

Federal Trade Commission

§ 802.21

C contributes cash. X is then being reincorporated in a new state. Each of A, B and C receive one third of the voting securities of newly reincorporated C. The reincorporation is not exempt from notification and may be reportable for A, B and C because of the contribution of new assets.

[70 FR 11513, Mar. 8, 2005]

§ 802.20 [Reserved]

§ 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold (as adjusted).

(a) An acquisition of voting securities shall be exempt from the requirements of the act if:

(1) The acquiring person and all other persons required by the act and these rules to file notification filed notification with respect to an earlier acquisition of voting securities of the same issuer;

(2) The waiting period with respect to the earlier acquisition has expired, or been terminated pursuant to § 803.11, and the acquisition will be consummated within 5 years of such expiration or termination; and

(3) The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold (as adjusted) greater than the greatest notification threshold met or exceeded in the earlier acquisition.

Examples: 1. In 2004, Corporation A acquired \$53 million of the voting securities of corporation B and both "A" and "B" filed notification as required, indicating the \$50 million threshold. Within five years of the expiration of the original waiting period, "A" acquires additional voting securities of B but not in an amount sufficient to meet or exceed \$100 million (as adjusted) or 50 percent of the voting securities of B. No additional notification is required.

2. In 2004, Corporation A acquired \$53 million of the voting securities of corporation B and both "A" and "B" filed notification as required, indicating the \$50 million threshold. Suppose that in year three following the expiration of the waiting period, the \$50 million notification threshold has been adjusted to \$56 million pursuant to Section 7A(a)(2)(a) of the Act. "A" now intends to acquire an additional \$5 million of the voting securities of B. "A" is not required to file another notification even though it now holds voting securities in excess of the \$56 million notification threshold (which is greater than the \$50 million notification threshold indicated in its filing), because it has not met or exceeded a

notification threshold (as adjusted) greater than the notification threshold exceeded in the earlier acquisition (i.e. \$100 million (as adjusted) or 50% notification thresholds).

3. Same facts as in Example 2 above except now the five year period has expired. Suppose that, the \$50 million notification threshold has been adjusted to \$57 million pursuant to Section 7A(a)(2)(a) of the Act. "A" now holds \$58 million of voting securities of B. Because § 802.21(a)(2) is no longer satisfied, the acquisition of any additional voting securities of B will require a new filing because "A" will hold voting securities valued in excess of the \$57 million notification threshold. If, however, the \$50 million notification threshold had been adjusted to \$60 million at the end of the five-year period, A could acquire up to that threshold without a new filing.

4. This section also allows a person to recross any of the threshold notification levels that were in effect at the time of filing notification any number of times within five years of the expiration of the waiting period following notification. Thus, if in Example 1, "A" had disposed of some voting securities so that it held less than \$50 million of the voting securities of B, and thereafter had increased its holdings to more than \$50 million but less than \$100 million or 50 percent of B, notification would not be required if the increase occurred within 5 years of the expiration of the original waiting period.

5. A files notification at the \$50 million notification threshold and acquires \$51 million of the voting securities of B in the year following expiration of the waiting period. The next greater notification threshold at the time of filing was \$100 million. In year three, the \$100 million notification threshold has been adjusted to \$106 million. A can now acquire up to, but not meet or exceed, voting securities of B valued at \$106 million. As the original \$100 million threshold is adjusted upward in years four and five, A can acquire up to those new thresholds as the adjustments are effected.

6. A files notification at the \$50 million threshold in January of year one. In February of year one, the \$50 million threshold is adjusted to \$52 million. A only needs to acquire in excess of \$50 million of voting securities of B, not in excess of \$52 million, to have exceeded the threshold which was filed for in the year following expiration of the waiting period (see § 803.7). It may then acquire up to the next greater notification threshold (as adjusted) during the five years following expiration of the waiting period.

(b) *Year 2001 transition.* For transactions filed using the 1978 thresholds where the waiting period expired after February 1, 1996, an acquiring person

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may, during the five-year period following expiration of the waiting period, acquire up to what was the next percentage threshold at the time it made its filing without filing another notification, even if in doing so it crosses a 2001 notification threshold in § 801.1(h) of this chapter. However, after the end of that period, any additional acquisition will be the subject of a new notification if it meets or exceeds a 2001 threshold in § 801.1(h) of this chapter.

Examples: 1. Corporation A filed to acquire 20 percent of the voting securities of corporation B and indicated the 15 percent threshold. The waiting period expired on October 3, 1999. “A” acquired the 20 percent within the year following expiration of the waiting period. “A” has until October 3, 2004, to acquire additional securities up to 25 percent of “B”’s voting securities, and need not make another filing before doing so, even though such acquisition by “A” may cross the \$50 million, \$100 million or \$500 million notification threshold in § 801.1(h) of this chapter. After October 3, 2004, “A” and “B” must observe the 2001 notification thresholds set forth in § 801.1(h) of this chapter.

2. Prior to February 1, 2001, “A” filed to acquire 12 percent of the voting securities of corporation B, valued at \$120 million, and indicated the \$15 million notification threshold. After February 1, 2001, “A” determines that it will make an additional acquisition which will result in its holding 16 percent of the voting securities of B, valued at \$160 million. “A” is required to file notification at the \$100 million notification threshold prior to making the acquisition since it is now crossing the next higher 1978 threshold (15 percent).

3. Prior to February 1, 2001, “A” filed to acquire 26 percent of the voting securities of “B” and indicated the 25 percent notification threshold. After the end of the five-year period following expiration of the waiting period, “A” will acquire additional shares of “B” which will result in its holding 30 percent of the voting securities of “B”, valued at \$125 million. “A” is required to file notification at the \$100 million notification threshold prior to making the acquisition. “A” could, however, have reached this level (30 percent valued at \$125 million) prior to the end of the five-year period without making an additional filing since it would not have crossed the next higher threshold at the time it filed (50 percent) and the acquisition would have been exempted by this § 802.21(b).

[43 FR 33544, July 31, 1978, as amended at 66 FR 8693, Feb. 1, 2001; 67 FR 11906, Mar. 18, 2002; 70 FR 4995, Jan. 31, 2005]

§ 802.23 Amended or renewed tender offers.

Whenever a tender offer is amended or renewed after notification has been filed by the offeror, no new notification shall be required, and the running of the waiting period shall be unaffected, except as follows:

(a) If the number of voting securities to be acquired pursuant to the offer is increased such that a greater notification threshold would be met or exceeded, only the acquiring person need again file notification, but a new waiting period must be observed;

(b) If a noncash tender offer is amended to become a cash tender offer, (1) one copy of the amended tender offer shall be filed in the manner prescribed by § 803.10(c) with the Federal Trade Commission and Assistant Attorney General, and (2) subject to the provisions of § 803.10(b)(1), the waiting period shall expire on the 15th day after the date of receipt (determined in accordance with § 803.10(c)) of the amended tender offer, or on the 30th day after filing notification, whichever is earlier; or

(c) If a cash tender offer is amended to become a noncash tender offer, (1) one copy of the amended tender offer shall be filed in the manner prescribed by § 803.10(c) with the Federal Trade Commission and Assistant Attorney General, and (2) subject to the provisions of § 803.10(b)(1), the waiting period shall expire on the 15th day after the date of receipt (as determined in accordance with § 803.10(c)) of the amended tender offer, or on the 30th day after filing notification, whichever is later.

Examples: 1. Assume that corporation A makes a tender offer for 20 percent of the voting securities of corporation B and that “A” files notification. Under this section, if A subsequently amends its tender offer only as to the amount of consideration offered, the waiting period so commenced is not affected, and no new notification need be filed.

2. In the previous example, assume that A makes an amended tender offer for 27 percent of the voting securities of B, valued at greater than \$1 billion. Since a new notification threshold will be crossed, this section requires that “A” must again file notification and observe a new waiting period. Paragraph (a) of this section, however, provides that “B” need not file notification again.