FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 802

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rule.

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 proposed rules published February 1, 2001, and will increase the clarity and improve the effectiveness of the rules.

DATES: These final rules are effective on April 17, 2002.

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 in the **Federal Register** 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 in the **Federal Register** and implemented amendments to section 7A of the Clayton Act enacted on December 21, 2000 (''2000 Amendments''). The proposed rules recommended other changes improving and updating the HSR rules and did not take effect upon publication. Both sets of rules invited public comments.

The Commission, with the concurrence of the Assistant Attorney General, is adopting the proposed rules, previously published on February 1, 2001, as final with certain further changes in response to the public comments, as described below. The Commission received eighteen public comments addressing either or both the interim rules (66 FR 8679–8721) and the proposed rules (66 FR 8723–8729). Fifteen of the eighteen public comments received pertained to the proposed rules.

The following provided public comments on the proposed rules to the Commission:

1. Baker & McKenzie (3/19/01)
2. Dockstader, Robert A. (3/19/01)
3. Ford Motor Company (Bolerjack, Stephen D.) (3/19/01)
4. Fulbright & Jaworski LLP (Wellington, Daniel L.) (3/19/01)
5. Jones, Day, Reavis & Pogue (Smith, Tom D.) (3/19/01)
6. McDermott, Will & Emery (Bloch, Ronald A.) (3/19/01)
8. National Association of Manufacturers (NAM) (3/29/01)
10. Otis, Steve (2/14/01)
11. Paul, Weiss, Rifkind, Wharton & Garrison (Malaquin, Didier) (3/1/01)
12. Gibson, Dunn & Crutcher (Pfunder, Malcolm R.) (3/19/01)
13. Section of Antitrust Law of the American Bar Association (3/19/01)
14. Shearman & Sterling (Prince, Kenneth S.) (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)
17. Willkie, Farr & Gallagher (Gartner, Steven J.) (3/19/01)

PART 801—COVERAGE RULES

No public comments were received concerning Part 801 of the proposed rules. These proposed changes include updating examples in §§ 801.4, 801.14 and 801.90; and amending § 801.15 to reflect the $50 million nexus with U.S. commerce threshold for foreign transactions and give proper reference to other rules sections. The Commission is adopting those proposed rules as final without change.

PART 802—EXEMPTION RULES

Section 802.2 Certain acquisitions of real property assets.

The proposed rules would amend § 802.2(g), mainly by removing ''associated agricultural assets'' from the agricultural real property exemption. Under the current rules, such assets are defined as assets that are integral to the agricultural business activities conducted on the property, including inventory (e.g., livestock, poultry, crops, fruit, vegetables, milk, eggs), structures that house livestock raised on the real property, fertilizer, and animal feed.

Comment 12 questioned the justification for removing the associated agricultural assets—particularly structures and inventories of crops, animal feed or fertilizer—from the exemption. The comment suggested that acquisitions of these assets would not potentially be of substantive antitrust interest.

The Commission has concluded that it is appropriate to remove associated agricultural assets from this real property exemption, as proposed. As the Statement of Basis and Purpose (''SBP'') to the Proposed Rules states, doing so will eliminate whatever ambiguity may arguably exist in the definition of ''associated agricultural assets.'' It also refocuses the rule on agricultural *real* property which was the initial intent of the exemption when promulgated. The more-than-threefold increase in the statutory size-of-transaction test to $50 million will continue to exempt acquisitions of agricultural property unless the additional assets being acquired—whether within or beyond the definition of ''associated agricultural assets''—are valued in excess of $50 million. The Commission believes that the elimination of ''associated agricultural assets'' from the agricultural property exemption simplifies the rule without significantly limiting the applicability of that exemption. If a significant number of agricultural property transactions are reported under HSR because of the ''associated agricultural assets'' conveyed in the transaction, the Commission can revisit the language of § 802.2(g).

Section 802.6 Federal agency approval.

Proposed § 802.6(b) was revised to state a general rule regarding mixed transactions rather than one that is industry specific. No comments were received regarding this rule revision, therefore the Commission is adopting this Proposed Rule as final without change.

Section 802.8 Certain supervisory acquisitions.

Proposed § 802.8 corrected a typographical error. No comments were received regarding this rule revision, therefore the Commission is adopting this Proposed Rule as final without change.

Sections 802.50 and 802.51 Foreign acquisitions.

The Proposed Rules would restructure and amend the exemptions contained in §§ 802.50 and 802.51. The Commission received fifteen comments regarding these proposed rules. One proposed amendment to these rules increases the thresholds for measuring nexus with U.S. commerce to $50 million from $15 million and $25 million. No comments were received concerning the increase to $50 million of the $15 million and $25 million nexus with U.S. commerce

thresholds contained in these exemptions. Consequently, these increased thresholds will be implemented without change from the Proposed Rules.

The comments focused on five other aspects of the proposed rules: (1) The period used to determine sales in or into the U.S.; (2) the method of valuation used for assets located in the U.S.; (3) the elimination of the $110 million aggregate U.S. sales and assets exemption for transactions valued in excess of $200 million; (4) the elimination of the absolute exemption for acquisitions of assets located outside of the U.S. by a foreign person; and (5) the applicability of aggregation of the sales and assets of multiple foreign issuers from the same acquired person to both U.S. and foreign acquiring persons.

The Commission is adopting Proposed §§ 802.50 and 802.51 as final, with two changes in response to these public comments. First, the measure of sales in or into the U.S. will be sales of the most recent fiscal year, rather than the sum of the most recent fiscal year's sales and sales year-to-date, as proposed. The Commission believes that the burden on the parties of determining any measure of sales in or into the U.S. beyond the most recent fiscal year of the parties may well outweigh the benefit to the agencies in capturing transactions involving a recent upswing in U.S. sales. Second, § 802.51 will be amended to correct a drafting error which resulted in aggregation of sales in or into the U.S. and assets located in the U.S. being applicable only to foreign persons acquiring multiple foreign issuers from the same acquired person. This error was discovered shortly after publication and will be corrected with additional language in paragraph (a) of the rule. This correction makes it clear that this aspect of the rule is intended to apply to acquisitions by both U.S. and foreign acquiring persons. These provisions, as well as others addressed by the comments, are discussed below. Finally, in a technical correction, the reference to § 801.40(c)(2) in paragraphs 802.50(b)(3), 802.51(a)(1), 802.51(b)(1), and 802.51(c)(3), has been changed to § 801.40(d)(2) to reflect the renumbering of that section.

(1) The Measure of Sales in or Into the United States

Comments 1–6 and 10–17 criticized the proposed requirement that sales in or into the U.S. be calculated by adding those sales from the last fiscal year to such sales generated to date since the end of that fiscal year, calculated no more than sixty days prior to the filing of notification or if notification is not required, within sixty days prior to the consummation of the acquisition. This proposed change reflected the recognition that sales figures based on a party's most recent fiscal year may be several months out of date and was intended to ensure that where U.S. sales generated by foreign assets and voting securities trend steeply upward prior to the acquisition, a filing would be required if that trend resulted in over $50 million in U.S. sales. The comments expressed a variety of concerns and offered several alternatives.

Comment 1 stated that this proposed method of calculating combined sales would, in many transactions, remove all benefit of the increased $50 million threshold for U.S. sales. It further noted that the requirement to combine sales could result in a filing obligation even where U.S. sales have been stagnating or even declining. The comment suggested that the requirement would produce widely disparate results based solely on when the transaction closes (*i.e.,* transactions that propose to close later in the year will be less likely to be able to claim the exemption than those that close early in the year). The comment proposed that the agencies' goal could be accomplished by requiring the comparison of U.S. sales over a two year period, and determining the applicability of an exemption based on the greater of U.S. sales for a single year in that period.

Comments 2, 3, 13 and 15 addressed the same concerns and suggested an alternative approach of using the higher of the most recent fiscal year's sales or estimated sales for the current year-to-date. Comment 13 further predicted that the proposed change would substantially narrow the exemption previously available and increase the number of transactions that are reportable.

Comment 4 suggested that a more equitable method would be to determine sales in the twelve months prior to filing or closing the transaction, calculated within sixty calendar days prior to filing notification or, if no filing is required, within sixty calender days of closing.

Comment 5 stated that determining the value of sales in or into the U.S. is often extraordinarily complex and time-consuming and that the proposed revisions do not reduce that burden. It further noted that while corporations have methods for analyzing such data, these methods are generally geared toward quarterly and annual assessments and are virtually never performed on an *ad hoc* basis. Outside of the audit procedures currently in place, it suggested that it is not practical, and perhaps not even possible, to take a meaningful snapshot of current revenues. The comment recommended deleting the requirement that current year sales be analyzed.

Comment 6 observed that throughout the rules, the determination of sales is always on an annual basis and is found in the reporting person's last year-end, consolidated statement of operations. It further opined that there is no suggestion that anti-competitive mergers have escaped review because of sharp upward trends in U.S. sales.

Comment 10 questioned why the rules for a foreign exemption should be particularly concerned about changes to sales since the end of the last fiscal year, when § 801.11 (measuring net sales for the size-of-person test) is not. Comment 12 similarly questioned why the change seeks to address an issue (a recent increase in U.S. sales) which arises in both foreign and domestic transactions, and no similar change is proposed for dealing with domestic transactions. It also suggested the possible approach of using the greater of the previous year's sales or sales year-to-date, but noted that the approach would still suffer from inconsistency with other provisions in the rules and further observed that current information is often difficult to obtain from foreign entities.

Comments 11, 14, and 16 noted that requiring the aggregation of sales since the end of the preceding fiscal year will lead in certain cases to uncertainty as to whether or not a transaction is reportable and places on the parties to a transaction the added burden of monitoring the sales of a foreign target while negotiations are in progress. Comment 14 suggested two alternative methods of calculation. One method was to determine a twelve month average of sales by adding the last fiscal year to the sales year-to-date, dividing the total by the number of months included, and multiplying this figure by twelve. The second suggested method was to use the most recent twelve months calculated within sixty days of filing or closing.

Finally, Comment 17 asserted that the proposed change, setting forth the time in which the calculation must be made, is unclear and imposes undue burden upon the parties that could generate delays in transactions. It proposed an alternative test of considering the greater of sales in the most recent fiscal year or sales over the last four available fiscal quarterly periods. It further stated that the parties should be entitled to a consistent cut-off date for calculating sales in or into the U.S., regardless of whether the transaction proves to be subject to notification. The comment

recommended that the parties measure these sales as of the end of the most recent quarterly period available as of the date the parties enter into an agreement, so long as no more than 135 days have elapsed since the end of that quarterly period. It suggested that this approach would provide the parties certainty; allow sufficient time to gather information that is not always readily available; minimize the burden imposed by requiring sales for a fiscal year that has not yet ended; properly take into account sales trends; and allow most parties to rely upon their existing reporting practices.

The Commission recognizes the burden on the parties in determining sales in or into the U.S. for any period of time other than the filing person's most recent fiscal year. The Commission also agrees with the observation that aggregating sales from the most recent fiscal year with those year-to-date may have the undesirable result of making acquisitions reportable where sales in or into the U.S. in the current year may be steady or even declining. The Commission considered the many alternative methods suggested in the comments (*e.g.*, most recent four quarters, most recent twelve months, greater of two years, greater of year-to-date or last fiscal year, twelve-month average) but was unable to discern how any of these methods would be significantly less burdensome than the approach put forth in the Proposed Rules. All of these approaches would also require compilation of data that is not captured in the ordinary course of business by many persons filing notification. Consequently, in the Final Rules, the measure of sales in or into the U.S. for purposes of §§ 802.50 and 802.51 will be those of the most recently completed fiscal year.

(2) Valuation of Assets Located in the United States

Comments 1, 3, 6 and 13 objected to the proposed change from book value to fair market value for measuring assets located in the U.S. The Commission believes that this change is appropriate in order to reflect more accurately a foreign person's nexus with U.S. commerce, to harmonize these sections with the rest of the rules, and to address questions frequently asked of the PNO concerning the use of book value to make this determination. Specifically, intangible assets such as U.S. patents and other intellectual property were often not carried on the books of a foreign person, and the question has frequently arisen as to what value should be attributed to these intangible assets and what method should be used to determine their book value. In these instances, the PNO advised parties to use fair market value.

Comment 1 asserted that the Commission's proposal is inconsistent with the rest of the rules and that the implementation of a fair market value test would impose a new, substantial burden upon parties in voting securities transactions. It argued that the size-of-person test is based on an existing balance sheet, not on a market valuation, and that it is only for assets that are being acquired that the rules require a fair market valuation. The comment suggested that in a stock deal, the market value of assets is not easily determinable, and any excess over the book value of the assets of the acquired company is reflected as goodwill on the balance sheet of the acquired company, precisely in recognition of the difficulties of a market value appraisal. It further maintained that the competitive significance and impact on U.S. commerce of a proposed acquisition will likely not turn upon whether the value of the acquired company's assets located in the U.S. has increased since its last book value calculation.

Comment 3 also argued that an additional burden is placed on the parties to extract the specific U.S. assets and determine their fair market value. It states that fair market valuation may be subject to dispute by the agencies, thus subjecting the parties to possible penalties, while book value is a simple, readily available value and provides certainty to parties seeking to determine whether the exemption is available. Comment 13 agreed that an additional burden is imposed by fair market valuation and also complained that some measure of certainty is lost since the agencies could dispute that valuation.

Lastly, Comment 6 claimed that the Commission's stated justification for the proposed rule change appeared to lack a factual foundation, arguing that consistency throughout the rules requires that book value be retained as the measure of value. It further submitted that book value is readily available and that requiring the acquiring person to determine the fair market value of the acquired person's, and in some cases its own, U.S. property imposes an unreasonable new burden. The comment concluded that, absent compelling evidence that a significant number of anticompetitive transactions will escape premerger review without this change, the book value of U.S. assets should continue to govern.

The Commission recognizes that in some instances the requirement to calculate the fair market value of assets located in the U.S. may impose additional burden on the acquiring person. However, in the vast majority of cases it will be readily apparent that the value of the assets clearly is above or below the $50 million threshold, and determination of whether or not the exemption is applicable will require a minimal amount of effort by the acquiring person.

As to the alleged inconsistency with the methodology used in determining the size-of-person of a party, the Commission notes that the $50 million threshold in §§ 802.50 and 802.51 is not a size-of-person test, but rather a ''size-of-nexus with the U.S.'' test. The fair market value of assets located in the U.S. is a far more accurate assessment of the true nexus with U.S. commerce at the present time. The book value may be out of date and may not reflect the true value, especially in the case of assets which constitute an ongoing business, since a portion of the value of those assets may be carried on the books as goodwill. Also, assets may be carried on the books showing significant depreciation that does not reflect their actual value.

For these reasons, the Commission believes that the potential burden on a small number of transactions is outweighed by the benefit to the agencies in requiring a current and meaningful measure of a transaction's nexus with U.S. commerce. Therefore, the Commission will adopt the proposed change to fair market value for calculating the value of assets located in the U.S.

(3) Elimination of the $110 Million Aggregate U.S. Sales and Assets Exemption for Transactions Valued in Excess of $200 Million

Comments 1 and 13 asserted that the elimination of this exemption for transactions valued in excess of $200 million is inappropriate. Comment 1 contended that there is no discussion in the 1978 SBP of the import now apparently attributed by the Commission to the overall value of a transaction in determining whether a transaction may have an anticompetitive impact on U.S. commerce. It argued that the result of this proposed change is not consistent with the original rationale for creating this exemption, and that the value of a transaction outside of the U.S. does not indicate in any way the transaction's potential anticompetitive effects in the U.S. Comment 13 states that the elimination of this portion of the exemption will greatly narrow its reach.

While this change may marginally narrow the exemptions, the general increase in the reporting threshold to over $50 million, together with the increase in the $15 million and $25 million nexus tests to $50 million, will significantly expand the number of exempt foreign transactions.

In the SBP for the Proposed Rules, the Commission referenced the 1978 SBP which explains that the $110 million threshold was adopted to approximate the size-of-person criteria of Section 7A(a)(2), as it seemed appropriate and consistent with congressional intent not to exempt a transaction involving two foreign persons with a U.S. presence similar in size to the general criteria of the act for all persons. 43 FR 33498 (July 31, 1978). Since the new legislation removes the size-of-person test for acquisitions valued at over $200 million, the Commission likewise believes that it is appropriate and consistent to require filings from foreign persons, regardless of the size of their U.S. presence, where the transaction is valued at over $200 million and the $50 million nexus test of these exemption rules is satisfied.

(4) Elimination of the Absolute Exemption for Acquisitions of Assets Located Outside of the U.S. by a Foreign Person

Comment 13 claimed that the Commission sets forth no explanation as to why such transactions are likely to raise competitive issues in the U.S. in order to justify removing the exemption. The Commission clearly stated in the SBP to the Proposed Rules that experience at both agencies has shown that foreign asset acquisitions can and do have a direct impact on the U.S. economy and that this is more likely to be true where the assets generate over $50 million in sales in or into the U.S. Thus, the Commission continues to believe that it is appropriate to require that their acquisition be reported where there is a substantial nexus to U.S. commerce. This approach makes the rule consistent with the treatment of U.S. acquiring persons.

(5) Applicability of Aggregation of the Sales and Assets of Multiple Foreign Issuers From the Same Acquired Person to Both U.S. and Foreign Acquiring Persons

Comments 11 and 17 correctly noted a section numbering error in § 802.51. The intent was to require the aggregation of sales and assets of multiple foreign issuers, which are being acquired from the same acquired person, by both foreign and U.S. acquiring persons. This numbering error was discovered shortly after publication of the Proposed Rules and is corrected by adding paragraph (a)(3) which reads: ''If interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether the $50 million thresholds are exceeded.'' This revision will make the intent of the rule clear. An example has been added to illustrate the aggregation requirement.

Section 802.52 Acquisitions by or from Foreign Governmental Corporations

The example in Section 802.52 has been amended to reflect the new $50 million threshold for measuring nexus with U.S. commerce.

Other Comments

In addition to the above noted comments, Comment 8 opposed all proposed changes to the foreign exemptions on the grounds that they narrowed the scope of the exemptions. It recommended broadening the exemptions instead, but offered no suggestions as to how this should be accomplished. This comment, as well as Comments 1 and 3, based its recommendation on the International Competition Policy Advisory Committee (''ICPAC'') (Report to the Attorney General of the International Competiton Policy Advisory Committee (February 2000)) finding that there were far too many filings in fiscal year 1999 involving foreign transactions. The ICPAC report dealt with filings subject to the prior $15 million size-of-transaction threshold and does not take into consideration changes in the level of filings as a result of the 2001 Amendments to the statute. Despite the marginal narrowing of the exemption in the areas discussed above, the Commission believes that the increase in the statutory size-of-transaction threshold to $50 million and the increase in the dollar thresholds in §§ 802.50 and 802.51 will dramatically reduce the number of foreign transaction filings overall.

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. 3501–3518, requires agencies to submit requirements for ''collections of information'' to the Office of Management and Budget (''OMB'') and obtain clearance prior to instituting them. 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 under OMB Control No. 3084–0005 (preceding the latest HSR amendments). Because the Final Rules would not affect the information collection requirements of the premerger notification program beyond those of the proposed rules, they are not being resubmitted to OMB for review pursuant to the PRA. The Supporting Statement accompanying 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 approximately a 47% reduction from what the burden estimate would be absent the final rules and based on the number of fiscal year 2000 filings. The Commission is seeking 3-year clearance with the requisite submissions to OMB.

List of Subjects in 16 CFR Parts 801 and 802

Antitrust, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR Parts 801 and 802 as follows:

PART 801—COVERAGE RULES

1. The authority citation for Part 801 continues to read as follows:

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

2. Amend § 801.4 by revising Example 5 in paragraph (b) to read as follows:

§ 801.4 Secondary acquisitions.

* * * * *

(b) * * *

Examples: * * *

5. In example 4 above, suppose the consideration paid by ''A'' for the acquisition of B is $60 million worth of the voting securities of ''A.'' By virtue of § 801.2(d)(2), ''A'' is both an acquiring and acquired person; B is an acquired person and B's shareholders are acquiring 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's shareholders are now also acquiring persons, unless one of them gains control of ''A'' in the transaction, no B shareholder makes a secondary acquisition of stock held by ''A.'' If the consideration paid by ''A'' is the voting securities of one of ''A''s subsidiaries and a shareholder of B thereby gains control of that subsidiary, the shareholder will make secondary acquisitions of any minority holdings of that subsidiary.

* * * * *

3. Amend § 801.14 by revising Example 2 in paragraph (b) to read as follows:

§ 801.14 Aggregate total amount of voting securities and assets.

* * * * *

(b) * * *

Examples: * * *

2. In the previous example, assume that the assets acquisition occurred first, and that the acquisition of the voting securities is to occur within 180 days of the first acquisition. ''A'' now looks to § 801.13(b)(2) and determines that the previously acquired assets are not treated ''as part of the present acquisition'' because the second acquisition is of voting securities and not assets; thus, the asset and voting securities acquisitions are not treated as one transaction. Therefore, the second acquisition would not be subject to the requirements of the act since the value of the securities to be acquired does not exceed the $50 million size-of-transaction test.

4. Amend § 801.15 by revising the introductory text, paragraphs (a)(2) and (b), and Examples 1, 4, 5, 7, and 8 in paragraph (c), to read as follows:

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

Notwithstanding § 801.13, for purposes of determining the aggregate total amount of voting securities and assets of the acquired person held by the acquiring person under Section 7A(a)(2) and § 801.1(h), none of the following will be held as a result of an acquisition:

(a) * * *

(2) Sections 802.1, 802.2, 802.5, 802.6(b)(1), 802.8, 802.31, 802.35, 802.52, 802.53, 802.63, and 802.70 of this chapter;

(b) Assets or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the act and these rules been in effect), or the present acquisition of which is exempt, under Section 7A(c)(9) and §§ 802.3, 802.4, 802.50(a), 802.51(a), 802.51(b) and 802.64 of this chapter unless the limitations contained in Section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held; and

(c) * * *

Examples: 1. Assume that acquiring person ''A'' is simultaneously to acquire $51 million of the convertible voting securities of X and $12 million of the voting common stock of X. Since the overall value of the voting securities to be acquired (§ 801.1 defines convertible voting securities as ''voting securities'') is greater than $50 million, ''A'' must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. However, because § 802.31 of this chapter is one of the exemptions listed in paragraph (a)(2) of this section, ''A'' would not hold the convertible voting securities as a result of this acquisition. Therefore, since as a result of the acquisition ''A'' would hold only the $12 million of common stock, the size-of-transaction tests of Section 7A(a)(2) would not be satisfied, and ''A'' need not observe the requirements of the act before acquiring the common stock. (Note, however, that the $51 million of convertible voting securities would be reflected in ''A''s next regularly prepared balance sheet, for purposes of § 801.11.)

* * * * *

4. Assume that acquiring person ''B,'' a United States person, acquired from corporation ''X'' two manufacturing plants located abroad, and assume that the acquisition price was $160 million. In the most recent fiscal year, sales into the United States attributable to the plants were $40 million, and thus the acquisition was exempt under § 802.50(a) of this chapter. Within 180 days of that acquisition, ''B'' seeks to acquire a third plant from ''X,'' to which United States sales of $12 million were attributable in the most recent fiscal year. Since under § 801.13(b)(2), as a result of the acquisition, ''B'' would hold all three plants of ''X,'' and the $50 million limitation in § 802.50(a) of this chapter would be exceeded, under paragraph (b) of this rule, ''B'' would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition, ''B'' would hold assets of ''X'' exceeding $50 million in sales in or into the United States, would not qualify for the exemption in § 802.50(a) of this chapter, and must observe the requirements of the act and file notification for the acquisition of all three plants before acquiring the third plant.

5. ''A'' acquires producing oil reserves valued at $400 million from ''B.'' Two months later, ''A'' agrees to acquire oil and gas rights valued at $75 million from ''B.'' Paragraph (b) of this section and § 801.13(b)(2) require aggregating the previously exempt acquisition of oil reserves with the second acquisition. If the two acquisitions, when aggregated, exceed the $500 million limitation on the exemption for oil and gas reserves in § 802.3(a), ''A'' and ''B'' will be required to file notification for the latter acquisition, including within the filings the earlier acquisition. Since, in this example, the total value of the assets in the two acquisitions, when aggregated, is less than $500 million, both acquisitions are exempt from the notification requirements. In determining whether the value of the assets in the two acquisitions exceeds $500 million, ''A'' need not determine the current fair market value of the oil reserves acquired in the first transaction, since these assets are now within the person of ''A.'' Instead, ''A'' is directed by § 801.13(b)(2)(ii) to use the value of the oil reserves at the time of their prior acquisition in accordance with § 801.10(b).

* * * * *

7. In Example 6, above, assume that ''X'' acquired 30 percent of the voting securities of M and proposes to acquire 40 percent of the voting securities of N, another entity controlled by ''Z.'' Assume also that M's assets at the time of ''X's'' acquisition of M's voting securities consisted of $90 million worth of producing coal reserves and non-exempt assets with a fair market value of $39 million, and that N's assets currently consist of $60 million worth of producing coal reserves and non-exempt assets with a fair market value of $28 million. Since ''X'' acquired a minority interest in M and intends to acquire a minority interest in N, and since M and N are controlled by ''Z,'' the assets of M and N must be aggregated, pursuant to §§ 801.15(b) and 801.13, to determine whether the acquisition of N's voting securities is exempt or whether it is reportable pursuant to the terms of § 802.4(c) of this chapter. ''X'' is required to determine the current fair market value of M's assets. If the fair market value of M's coal reserves is unchanged, the aggregated exempt assets do not exceed the limitation for coal reserves under § 802.3(b) of this chapter. However, if the present fair market value of N's non-exempt assets also is unchanged, the present fair market value of the non-exempt assets of M and N when aggregated is greater than $50 million. Thus the acquisition of the voting securities of N is not exempt under § 802.4 of this chapter. If ''X'' proposed to acquire 50 percent or more of the voting securities of both M and N in the same acquisition, the assets of M and N must be aggregated to determine if the acquisition of the voting securities of both issuers is exempt. Since the fair market value of the aggregated non-exempt assets exceeds $50 million, the acquisition would not be exempt.

8. ''A'' acquired 49 percent of the voting securities of M and 45 percent of the voting

securities of N. Both M and N are controlled by ''B.'' At the time of the acquisition, M held rights to producing coal reserves worth $90 million and N held a producing coal mine worth $90 million. This acquisition was exempt since the aggregated holdings fell below the $200 million limitation for coal in § 802.3(b) of this chapter. A year later, ''A'' proposes to acquire an additional 10 percent of the voting securities of both M and N. In the intervening year, M has acquired coal reserves so that its holdings are now valued at $140 million, and the value of N's assets remained unchanged. ''A's'' second acquisition would not be exempt. ''A'' is required to determine the value of the exempt assets and any non-exempt assets held by any issuer whose voting securities it intends to acquire before each proposed acquisition (unless ''A'' already owns 50 percent or more of the voting securities of the issuer) to determine if the value of those holdings of the issuer falls below the limitation of the applicable exemption. Here, the holdings of M and N now exceed the $200 million exemption for acquisitions of coal reserves in § 802.3 of this chapter, and thus do not qualify for the exemption of voting securities provided by § 802.4(a) of this chapter.

5. Amend § 801.90 by revising Example 1 to read as follows:

§ 801.90 Transactions or devices for avoidance.

* * * * *

Examples: 1. Suppose corporations ''A'' and ''B'' wish to form a joint venture. ''A'' and ''B'' contemplate a total investment of over $100 million in the joint venture; persons ''A'' and ''B'' each has total assets in excess of $100 million. Instead of filing notification pursuant to § 801.40, ''A'' creates a new subsidiary, A1, which issues half of its authorized shares to ''A.'' Assume that A1 has total assets of $3000. ''A'' then sells 50 percent of its A1 stock to ''B'' for $1500. Thereafter, ''A'' and ''B'' each contribute $53 million to A1 in exchange for the remaining authorized A1 stock (one-fourth each to ''A'' and ''B''). ''A''s creation of A1 was exempt under § 802.30 of this chapter; its $1500 sale of A1 stock to ''B'' did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisitions of stock in A1 by ''A'' and ''B'' were exempt under Sections 7A(c)(3) and (10), because ''A'' and ''B'' each already controlled A1, based on their holdings of 50 percent of A1's then-outstanding shares. Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by ''A'' and ''B'' having over $10 million in assets. Such a transaction would be covered by § 801.40, and ''A'' and ''B'' must file notification and observe the waiting period.

* * * * *

PART 802—EXEMPTION RULES

6. The authority citation for Part 802 continues to read as follows:

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

7. Revise § 802.2(g) to read as follows:

§ 802.2 Certain acquisitions of real property assets.

* * * * *

(g) *Agricultural property.* An acquisition of agricultural property and assets incidental to the ownership of such property shall be exempt from the requirements of the act. Agricultural property is real property that primarily generates revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (activities within NAICS sector 11).

(1) Agricultural property does not include either:

(i) Processing facilities such as poultry and livestock slaughtering, processing and packing facilities; or

(ii) Any real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition.

(2) In an acquisition that includes agricultural property, the transfer of any assets that are not agricultural property or assets incidental to the ownership of such property (cash, prepaid taxes or insurance, rentals receivable and the like) shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

* * * * *

8. Amend § 802.6 by revising paragraph (b) and its Example to read as follows:

§ 802.6 Federal agency approval.

* * * * *

(b)(1) A mixed transaction is one that has some portion that is exempt under Section 7A (c)(6), (c)(7) or (c)(8) because it requires regulatory agency premerger competitive review and approval, and another portion that does not require such review.

(2) The portion of a mixed transaction that does not require advance competitive review and approval by a regulatory agency is subject to the act and these rules as if it were being acquired in a separate acquisition.

Example: Bank ''A'' acquires Bank ''B'', which owns a financial subsidiary engaged in securities underwriting. ''A''s acquisition of ''B'' requires agency approval by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System or Federal Deposit Insurance Corporation (depending on whether ''A'' is a national bank, state member bank, or state non-member bank under section 18(c) of the FDI Act), and therefore is exempt from filing under Section 7A (c)(7). However, the acquisition of the financial subsidiary is subject to HSR reporting requirements, and ''A'' and ''B'' each must make a filing for that portion of the transaction and observe the waiting period if the act's thresholds are met.

9. Revise § 802.8(a) to read as follows:

§ 802.8 Certain supervisory acquisitions.

(a) A merger, consolidation, purchase of assets, or acquisition requiring agency approval under sections 403 or 408(e) of the National Housing Act, 12 U.S.C. 1726, 1730a(e), or under section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, shall be exempt from the requirements of the act, including specifically the filing requirement of Section 7A(c)(8), if the agency whose approval is required finds that approval of such merger, consolidation, purchase of assets, or acquisition is necessary to prevent the probable failure of one of the institutions involved.

* * * * *

10. Revise § 802.50 to read as follows:

§ 802.50 Acquisitions of foreign assets.

(a) The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million during the acquired person's most recent fiscal year.

(b) Where the foreign assets being acquired exceed the threshold in paragraph (a) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) are less than $110 million; and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

Example to §802.50:

1. Assume that ''A'' and ''B'' are both U.S. persons. ''A'' proposes selling to ''B'' a manufacturing plant located abroad. Sales in or into the United States attributable to the plant totaled $13 million in the most recent fiscal year. The transaction is exempt under this paragraph (a) of this section.

2. Sixty days after the transaction in example 1, ''A'' proposes to sell to ''B'' a second manufacturing plant located abroad; sales in or into the United States attributable to this plant totaled $38 million in the most recent fiscal year. Since ''B'' would be acquiring the second plant within 180 days

of the first plant, both plants would be considered assets of ''A'' held by ''B'' as a result of the second acquisition (see § 801.13(b)(2) of this chapter). Since the total sales in or into the United States exceed $50 million, the acquisition of the second plant would not be exempt under this paragraph (a) of this section.

3. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States of $200 million. If ''A'' acquires only foreign assets of ''B,'' and if those assets generated $50 million or less in sales in or into the United States, the transaction is exempt.

4. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States and assets located in the United Sates of less than $100 million. If ''A'' acquires only foreign assets of ''B'', and those assets generated in excess of $50 million in sales in or into the United States during the most recent fiscal year, the transaction is exempt from reporting if the assets are valued at $200 million or less, but is reportable if valued at greater than $200 million.

11. Revise § 802.51 to read as follows:

§ 802.51 Acquisitions of voting securities of a foreign issuer.

(a) *By U.S. persons.* (1) The 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: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) having an aggregate total value of over $50 million; or made aggregate sales in or into the United States of over $50 million in its most recent fiscal year.

(2) If interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million threshold is exceeded.

(b) *By foreign persons.* (1) The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) having an aggregate total value of over $50 million; or made aggregate sales in or into the United States of over $50 million in its most recent fiscal year.

(2) If controlling interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million threshold is exceeded.

(c) Where a foreign issuer whose securities are being acquired exceeds the threshold in paragraph (b)(1) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) are less than $110 million; and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

Example to § 802.51 1. ''A,'' a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of $77 million in the most recent fiscal year. The transaction is not exempt under this section.

2. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States of $200 million, and that ''A'' is acquiring 100% of the voting securities of ''B.'' Included within ''B'' is U.S. issuer C, whose total U.S. assets are valued at $161 million. Since ''A'' will be acquiring control of an issuer, C, with total U.S. assets of more than $50 million, and the parties' aggregate sales in or into the U.S. in the relevant time period exceed $110 million, the acquisition is not exempt under this section.

3. ''A,'' a foreign person, intends to acquire 100 percent of the voting securities of two wholly owned subsidiaries of ''B'' for a total of $65 million. BSUB1 is a foreign issuer with $10 million in sales into the U.S. in its most recent fiscal year and with assets of $10 million located in the U.S. $20 million of the acquisition price has been allocated to BSUB1. BSUB2 is a U.S. issuer with $60 million in U.S. sales and $60 million in assets located in the U.S. The remaining $45 million of the acquisition price is allocated to BSUB2. Since BSUB1 does not exceed the $50 million limitation for U.S. sales or assets in § 802.51(b), its voting securities are not held as a result of the acquisition (see § 801.15(b) of this chapter). Since the acquisition price for BSUB2 alone would not result in ''A'' holding in excess of $50 million of voting securities of the acquired person, the transaction is non-reportable in its entirety. Note that the U.S. sales and assets of BSUB1 are not aggregated with those of BSUB2 for purposes of determining whether the limitations in paragraph (b) of this section are exceeded. If BSUB2 were also a foreign issuer, such aggregation would be required under paragraph (b)(3) of this section, and the transaction in its entirety would be reportable.

12. Amend § 802.52 by revising the Example to read as follows:

§ 802.52 Acquisitions by or from foreign governmental agencies.

* * * * *

Example: The government of foreign country X has decided to sell assets of its wholly owned corporation, B, all of which are located in foreign country X. The buyer is ''A,'' a U.S. person. Regardless of the aggregate sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate sales were $50 million or less, the transaction would also be exempt under § 802.50.)

By direction of the Commission.

Donald S. Clark,

Secretary.

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FEDERAL TRADE COMMISSION

16 CFR Part 802

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rule.

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. This rule amendment is necessary to address public comments regarding a previously published interim rule provision, and will increase the clarity and improve the effectiveness of the rule.

EFFECTIVE DATES: This final rule is effective on March 18, 2002 and will be applied retroactively to February 2, 2002, as explained in **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Marian R. Bruno, Assistant Director, Karen E. Berg, Attorney, or B. Michael