENTS? ☐ YES ☐ NO
If YES, list jurisdictions: *(voluntary)* ______________________

IS THIS ACQUISITION A CASH TENDER OFFER? ☐ YES ☐ NO | BANKRUPTCY? ☐ YES ☐ NO

DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? *(Grants of early termination are published in the Federal Register AND on the FTC web site www.ftc.gov)*
☐ YES ☐ NO

ITEM 1 – PERSON FILING

1(a) NAME and
HEADQUARTERS ADDRESS
of PERSON FILING

1(b) PERSON FILING NOTIFICATION IS
☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE PERSON FILING NOTIFICATION
☐ Corporation ☐ Partnership ☐ Other *(Specify)*: ______________________

1(d) DATA FURNISHED BY
☐ calendar year ☐ fiscal year *(specify period)* ______________ (month/year) to ________________ (month/year)

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty of not more than $11,000 for each day during which such person is in violation of 15 U.S.C. §18a.

All information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

Filing - Complete and return *two* copies (with one original affidavit and certification and one set of documentary attachments) of this Notification and Report Form to: Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. *Three* copies (with one set of documentary attachments) should be sent to: Director of Operations and Merger Enforcement, Antitrust Division, Department of Justice, Patrick Henry Building, 601 D Street, N.W., Room #10013, Washington, D.C. 20530. (For FEDEX airbills to the Department of Justice, do not use the 20530 zip code; use zip code 20004.)

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 39 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office,
H-303
Federal Trade Commission
Washington, DC 20580

Office of Information and
Regulatory Affairs,
Office of Management and Budget
Washington, DC 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. That number is 3084-0005, which also appears in the upper right-hand corner of the first page of this form.

NAME OF PERSON FILING NOTIFICATION	DATE

1(e) PUT AN X IN THE APPROPRIATE BOX AND GIVE THE NAME AND ADDRESS OF ENTITY FILING NOTIFICATION (if other than ultimate parent entity)

☐ NA

☐ This report is being filed on behalf of a foreign person pursuant to § 803.4.

☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME OF ENTITY FILING NOTIFICATION	ADDRESS

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS OR VOTING SECURITIES ARE BEING ACQUIRED IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

PERCENT OF VOTING SECURITIES HELD BY EACH ENTITY IDENTIFIED IN ITEM 1(a)

1(g) IDENTIFICATION OF PERSON TO CONTACT REGARDING THIS REPORT

NAME OF CONTACT PERSON	
TITLE	
FIRM NAME	
BUSINESS ADDRESS	
TELEPHONE NUMBER	
FAX NUMBER	
E-MAIL ADDRESS	

(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS. (See § 803.20(b)(2)(iii))

NAME OF CONTACT PERSON	
TITLE	
FIRM NAME	
BUSINESS ADDRESS	
TELEPHONE NUMBER	
FAX NUMBER	
E-MAIL ADDRESS	

ITEM 2

2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS	LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

2(b) THIS ACQUISITION IS *(put an X in all the boxes that apply)*

☐ an acquisition of assets
☐ a merger (see § 801.2)
☐ an acquisition subject to § 801.2(e)
☐ a formation of a joint venture of other corporation (see § 801.40)
☐ an acquisition subject to § 801.30 (*specify type*)
☐ other (*specify*) ____________________
☐ a consolidation (see § 801.2)
☐ an acquisition of voting securities
☐ a secondary acquisition
☐ an acquisition subject to § 801.31

2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED *(acquiring person only in an acquisition of voting securities)*

☐ $50 million ☐ $100 million ☐ $500 million ☐ 25% (see Instructions) ☐ 50%

2(d)(i) VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION	(ii) PERCENTAGE OF VOTING SECURITIES	(iii) VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION	(iv) AGGREGATE TOTAL VALUE
$	%	$	$

NAME OF PERSON FILING NOTIFICATION	DATE

2(e) If aggregate total value in 2(d)(iv) is based in whole or in part on a fair market valuation pursuant to § 801.10(c)(3), identify the person or persons responsible for making the valuation *(acquiring persons only)*.

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

NAME OF PERSON FILING NOTIFICATION	DATE

3(b)(i) ASSETS TO BE ACQUIRED (to be completed only for asset acquisitions)

3(b)(ii) ASSETS HELD BY ACQUIRING PERSON

3(c) VOTING SECURITIES TO BE ACQUIRED

3(c)(i) LIST AND DESCRIPTION OF VOTING SECURITIES AND LIST OF NON-VOTING SECURITIES:

3(c)(ii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY:

3(c)(iii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY BEING ACQUIRED:

NAME OF PERSON FILING NOTIFICATION	DATE

3(c)(iv) IDENTITY OF PERSONS ACQUIRING SECURITIES:

3(c)(v) DOLLAR VALUE OF SECURITIES IN EACH CLASS BEING ACQUIRED:

3(c)(vi) TOTAL NUMBER OF EACH CLASS OF SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION:

3(d) SUBMIT A COPY OF THE MOST RECENT VERSION OF CONTRACT OR AGREEMENT (or letter of intent to merge or acquire)

DO NOT ATTACH THIS DOCUMENT TO THIS PAGE ATTACHMENT OR REFERENCE NUMBER OF CONTRACT OR AGREEMENT ____________

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 4 PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (See Item by Item instructions). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

4(a) DOCUMENTS FILED WITH THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION	ATTACHMENT OR REFERENCE NUMBER

4(b) ANNUAL REPORTS, ANNUAL AUDIT REPORTS, AND REGULARLY PREPARED BALANCE SHEETS	ATTACHMENT OR REFERENCE NUMBER

4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS	ATTACHMENT OR REFERENCE NUMBER

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5 (See "References" listed in the General Instructions to the Form. Refer to the *North American Industry Classification System-United States, 1997* (*1997 NAICS Manual*) for the 6-digit (NAICS) industry codes. Refer to the *1997 Numerical List of Manufactured and Mineral Products* (EC97M31R-NL) for the 7-digit product class codes and the 10-digit product codes. Report revenues for the 7-digit product class codes and 10-digit product codes using the codes in the columns labeled "Product code." For further information on NAICS-based codes visit the www.census.gov web site.)

5(a) DOLLAR REVENUES BY INDUSTRY

6-DIGIT INDUSTRY CODE	DESCRIPTION	1997 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(i) DOLLAR REVENUES BY MANUFACTURED PRODUCTS

10-DIGIT PRODUCT CODE	DESCRIPTION	1997 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(ii) PRODUCTS ADDED OR DELETED

DESCRIPTION (10-DIGIT PRODUCT CODE)	ADD	DELETE	YEAR OF CHANGE	TOTAL DOLLAR REVENUES

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS

7-DIGIT PRODUCT CLASS	DESCRIPTION	YEAR I___________I TOTAL DOLLAR REVENUES

(Item 5(b)(iii) continued on page 10)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS - CONTINUED

7-DIGIT PRODUCT CLASS	DESCRIPTION	YEAR I____________I TOTAL DOLLAR REVENUES

ITEM 5(c) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY

6-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR I____________I TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

5(d) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE OR OTHER CORPORATION

5(d)(i) NAME AND ADDRESS OF THE JOINT VENTURE OR OTHER CORPORATION

5(d)(ii)

(A) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION HAS AGREED TO MAKE

(B) DESCRIPTION OF ANY CONTRACTS OR AGREEMENTS

(C) DESCRIPTION OF ANY CREDIT GUARANTEES OR OBLIGATIONS

(D) DESCRIPTION OF CONSIDERATION WHICH EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION WILL RECEIVE

5(d)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE OR OTHER CORPORATION WILL ENGAGE

5(d)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 7-DIGIT PRODUCT CLASS (manufacturing)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

6(b) SHAREHOLDERS OF PERSON FILING NOTIFICATION

NAME OF PERSON FILING NOTIFICATION | DATE

6(c) HOLDINGS OF PERSON FILING NOTIFICATION

ITEM 7 DOLLAR REVENUES

7(a) 6-DIGIT NAICS CODE AND DESCRIPTION

7(b) NAME OF EACH PERSON WHICH ALSO DERIVED DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

7(c) GEOGRAPHIC MARKET INFORMATION

ITEM 8 PRIOR ACQUISITIONS (to be completed by acquiring person only)

NAME OF PERSON FILING NOTIFICATION	DATE

CERTIFICATION

This **NOTIFICATION AND REPORT FORM,** together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

NAME (Please print or type)	TITLE
SIGNATURE	DATE

Subscribed and sworn to before me at the
City of ____________________, State of __________________

this ________________________day of ________________________, the year _____________

Signature ____

My Commission expires __________________________________

[SEAL]