

By direction of the Commission.

Dated: January 24, 2001.

Donald S. Clark,
Secretary.

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FEDERAL TRADE COMMISSION

16 CFR Part 2

Rules of Practice

AGENCY: Federal Trade Commission (FTC).

ACTION: Interim rule with request for comments.

SUMMARY: The FTC is amending its Rules of Practice to incorporate procedures for internal agency review of requests for additional information or documentary material relating to transactions subject to the premerger notification requirements of Section 7A of the Clayton Act. These procedures are necessary to implement recent amendments to Section 7A. The procedures will ensure that petitions for such review are handled in accordance with the statute's requirements.

DATES: These rules are effective February 1, 2001. Comments should be filed no later than March 19, 2001.

ADDRESSES: Address all comments concerning these rules to Secretary, Federal Trade Commission, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580, or by e-mail to hsr-rules@ftc.gov.

FOR FURTHER INFORMATION CONTACT: Christian S. White, Assistant General Counsel, Room 592, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. Telephone: (202) 326-32424.

SUPPLEMENTARY INFORMATION: On December 21, 2000, the President signed into law certain amendments to Section 7A of the Clayton Act, 15 U.S.C. 18a, which requires that parties to certain mergers or acquisitions file reports with the FTC and with the Department of Justice and to wait a specified period of time before consummating such a transaction, so that the agencies can determine whether the transaction may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. *See* Pub. L. 106-553, 114 Stat. 2762 ("2000 Amendments"). The statutory amendments are effective on February 1, 2001.

In a separate **Federal Register** document, the Commission is adopting interim implementing amendments to

its rules and notification form for premerger review under Section 7A (16 CFR Parts 801, 802, and 803) and, in another **Federal Register** document, is proposing additional rule amendments.

In this **Federal Register** document, the Commission, in accordance with Section 7A(e)(1)(B) of the Clayton Act, 15 U.S.C. 18a(e)(1)(B), as added by the 2000 Amendments, is adopting administrative procedures for persons seeking to obtain internal agency review of requests for additional information or documentary material ("second requests") relating to proposed transactions for which premerger notification is required under Section 7A. These "second request" review procedures will be incorporated into previously reserved Subpart B of Part 2 of the Commission's Rules of Practice and will implement the statute's requirement that a senior agency official be designated for the review, upon petition, of a "second request" to determine whether it is unreasonably cumulative, unduly burdensome, or cumulative, or whether the petitioner has substantially complied with the request.

Administrative Procedure Act

These procedures are exempt from the notice-and-comment requirements of the Administrative Procedure Act as rules of agency organization, procedure or practice. *See* 5 U.S.C. 553(b)(A). Nonetheless, the Commission seeks public comment on these procedures and reserves the right to amend them based on its experience and on any comments that may be received after the procedures take effect.

Regulatory Flexibility Act

The requirements for initial and final regulatory analyses under the Regulatory Flexibility Act, 5 U.S.C. 601-612, do not apply to these procedural rules, because they will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Under the recent statutory amendments to Section 7A of the Clayton Act, transactions valued at less than \$50 million are exempted, and these "second request" review procedures do not expand or otherwise alter the coverage of the premerger notification rules in a way that would affect its impact, if any, on small business. Accordingly, the Commission certifies that these procedural 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

These procedural rules do not contain any record maintenance, reporting, or disclosure requirements that would constitute agency "collections of information" that would have to be submitted for clearance and approval by the Office of Management & Budget under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3518.

List of Subjects in 16 CFR Part 2

Administrative practice and procedure.

Accordingly, for the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR part 2 as follows:

PART 2—NONADJUDICATIVE PROCEDURES

1. Revise the authority citation for part 2 to read as follows:

Authority: 15 U.S.C. 46, unless otherwise noted.

2. Add subpart B to read as follows:

Subpart B—Petitions Filed Under Section 7A of the Clayton Act, as Amended, for Review of Requests for Additional Information or Documentary Material

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

§ 2.20 Petitions for review of requests for additional information or documentary material.

(a) For purposes of this section, "second request" refers to a request for additional information or documentary material issued under 16 CFR 803.20.

(b) *Second request procedures.* (1) *Notice.* Every request for additional information or documentary material issued under 16 CFR 803.20 shall inform the recipient(s) of the request that the recipient has a right to discuss modifications or clarifications of the request with an authorized representative of the Commission. The request shall identify the name and telephone number of at least one such representative.

(2) *Second request conference.* An authorized representative of the Commission shall invite the recipient to discuss the request for additional information or documentary material soon after the request is issued. At the conference, the authorized representative shall discuss the competitive issues raised by the proposed transaction, to the extent then known, and confer with the recipient about the most effective way to obtain information and documents relating to the competitive issues raised. The

conference will ordinarily take place within 5 business days of issuance of the request, unless the recipient declines the invitation or requests a later date.

(3) *Modification of requests.* The authorized representative shall modify the request for additional information or documentary material, or recommend such modification to the responsible Assistant Director of the Bureau of Competition, if he or she determines that a less burdensome request would be consistent with the needs of the investigation. A request for additional information or documentary material may be modified only in writing signed by the authorized representative.

(4) *Review of request decisions.* (i) If the recipient of a request for additional information or documentary material believes that compliance with portions of the request should not be required and the recipient has exhausted reasonable efforts to obtain clarifications or modifications of the request from an authorized representative, the recipient may petition the General Counsel to consider and rule on unresolved issues. Such petition shall be submitted by letter to the General Counsel with a copy to the authorized representative who participated in the second request conference held under paragraph (b)(3) of this section. The petition shall not, without leave of the General Counsel, exceed 500 words, excluding any cover, table of contents, table of authorities, glossaries, proposed form of relief and

any appendices containing only sections of statutes or regulations, and shall address petitioner's efforts to obtain modification from the authorized representative.

(ii) Within 2 business days after receiving such a petition, the General Counsel shall set a date for a conference with the petitioner and the authorized representative.

(iii) Such conference shall take place within 7 business days after the General Counsel receives the petition, unless the request recipient agrees to a later date or declines to attend a conference.

(iv) Not later than 3 business days before the date of the conference, the petitioner and the authorized representative may each submit memoranda regarding the issues presented in the petition. Such memoranda shall not, without leave of the General Counsel, exceed 1250 words, excluding any cover, table of contents, table of authorities, glossaries, proposed form of relief and appendices containing only sections of statutes or regulations. Such memoranda shall be delivered to counsel for the other participants on the same day they are delivered to the General Counsel.

(v) The petitioner's memorandum shall include a concise statement of reasons why the request should be modified, together with proposed modifications, or a concise explanation why the recipient believes it has substantially complied with the request for additional information or documentary material.

(vi) The authorized representative's memorandum shall include a concise statement of reasons why the petitioner's proposed modifications are inappropriate or a concise statement of the reasons why the representative believes that the petitioner has not substantially complied with the request for additional information and documentary material.

(vii) The General Counsel shall advise the petitioner and the authorized representative of his or her decision within 3 business days following the conference.

By direction of the Commission.

Dated: January 24, 2001.

Donald S. Clark,
Secretary.

**Statement of Commissioner Orson Swindle
Concerning Premerger Notification Rules
Changes File No. P989316**

The Commission and its staff have worked quickly and diligently on a package of interim rules to implement statutory changes to the premerger notification program that will take effect shortly. Other amendments to the premerger rules are designed to achieve needed housekeeping improvements or spell out procedures for the appeals process in Hart-Scott-Rodino matters. Although the interim rules announced today take effect imminently, I look forward to—and would encourage—any comments that members of the public care to submit concerning the clarity, consistency, and anticipated effects of these rules.

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