Federal Register

Thursday,
April 8, 2004

Part II

Federal Trade Commission

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements; Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing amendments to the premerger notification rules ("the rules") that attempt to reconcile, as far as is practical, the current disparate treatment of corporations, partnerships, limited liability companies and other types of non-corporate entities under the rules. The rules require the parties to certain mergers and acquisitions to file reports with the Federal Trade Commission ("the Commission") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice ("the Assistant Attorney General") and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to 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 proposed rulemaking introduces a number of changes that attempt to reconcile, as far as is practical, the current disparate treatment of corporations, partnerships, limited liability companies and other types of non-corporate entities under the rules, particularly in the areas of acquisitions of interests in these entities; formations of the entities; and the application of certain exemptions, including the intraperson exemption.

DATES: Comments must be received on or before June 4, 2004.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "HSR Proposed Rulemaking, Project No. P989316," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex E), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

An electronic comment can be filed by (1) clicking on *http://www.regulations.gov;* (2) selecting "Federal Trade Commission" at "Search for Open Regulations;" (3) locating the summary of this Notice of Proposed Rulemaking ("NPR"); (4) clicking on "Submit a Comment on this Regulation;" and (5) completing the form. For a given electronic comment, any information placed in the following fields—"Title," "First Name," "Last Name," "Organization Name," "State," "Comment," and "Attachment"—will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of these fields, but if they do so, their comments may not be considered.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, Washington, DC 20503, Attention: Carolyn Lovett, Desk Officer for Federal Trade Commission. Such comments should also be mailed to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex E), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

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

SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94–435, 90 Stat. 1390 ("the Act"), requires all persons contemplating certain mergers or acquisitions to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Congress empowered the Commission, with the concurrence of the Assistant Attorney General, to require "that the notification * * * be in such form and contain such documentary material and information * * * as is necessary and appropriate" to enable the agencies "to determine whether such acquisitions may, if consummated, violate the antitrust laws." Congress similarly granted rulemaking authority to, inter alia, "prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section." 15 U.S.C. 18a(d).

Pursuant to that section, the Commission, with the concurrence of the Assistant Attorney General, developed the Antitrust Improvements Act Rules ("the HSR rules") and Notification and Report Form for Certain Mergers and Acquisitions ("the Form"), and has amended or revised the HSR rules and the Form on numerous occasions, and now proposes these further changes to the HSR rules.

The Commission invites interested members of the public to submit written data, views, facts, and arguments addressing the issues raised by this NPR. Written comments must be submitted on or before June 4, 2004. Comments should refer to "HSR Proposed Rulemaking, Project No. P989316," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex E), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled "Confidential." [1] The FTC is requesting

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit

that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

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Background

The Act applies to acquisitions of voting securities or assets. Whether a transaction must be reported is determined by applying the statute, supporting regulations, and formal and informal staff interpretations. Neither the Act nor the HSR rules specifically address whether interests in unincorporated entities are deemed to be voting securities or assets. The Premerger Notification Office, by informal interpretation, has long taken the position that partnership interests, and, by extension, interests in other types of unincorporated entities, are neither assets nor voting securities. Thus, any acquisition of such interests has not been deemed a reportable event unless 100 percent of the interests are acquired, in which case the acquisition is deemed to be that of all of the underlying assets of the partnership or other unincorporated entity.

When promulgating the original HSR rules, the Commission recognized the possible applicability of the Act to acquisitions of less than 100 percent of the interests in such entities. Although the Commission did not extend the coverage of § 801.40 regarding formations of corporations to unincorporated entities, the Statement of Basis and Purpose to Section 801.40 reads:

"There is evidence that Congress intended coverage of acquisitions by or of noncorporate entities. Section 7A(b)(3)(A) states:

The term "voting securities'' means any securities which * * * entitle the owner or holders thereof to vote for the election of directors of the issuer, or, *with respect to unincorporated issuers,* persons exercising similar functions. (Emphasis supplied).

However, the Commission has instructed its staff to monitor the formation of joint business arrangements of all types and forms and to determine, after a year of operation, whether the rules provide appropriate coverage. The fact that persons contributing to the formation of a noncorporate joint venture are not required to report and wait prior to the transaction should not, of course, be construed as a Commission statement that such transactions are free from antitrust concerns.'' [2]

At the end of the one year period, further modifications to the rules were not made.

The language of the Act cited above suggests that unincorporated entities can have voting securities. Voting securities, under the Act, must entitle the holder to vote either for the election of directors or to vote for the election of individuals exercising similar functions with respect to unincorporated entities.[3] The Commission did not apply this approach to unincorporated entities in 1978 and does not propose to do so in these proposed amendments. In the 1987 rulemaking that redefined control of partnerships, which is discussed in more detail below, the Commission stated:

"* * * [t]he Commission staff concluded that partnerships do not possess 'individuals exercising similar functions' to directors; * * *'' [4]

Because the Commission concluded that partnerships do not have directors or individuals exercising similar functions, partnerships cannot have voting securities as defined in the Act.

In 1987, the Commission revised a longstanding staff position that a partnership was never controlled by its partners and thus was always its own ultimate parent entity. The rules were amended to incorporate the current control tests for partnerships.[5] In the Statement of Basis and Purpose accompanying that rulemaking, the Commission addressed the possibility of making the acquisition of control of a partnership a reportable event.

"* * * the Commission is considering whether, in light of its adoption of the 'partnership control' rule, it should also revise its rules to require reporting the acquisition of control of a partnership. Currently, the staff interpretation makes acquisition of less than a 100 percent interest in a partnership not reportable, because a partnership interest is deemed to be neither a voting security nor an asset.'' [6]

The Commission also raised the possibility of applying the intraperson exemption to partnerships should the acquisition of control be made a reportable event. Responding to a comment from the ABA Section of Antitrust Law asking whether an acquisition of assets from a partnership by a person who controlled that partnership would be an exempt transaction, the Commission replied:

"As a general matter, the Commission agrees it would be logical to exempt such transactions if acquisition of control of the partnership were a reportable event. However, as is noted above, under current staff interpretations, acquisition of control is

request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

[2] 43 FR 33487 (July 31, 1978).

[3] Section 7A(b)(3)(A).

[4] 52 FR 20062 (May 29, 1987).

[5] 16 CFR 801.1(b)(1)(ii) ("In the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity * * *'').

[6] 52 FR 20061 (May 29, 1987).

not normally a reportable event. Consequently, the Commission is not prepared now to exempt the asset acquisition. It will consider such an exemption as it considers making the acquisition of control of a partnership a reportable event.''[7]

In developing these proposed rule amendments, the Commission considered changing the control test for unincorporated entities from an equity test (having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity)[8] to a governance test (the general partner(s) of a partnership, the person(s) who designate the general partner, the managing member(s) of a limited liability company (''LLC''), or the person(s) who designate the management committee of an LLC, etc.). Such a change would conform the control test for unincorporated entities more closely to the control test for corporations (either holding 50 percent more of the outstanding voting securities of the issuer or having the contractual power presently to designate 50 percent or more of the directors of a corporation)[9]. However, the application of a governance test of control to an unincorporated entity would be difficult to apply consistently. The Commission has decided that changing the control rule in such a manner would create confusion and make the control test more ambiguous than the current rule. Therefore, these proposed amendments do not include such a change to the control test, and the current rule will remain unchanged with one exception. The proposed amendment to § 801.1(b)(2) would remove the alternate test of control for unincorporated entities which provides for control through having the contractual power presently to designate individuals exercising similar functions to those of directors of a corporation. This is discussed further in the narrative accompanying the proposed amendments to § 801.1.

Finally, in February, 1999 the Commission issued Formal Interpretation 15, which defined circumstances under which the formation of LLCs would be reportable. At that time, the Commission recognized that the use of LLCs had evolved, and while LLCs were still used to some extent as vehicles for start-up enterprises, they were also often being used to combine competing businesses under common control. To address the combination of businesses, Formal Interpretation 15 construed the Act and rules to require reporting when two or more ongoing businesses were combined under common control. Formal Interpretation 15 covers only LLCs, leaving other non-corporate ventures unaddressed, and has been complicated to apply.

In its commentary in Formal Interpretation 15, the Commission again indicated the possibility of making formations of partnerships reportable under the same reasoning that it used for LLCs.

> ''Some of the reasons for concluding that the formation of certain LLCs should be treated as reportable may apply equally well to partnerships * * *. [t]he [PreMerger Notification Office] has decided not to change its treatment of partnerships at this time, but may re-visit this issue in the future as developments require.''[10]

The use of unincorporated entities is expanding, and such entities are increasingly engaging in acquiring interests in other corporate and unincorporated entities. For example, the number of corporate income tax filings increased from 4,630,000 to 5,711,000 (23%) between 1994 and 2002, while the number of partnership returns[11], including LLCs taxed as partnerships, increased from 1,550,000 to 2,236,000 (44%) during the same period.[12] In addition, a number of states have amended their statutes in recent years to allow limited liability companies to merge with other types of legal entities.

Delaware has traditionally led the nation in incorporations and has now achieved the same position with unincorporated entities. According to the Delaware Secretary of State, 1,499 statutory trusts, 5,717 limited partnerships (''LPs'') and more than 47,000 LLCs were formed in 2002.[13]

Professor Susan Pace Hamill comments in the Michigan Law Review ''[r]egardless of whether the motivation is tax or business related, the use and acceptance of LLCs as a serious alternative to the partnership and the corporation [has] exponentially increased * * * and will probably grow more each year. Indeed, some commentators believe the LLC will largely replace the partnership and the closely held corporation and emerge as the dominant form of business for non-publicly traded entities.'' She further observes that ''[c]ommentators are just starting to speculate on the future popularity of the LLP (limited liability partnership). Some believe that LLPs will evolve as the business form of choice for many transactions and may even surpass the LLC.''[14]

Consequently, as a result of the increased usage of non-corporate entities in transaction structures, the Commission believes that this is the appropriate time to review its application of the Act and the HSR rules to non-corporate entities and to propose amendments that will revise the Commission's historic treatment of these entities.

Current Interpretations

Staff informal interpretations of the current rules with respect to unincorporated entities lead to several anomalies which do not occur with corporations. These inconsistencies relate primarily to three areas: changes of control, intraperson transfers of assets, and formations.

(a) Changes of Control

Section 801.2(a) states ''[a]ny person which, as a result of an acquisition, will hold voting securities or assets * * * is an acquiring person.'' Section 801.1(c)(8) further states ''* * * in addition to its own holding, an entity holds all assets and voting securities held by the entities which it controls * * *''. Despite this language, under current application of the rules, if a minority interest holder or a person who holds no interests at all acquires a controlling, but less than 100 percent interest in an existing unincorporated entity, the transaction is never reportable because the person who will control the unincorporated entity is not deemed to be acquiring the assets of the entity and no reportable acquisition occurs. However, under the rules, the person is immediately deemed to hold those same assets for purposes of determining the size-of-person test by virtue of having the right to 50% of the profits and assets upon dissolution of the entity. Further, if the person who now controls the unincorporated entity, who is deemed to hold all of the assets of the entity under § 801.1(c)(8), were to acquire the remaining interests, it would be required to file notification to acquire the same assets it is deemed to currently

[7] *Ibid.*

[8] 16 CFR 801.1(b)(1)(ii).

[9] 16 CFR 801.1(b).

[10] 64 FR 5808 (February 5, 1999).

[11] Partnership return of income forms (Form 1065) are not strictly income tax returns because partnerships are not taxed directly.

[12] Internal Revenue Service, *FY 1994 and FY 2002 Data Books, Summary of Number of Returns by Type of Return.*

[13] BNA's Corporate Counsel Weekly Newsletter Analysis, ''*Delaware Law: 2003 Amendments to Delaware's Alternative Entity Statutes*'', Turthill and Hering (October 8, 2003).

[14] Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question,* 95 Mich. L. Rev. 393 (November, 1996).

hold, assuming the jurisdictional thresholds are met. The intraperson exemption provided in § 802.30 prevents this result in the context of a corporation but is not available to unincorporated entities because the exemption requires that the acquiring and acquired person be the same by reason of holdings of voting securities.

Under this approach, if a person who currently holds no interests or a minority position in a non-corporate entity acquires 100 percent of the interests, the person is required to file, but if the person acquires 99 percent it does not. A person who controls a non-corporate entity and acquires the remainder of the interests must also file. Both situations are anomalous: a filing is required after control is obtained, yet no filing is required to gain control.

Consistent with the treatment of corporate entities, meaningful antitrust review should occur at the time that control of an unincorporated entity changes and not after control is already acquired. Currently, if a person who controls a partnership or other unincorporated entity is acquiring the remaining interests, that interest holder is deemed both the acquiring and acquired person and files notification to acquire the assets which, according to a literal reading of the rules, it already holds.[15] For example, a 90 percent partner acquiring the remaining 10 percent of the interest in a partnership must file. An HSR filing for this type of transaction appears to be of little antitrust significance. The Commission receives a significant number of such filings each year and believes that other such transactions are not reported as required due to the counterintuitive nature of the current application of the rules.[16]

(b) Intraperson Transfers

In the context of corporations, any transfer of assets from a corporation to a controlling shareholder, or a transfer of assets from one corporate subsidiary of a parent to another corporate subsidiary of the same parent is exempt.[17] However, because partnerships and other unincorporated entities are not controlled through the holding of voting securities, similar transfers involving such entities are reportable. This results, for example, in a reportable transaction when assets are transferred from a partnership to a partner that holds a 90 percent interest in the partnership, irrespective of the fact that the controlling partner is already deemed to hold those assets. Similarly, if a person controls two different partnerships and transfers assets from one to the other, that person would have a filing requirement despite the fact that it holds the assets under the rules both before and after the transfer. This result conflicts with the definition in § 801.2 which defines an acquiring person as "Any person which, *as a result of an acquisition* will hold voting securities or assets * * *'' (emphasis supplied).

(c) Formations

With the exception of certain limited liability company formations, as noted above,[18] formations of non-corporate entities are not reportable events. This leads to a number of transactions where de facto change of control of assets can occur without notification. For example, A and B form a non-corporate entity to which B will contribute a business in exchange for a 40 percent interest and A will contribute cash in exchange for a 60 percent interest. Although A now holds assets which were previously held by B, current application of the rules does not require notification because A will not hold 100 percent of the interests in the non-corporate entity nor are two pre-existing businesses being combined in an LLC. This would not be reportable in an LLC or partnership formation but would be reportable in the formation of a corporation. While Formal Interpretation 15 was an attempt to address this inconsistency in the context of limited liability company formations, its application still results in non-reportable transactions which could have significant antitrust implications.

Proposed Amendments

These proposed rules attempt to apply the Act as consistently as possible to all forms of legal entities, requiring filings for transactions which are likely to present antitrust concerns and exempting transactions which are not. The Commission particularly seeks information on the number and types of transactions that would become reportable and whether changes in the proposal, including additional exemptions, could limit any undesirable effects.

Proposed changes to the coverage rules include a revision to § 801.1(b) to remove the alternate control test for unincorporated entities; an amendment to § 801.1(f) to define a "non-corporate interest''; revising § 801.2(d) to clarify the consolidation rule; amending § 801.2(f) to define when acquiring interests in unincorporated entities may constitute an acquisition; adding a new subsection to § 801.10 to define how to value such an acquisition; adding a new subsection to § 801.13 to address aggregation of non-corporate interests; and adding a new § 801.50 which makes certain formations of unincorporated entities a reportable event. There are also ministerial changes to §§ 801.4, 802.40 and 802.41 to adapt their application to both corporations and unincorporated entities. Additionally, there are minor changes to the Notification and Report Form to require that Item 5(d) be completed in connection with the formation of an unincorporated entity and to reflect the applicability of Items 7 and 8 to unincorporated entities and to change the reporting requirement in Item 7 with regard to the formation of new entities.

Proposed changes to the exemption rules include modifying § 802.4 to eliminate the dissimilar treatment of asset and voting securities acquisitions which are substantively the same; codifying in § 802.10 a longstanding informal interpretation that pro-rata reformations (*i.e.* reincorporation in a new jurisdiction) are exempt transactions; changing § 802.30 to apply the intraperson exemption to entities which are held other than through holdings of voting securities; and adding a new § 802.65 to exempt acquisitions of non-corporate interests in entities which are formed in connection with financing transactions.

If the Commission adopts the proposed rules, it will revoke Formal Interpretation 15 and issue a new Formal Interpretation 18 because LLCs will then be treated like any other unincorporated entity under the rules.[19]

[15] 16 CFR 801.1(c)(8) (A person holds all assets and voting securities held by the entities included within it; in addition to its own holding, an entity holds all assets and voting securities held by the entities *which it controls* directly or indirectly). (emphasis supplied).

[16] Between 1997 and 2002, the Commission received 248 filings in which the acquiring person and the acquired person were the same.

[17] "An acquisition (other than the formation of a joint venture or other corporation the voting securities of which will be held by two or more persons) in which, by reason of holdings of voting securities, the acquiring and acquired persons are (or as a result of formation of a wholly owned entity will be) the same person, shall be exempt from the requirements of the Act.'' 16 CFR 802.30.

[18] Formal Interpretation (64 FR 5808 (February 5, 1999)) treats as reportable the formation of an LLC if (1) two or more pre-existing, separately controlled businesses will be contributed, and (2) at least one of the members will control the LLC. The formation of all other LLCs is treated similar to the formation of a partnership which is not reportable.

[19] Text of proposed Formal Interpretation 18:

1. This formal interpretation of the Premerger Notification Rules concerning limited liability companies is issued by the Federal Trade Commission pursuant to 16 CFR 803.30. It supersedes a formal interpretation issued by the

Continued

In addition to amendments concerning unincorporated entities, there are technical corrections to §§ 801.13, 801.15 and 802.2.

Part 801—Coverage Rules

Section 801.1 Definitions

The proposed amendment to § 801.1(b)(2) would remove the alternate test of control for unincorporated entities, which provides for control through having the contractual power presently to designate individuals exercising similar functions to those of directors of a corporation. This deletion simplifies the test of control for unincorporated entities, which is defined as having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity. The elimination of the alternate control test insures that an acquisition involving an unincorporated entity is reportable only when control is acquired through an acquisition of non-corporate interests which confer the right to profits or assets upon dissolution of the entity, not when obtaining the right to designate individuals exercising functions similar to those of directors of a corporation, such as the management committee of an LLC. The proposed amendment also clarifies that the only test for control of a not-for-profit corporation which does not issue voting securities is the right to designate 50 percent or more of the board of directors.

Proposed new § 801.1(f)(1)(ii) would define the term "non-corporate interest'' as an interest in any unincorporated entity which gives the holder the right to any profits of the entity or the right to any assets of the entity in the event of dissolution of that entity. This term is used throughout the proposed rule changes.

Section 801.2 Acquiring and Acquired Persons

The proposed amendment to § 801.2(d) would codify a longstanding informal staff position that the combination of any two entities into a new holding company is the functional equivalent of a consolidation and should be treated in the same manner regardless of whether the entities are corporations or non-corporate entities. It also clarifies that even if the two entities are retaining their separate legal identities, either by becoming subsidiaries of the new holding company or through arrangements such as dual-listing agreements, the transactions would be treated the same.

Proposed new § 801.2(f)(1) provides that an acquisition occurs at the time non-corporate interests which confer control of an unincorporated entity are acquired. At this point the person who controls the entity is deemed to hold all of the assets of the entity. Thus the proposed rules would shift reporting from when 100% of the interest in an unincorporated entity is received to the more significant point when control is obtained.[20] This change would be consistent with Section 801.2(a) which defines an acquiring person as "[a]ny person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly * * * is an acquiring person.''

Proposed new § 801.2(f)(2) would clarify that a contribution of assets or voting securities to an existing unincorporated entity is an acquisition by that entity and that such a transaction would not be governed by new § 801.50, even if all or part of the consideration is interests in the entity. This differs from Formal Interpretation 15 which views the contribution of a business to an existing LLC in exchange for membership interests as a new formation of that LLC. Note that when a person acquires control of an existing non-corporate entity as a result of a contribution made to that non-corporate entity, the acquisition by the non-corporate entity from the contributing person is not separately reportable. If the rule is amended as proposed, Formal Interpretation 15 will be repealed.

Proposed § 801.2(f)(3) would also codify a longstanding informal position that acquiring the right to designate 50 percent or more of the board of directors of a not-for-profit corporation is an acquisition of all of the underlying assets of such an entity. This is generally accomplished by becoming a member with the right to designate 50 percent or more of the board of directors.

Section 801.4 Secondary Acquisitions

The proposed amendment to § 801.4 would clarify that any indirect acquisition of voting securities of an issuer that is not controlled by the acquired entity in the primary acquisition is deemed a secondary acquisition and is separately subject to the reporting requirements of the Act. This is true whether the primary acquisition confers control of a corporation or an unincorporated entity. Again, the Commission intends to elevate substance over form in the application of this rule to different types of legal entities. A separately reportable acquisition of an unincorporated entity may also occur through an indirect acquisition of minority non-corporate interests if the acquiring person already holds non-corporate interests in that entity that in aggregate would result in control.

Section 801.10 Value of Voting Securities, Assets and Non-Corporate Interests To Be Acquired

Proposed § 801.10(d) would specify the method of valuing a transaction in which non-corporate interests which confer control of an existing unincorporated entity are acquired. Under the proposed rules, an acquisition of non-corporate interests is potentially reportable where a change of control results in the acquiring person being deemed to hold all of the assets of the unincorporated entity. That said, it appears inequitable to require the acquiring person in such a transaction to value all of the underlying assets of the unincorporated entity if less than 100 percent of the interests are being acquired. Under the current rules, in an acquisition of voting securities of a non-publicly traded corporation, where a person acquires 50 percent or more of the corporation's voting securities, that person is deemed to hold all of the assets of the corporation. However, the value of the transaction is the value of the percentage interest held in the corporation, not the value of 100 percent of the underlying assets. The Commission believes that it is appropriate to similarly value an acquisition of non-corporate interests. Rather than treating such a transaction as a stand-alone acquisition of assets, which would be valued in accordance with § 801.10(b), the new rule establishes the value of the transaction by using the same methodology employed in valuing voting securities of a non-publicly traded corporation. Therefore, the value of any non-corporate interests which are being acquired is the acquisition price if determined or if undetermined, the fair market value of those interests. The value of any non-corporate interests in the same unincorporated entity which are already held prior to the instant

staff of the Federal Trade Commission on February 5, 1999.

2. The formal interpretation issued on February 5, 1999, will no longer be used to analyze the reportability of transactions involving limited liability companies. Such transactions will now be analyzed under parts 801–803 of the Premerger Notification Rules in the same manner as any other non-corporate entities.

[20] See § 801.1(c)(8), which provides that a "person holds all assets and voting securities held by the entities included within it; in addition to its own holdings, an entity holds all assets and voting securities held by the entities which it controls directly or indirectly.''

acquisition is the fair market value of those interests.

Section 801.13 Aggregation of Voting Securities, Assets and Non-Corporate Interests

The proposed amendment to § 801.13(b) would correct a drafting oversight that has existed since the original rulemaking in 1978.[21] Because this section only requires aggregation of a current acquisition of assets with an earlier acquisition of assets from the same acquired person if the earlier transaction has been consummated, incongruous unintended results are produced in many instances.

Under the current rule, the value of a past and current asset acquisition must be aggregated if the acquiring person has signed a letter of intent or entered into a contract or agreement in principle to acquire assets from the acquired person, and if the acquiring person has acquired assets from the acquired person within 180 calendar days preceding the signing of such agreement. This requirement applies if the prior acquisition was not previously subject to the requirements of the Act.

A problem arises when the acquiring person has not consummated the prior acquisition of assets at the time the subsequent acquisition letter of intent or agreement has been entered into. In that situation, aggregation is not required yet the combination of assets may exceed the reporting thresholds. As a result, an earlier planned non-reportable acquisition which is the subject of a letter of intent or agreement that is still valid, but has not closed would not be aggregated with assets to be acquired from the same acquired person pursuant to a new letter of intent or agreement executed within 180 days of the original transaction. For example, if A enters into an agreement with B to acquire $30 million in assets on day one, and enters into a second agreement with B to acquire $30 million in additional assets on day 60, aggregation of the two sets of assets would not be required if the first acquisition has not closed, but would be required if it has closed.

To correct this anomaly, amended § 801.13(b) would require aggregation if within the 180 days preceding the execution of a letter of intent or agreement, either (1) a still valid letter of intent or agreement which has not been consummated was entered into with the same acquired person; or (2) assets were acquired from the same acquired person and are still held by the acquiring person. No aggregation is required if the earlier contemplated or consummated acquisition was subject to the requirements of the Act. The reference to § 801.1(h)(1) would also be removed because that part of the rule is no longer applicable to asset acquisitions.

Proposed new § 801.13(c) would require that any new acquisition of non-corporate interests be aggregated with any previously acquired non-corporate interests in the same unincorporated entity for purposes of determining the value of the transaction in accordance with new § 801.10(d). An acquisition of non-corporate interests that does not confer control of the unincorporated entity is not aggregated with any other assets or voting securities which have been or are currently being acquired from the same acquired person.

Section 801.15 Aggregation of Voting Securities and Assets the Acquisition of Which Was Exempt

The proposed amendment to § 801.15 would correct a drafting oversight in the rulemaking promulgated in March, 2002 [22], which, among other things, reorganized the foreign exemptions found in § § 802.50 and 802.51. The foreign exemptions were originally organized by nationality of the acquiring person such that § 802.50 covered acquisitions of both assets located outside of the U.S. and voting securities of foreign issuers by U.S. persons. Section 802.51 likewise covered both types of acquisitions by foreign persons. The 2002 rulemaking reorganized the two rules by type of transaction. Section 802.50 now covers acquisitions of assets located outside of the U.S. by any person and § 802.51 covers acquisitions of voting securities of foreign issuers by any person.

Both rules proscribe the use of the exemption if the foreign assets or foreign issuer generated sales in or into the U.S. in excess of $50 million in the most recent year or if the foreign issuer has assets located in the U.S. valued in excess of $50 million. Section 801.15(b) states that any assets or voting securities exempted under § 802.50 or § 802.51 are not held as a result of an acquisition unless the $50 million limitation in the relevant section is exceeded.

The original rules each referenced both assets and voting securities and thus covered aggregation of the U.S. sales attributable to foreign assets and voting securities that are acquired from the same acquired person in the same transaction. However, the rules as amended present a problem when applied without change to § 801.15. Because § 801.15(b) is applied separately to each exemption to determine whether the limitation in that exemption has been exceeded, under the current aggregation rule, §§ 802.50 and 802.51 are each analyzed separately to determine if the limitation in each has been exceeded independent of the other. This produced the unintended result that an acquisition can be made of voting securities of foreign issuers and assets located outside of the U.S. from the same acquired person, which in aggregate have sales in or into the U.S. in excess of $50 million, which will not be reportable if both the assets and the issuers do not individually exceed the limitation. For example, an acquisition of assets located outside of the U.S. with $30 million in sales into the U.S. coupled with an acquisition of voting securities of a subsidiary of the same acquired person with $30 million of sales into the U.S. would not currently be reportable. This is obviously not the intended result because the requisite nexus with U.S. commerce has been satisfied.

To correct this earlier drafting omission, the proposed amendment to § 801.15 would remove §§ 802.50 and 802.51 from paragraph (b) and move them to new paragraph (d) which requires that sales in or into the U.S. be aggregated under both foreign exemptions to determine if the $50 million limitation is exceeded. This proposed revision would insure consistent application of the foreign exemptions to transactions which are substantively the same but different in form.

Section 801.50 Formation of Unincorporated Entities

Because the formation of an entity presents the same potential antitrust concerns regardless of whether its legal form is that of a corporation or a non-corporate entity, the Commission believes that all such formations should be treated as similarly as possible under the rules. Thus, proposed new § 801.50 would mirror § 801.40, which governs the formation of corporations, with two exceptions. Most importantly, like any potentially reportable acquisition of an existing unincorporated entity, acquisitions of non-corporate interests which confer control must be reported. Because acquiring control is the triggering event in such a formation, the special size of person test in § 801.40 that requires that two acquiring persons and the newly formed corporation have sufficient size to satisfy the jurisdictional requirements, appears to be unnecessary. It might be inconsistent with the structure of the proposed rule, because there may well be only one

[21] 43 FR 33487 (July 31, 1978).

[22] 67 FR 11898 (March 18, 2002).

acquiring person (*i.e.*, only one person who will control the entity) in a formation of an unincorporated entity even though there are other minority interest holders. Therefore, this test is omitted in proposed new § 801.50 and the standard size of person test specified in section 7A(a)(2) of the Act is used.

Outside parties have raised questions concerning the determination of the right of profits or assets upon dissolution in a new unincorporated entity that has a formulaic distribution of profits based upon variables that cannot be determined at the time of the formation of the entity. If a formation agreement designates a fixed percentage of profits and assets upon dissolution for each person contributing to the formation of the entity, the analysis is straightforward. If however, the profit distribution depends on the level of profit, for instance, the analysis is more complex.

Thus far, staff in the Premerger Notification Office has learned of two profit sharing arrangements that raise complications when the control test is applied. In the first instance, the profit distribution is based on the level of cumulative profits. For example, the first $10 million in profits is distributed 80% to A and 20% to B. The second $10 million is distributed 50% to each. Any profits above $20 million are distributed 20% to A and 80% to B. Thus, the eventual distribution of profit cannot be determined in advance. At different points the right to 50% or more of the profits shifts from A to B and at one point they each have that right. Given the uncertainty that any of the profit targets will be achieved, the analysis of rights to profits becomes extremely difficult. Does A control because it has the right to more than 50% in the first 10 million, does B control because it has the same right to profits above $20 million, or do both control because they each have the right to 50% or more at different times? Does only A control because the only certainty is that the entity will have less than $10 million in profits, if indeed it ever generates any profits, at some point in its life cycle? Or does neither control?

A second arrangement is even more problematic. In this scenario, the percentage of profits distributed to each of the persons contributing to the formation is recalculated based on the level of profits achieved since the last distribution. Thus, each time there is a new distribution, a different person may have the right to more than 50% of that distribution.

To address these problems, the Commission proposes that any profit distribution arrangement that cannot be determined at the time of the formation of the entity will result in the right to profits of the entity being deemed undetermined. The control test in such a scenario will be the right to residual assets of the entity. Under the formation agreement, if any person contributing to the formation receives the right to 50% or more of the assets of the entity once all its debt has been repaid, then that person is deemed to have acquired control of the entity at the time of its formation. If no such right is conferred, the entity is deemed to be its own ultimate parent entity and its formation will not be reportable.

Proposed § 801.50 is intended to cover only the formation of unincorporated entities, not other contractual arrangements that may confer rights to profits of a joint enterprise that does not involve the formation of an entity, nor any existing contractual arrangement deemed by a court to be a partnership under rule of law.

PART 802—EXEMPTION RULES

Section 802.2 Certain Acquisitions of Real Property Assets

Section 802.2 of the rules was promulgated in 1996 to exempt eight categories of real property acquisitions, including office and residential property, unproductive real property, hotels and motels, and agricultural property, that the agencies concluded were unlikely to violate the antitrust laws.[23]

Section 802.2(g) of the 1996 version of the rule exempted acquisitions of agricultural property and stated:

> "Agricultural property is real property and assets that primarily generate revenues from the production of crops, fruits, vegetables, livestock, poultry, milk, and eggs (activities within SIC[24] Major Groups 01 and 02)."

SIC major groups 01 and 02 did not include timber tracts (08) or logging (24).

At the time § 802.2 was originally adopted, the agencies explained that three comments had proposed "an exemption for acquisitions of timberland, noting that the raw material supply and manufacturing resources in the forestry industry are abundant, and ownership of timberland is fragmented." The agencies expressly rejected creating such an exemption:

> "However, because there has been enforcement interest in a number of transactions involving timberland in the western United States, the Commission declined to include an exemption for acquisitions of timberland to insure that the enforcement agencies continue to receive notification of those acquisitions of timberland that may present competitive concerns."[25]

In 2001, the FTC amended the HSR Form and Instructions to require reporting of revenue data by NAICS[26] rather than by SIC code.[27] At the same time, the two HSR Rules that had referenced SIC codes were amended so as to replace those references with "the applicable NAICS sector." Accordingly, the parenthetical in the agricultural property exemption was amended to read:

> "(activities within NAICS sector 11)."

The Statement of Basis and Purpose simply stated: "This amendment is necessary to update the definition to the applicable NAICS sector rather than the SIC industry code."[28]

The agencies have since discovered that timberland, which was in SIC major group 08 and thus not originally referenced in the parenthetical at issue, is in NAICS sector 11, which is captioned "Agriculture, Forestry, Fishing and Hunting." Within sector 11 are "timber tract operations", "forest nurseries and gathering of forest products", and "logging." Thus, the change to NAICS sector 11 inadvertently expanded the exemption beyond the agricultural property originally intended.

To clarify that timberland acquisitions are not exempted by § 802.2(g), the proposed amendment to this rule would make two changes. First, the parenthetical at issue would be revised to make it clear that only real property and assets that primarily generate revenues from "certain" activities within NAICS sector 11, *i.e.*, activities named in the text of the rule (the production of crops, fruits, vegetables, livestock, poultry, milk and eggs), are exempted. Second, the amendment would add a new subsection under the exceptions to the rule providing that timberland or other real property that generate revenues from activities within NAICS subsector 113 (Forestry and logging) and NAICS industry group 1153 (Support activities for forestry and logging) do not qualify for the agricultural property exemption.

[23] 61 FR 13666 (March 28, 1996).

[24] Standard Industrial Classification.

[25] 61 FR 13679 (March 28, 1996).

[26] North American Industry Classification System.

[27] 66 FR 23561 (May 9, 2001) (interim rules); 66 FR 35541 (July 6, 2001) (finalizing interim rules).

[28] *Ibid.*

Section 802.4 Acquisitions of Voting Securities of Issuers or Non-Corporate Interests in Unincorporated Entities Holding Certain Assets the Acquisition of Which Is Exempt

Section 802.4 in its current form was promulgated in connection with the 1996 rulemaking that exempted the acquisition of certain real property and goods acquired in the ordinary course of business. Consequently, its scope is limited to such acquisitions. This limitation of the exemption requires filings even for transactions of a type that the Commission has now deemed unlikely to create antitrust concerns.

For example, the current rule does not exempt the acquisition of voting securities of a U.S. issuer whose only assets are foreign with no nexus to the U.S., while the direct acquisition of those foreign assets would be exempt under § 802.50. Another example would be the acquisition of an issuer whose only assets consisted of cash and cash equivalents. While the direct acquisition of the assets would not be reportable under § 801.21, the acquisition of the voting securities is not exempted by the current version of the rule. It seems unlikely that a filing in such acquisitions of voting securities would prove useful if the direct acquisition of the same assets of the issuer would be exempt.

The exemption in § 802.4 applies to acquisitions of voting securities of issuers that hold certain assets that are exempt from the notification requirements if acquired directly. The exemption is only available if the acquired issuer or issuers do not in the aggregate hold non-exempt assets exceeding the $50 million notification threshold. The Commission now believes that this exemption should be expanded in two ways. First, consistent with the other proposed amendments to the rules, the proposed amendments to this exemption would apply to both acquisitions of voting securities and to acquisitions of non-corporate interests in an unincorporated entity. Second, the proposed exemption would be broadened to include acquisitions of voting securities of an issuer or of non-corporate interests which confer control of a non-corporate entity whose assets are exempt under any section of part 802 of the rules or section 7A(c) of the Act or are specified under § 802.21 of the rules. The Commission has concluded that if the direct acquisition of an asset is already exempt, it appears logical to extend that exemption to an acquisition of voting securities of an issuer or of non-corporate interests in a unincorporated entity whose only holding is that same asset.

The proposed rule would also codify another informal staff position that the value of any minority interests in either corporations or unincorporated entities does not count toward the $50 million limitation for non-exempt assets. However, the indirect acquisitions of such minority interests could be separately reportable as a secondary acquisition in the case of voting securities or if the acquiring person already has a minority interest in an unincorporated entity that, when combined with the interest being indirectly acquired, would result in control of that entity. The Commission believes that expanding coverage of § 802.4 would ensure that all of the exemptions are applied consistently to the substance of a transaction regardless of whether it is structured as an asset or a voting securities acquisition.

Section 802.10 Stock Dividends and Splits; Reorganizations

Proposed new § 802.10(b) would expand the existing exemption to codify another longstanding informal position that exempts the reincorporation or formation of an upstream holding company by an existing corporation, as long as two conditions are met: (1) no new assets will be introduced as a result of the conversion, and (2) the interests that will be held by an acquiring person in the new entity will be pro-rata to or less than the holdings in the original entity or the acquiring person was a controlling shareholder or interest holder prior to the conversion. The reorganization will be exempt for a person that controlled the original entity regardless of its holdings in the new entity as long as the first condition is met.

Section 802.30 Intraperson Transactions

Section 802.30 in its present form exempts acquisitions in which, by reason of holdings of voting securities, the acquiring and acquired person are the same person. Current § 802.30 produces another inconsistent application of an exemption dependent on whether a corporation or an unincorporated entity is involved in the transaction. Because of the qualifying phrase "by reason of holdings of voting securities'', entities that do not issue voting securities are excluded from the exemption. For example, if a corporate subsidiary transfers assets to its controlling shareholder, no filing is required. If an unincorporated subsidiary made the same transfer to a person who controlled it, the exemption would not apply. Similarly, if a parent controlled two corporations and transferred assets from one to the other, no filing is required. If a parent controlled two partnerships and made the same transfer between them, the exemption is inapplicable and a filing would be required. These scenarios seem at odds with the HSR rules' definition of "control'' and "hold'' because the parent holds the assets of the controlled entities both before and after each transaction.

Proposed § 802.30(a) would eliminate the requirement that control be through the holding of voting securities, and instead applies the appropriate control test in § 801.1(b)(1) to any type of entity. This proposed section also adds the provision that the exemption would apply if "at least one of the acquired persons'' is the same person. This insures that the proposed exemption would be available in an acquisition where there are two acquired ultimate parent entities as in proposed Example 1. These proposed changes would ensure that this prong of the intraperson exemption is applied consistently to all types of entities.

The proposed amendment to § 802.30(b) would restate the existing exemption for formation of wholly owned subsidiaries, but would change the language slightly to exempt the formation of any type of wholly-owned entity.

Proposed new § 802.30(c) would provide that assets which will be contributed to a new entity upon its formation would not be subject to the requirements of the Act with respect to the person contributing the assets to the formation. This is intended to eliminate a filing requirement where the assets contributed to the formation by other persons would not on their own be subject to the Act, such as when the controlling person contributes assets and the non-controlling person contributes only cash. This proposed exemption would be applicable to the formations of both unincorporated entities and corporations.

Section 802.40 Exempt Formation of Corporations or Unincorporated Entities

Section 802.40 is intended to exempt the formation of not-for-profit corporations, but its requirement that the acquisition be of voting securities of the not-for-profit is anomalous in that the vast majority of not-for-profit corporations do not issue voting securities. The proposed amendment to § 802.40 would correct this by removing the reference to voting securities, thereby extending the exemption to the formation of any not-for-profit entity

within the meaning of the cited sections of the Internal Revenue Code.

Section 802.41 Corporations or Unincorporated Entities at the Time of Formation

Section 802.41 states that in a formation of a joint venture or other corporation under § 801.40, only the acquiring persons need file notification and not the new entity being formed. The new corporation being formed is not required to file as an acquired person. The proposed amendment to § 802.41 would extend the same treatment to new unincorporated entities being formed under proposed new § 801.50.

Section 802.65 Exempt Acquisition in Formation of Unincorporated Entity

Proposed new § 802.65 would exempt certain acquisitions in financing transactions involving the formation of unincorporated entities. In some financing transactions, a new unincorporated entity is formed into which one party contributes assets and another contributes only cash. Initially, the cash investor will have a preferred return in order to recover its investment. As a result, that person may have the right to 50 percent or more of the profits of the entity for some period of time following the formation. Although this right to profits constitutes control of the entity under § 801.1(b), the investor has no operational control of the entity. This type of transaction is analogous to a creditor acquiring secured debt in the entity, an event which is not subject to the Act. Rather than taking back secured debt, however, the investor acquires an equity interest in the entity to obtain its return on investment. For these reasons, the Commission believes that such a financing arrangement is unlikely to raise antitrust concerns.

The proposed new exemption would be applicable if four conditions are met: (1) The acquiring person is contributing only cash to the formation of the entity; (2) the formation transaction is in the ordinary course of the acquiring person's business; (3) the terms of the formation agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return; and (4) the acquiring person will not be a competitor of the new entity. While the investor's acquisition of control of the new entity at its formation would be exempt, the investor would be deemed to control the new entity for all other purposes following the formation.

Part 803—Transmittal Rules

Appendix: Premerger Notification and Report Form

Item 5(d) Corporations and Unincorporated Entities at the Time of Formation

Current Item 5(d) requires that certain additional information be provided when the Notification and Report Form is being submitted in connection with the formation of a new corporation. The proposed amendment to the Item 5(d) instructions would require that the same information be provided in connection with the formation of a new unincorporated entity pursuant to new § 801.50. Item 5(d) on the Notification and Report Form would be amended to include reference to unincorporated entities as well as corporations.

Item 7 NAICS Code Overlaps

The instructions to Item 7 currently require the reporting of any NAICS codes in which the person filing notification and any other person that is a party to the transaction also derived revenues in the most recent year. This language implies that in the formation of a new entity, overlaps among the acquiring persons contributing to the formation must be reported. The Commission believes that is overly burdensome and provides little helpful information because the only relevant overlap is between the person filing notification as an acquiring person and the newly formed entity. The proposed new language would also clarify that this information is provided in connection with the formation of new corporations and new unincorporated entities.

Item 8 Previous Acquisitions

The instructions to Item 8 would also be amended to include reference to newly formed unincorporated entities as well as corporations.

Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. 16 CFR 1.26(b)(5).

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 Commission 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 2000 amendments to the Act 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 proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these proposed 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, 44 U.S.C. 3501–3518, requires agencies to submit "collections of information'' to the Office of Management and Budget ("OMB'') and obtain clearance before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The information collection requirements in the HSR rules and Form have been reviewed and approved by OMB under OMB Control No. 3084–0005. The current clearance expires on May 31, 2004, and the FTC is seeking a renewal clearance from OMB.[29] Because the rule amendments proposed in this NPR would change existing reporting requirements, the Commission has submitted a Supporting Statement for Information Collection Provisions to OMB.

Increase in Filings Due to Proposed Change in Filing Requirements for Non-Corporate Entities

The proposed amendments make certain acquisitions of controlling interests in existing and newly-formed non-corporate entities a reportable event. Currently, a filing is only required if 100 percent of the interests in a non-corporate entity are acquired.

Staff has estimated the increase in reportable transactions due to this aspect of the proposed rule by making reasonable deductions using publicly available statistics, from the State of Delaware, which is a leading domicile for U.S. and international corporations. More than half a million business entities have made Delaware their legal home including 280,000 corporations

[29] 69 FR 7225 (February 13, 2004).

and 250,000 limited liability companies and partnerships. More than 50% of all publicly-traded companies in the United States including 58% of the Fortune 500 have chosen Delaware as their legal home.[30] Based on the above estimates, unincorporated entities in Delaware represent a figure that is 47% of the total entities registered in Delaware. In the absence of other relevant available data, staff believes that this is approximately the same proportion nationwide.

The total number of transactions requiring HSR filings in FY 2003 in which a controlling interest in a corporation was acquired is 495. Applying the 47% figure from above, staff estimates a total of 233 transactions requiring HSR filings for acquisitions of a controlling interest in an unincorporated entity under the proposed rules (495 × .47 = 233).[31] This estimate is extremely conservative because HSR filings are already required for acquisitions of 100 percent of the interests in an unincorporated entity and for certain formations of LLCs. Using a conservative estimate that 50% of acquisitions of controlling interests in unincorporated entities are already reported at a different point than they will be under the proposed rules results in a projected increase of 117 transactions requiring HSR filings (233 × .50 = 117).

Decrease Due to Proposed Broadening of the Exemptions

The broadening of the exemptions in the proposed rules would eliminate the filing requirement for a number of the projected filings for unincorporated entities. The intraperson exemption in § 802.30 currently only applies to corporations. The proposed amendments would expand this exemption to cover non-corporate entities as well. Additionally, proposed new § 802.65 exempts the acquisition of a controlling interest in a non-corporate entity which is being formed in connection with a financing transaction. Applying an extremely conservative estimate of 50% of these transactions qualifying for exemption, the total projected decrease is 59 (117 × .50 = 59).

This estimate is conservative, because a number of filings for corporate transactions would also be exempted under the proposed rules which would require a filing under the current rules. In particular, § 802.4, which exempts acquisitions of voting securities of an issuer which holds exempt assets, is currently limited to a narrow range of real property and ordinary course of business related assets. The proposed amendment to this exemption would expand coverage to all assets exempted in any section of the HSR rules or the Act. Again, applying a conservative estimate that 10% of the total transactions involving acquiring a controlling interest in a corporation would now be exempted, a total of 50 transactions which currently require HSR filings would be exempted under the proposed rule (495 × .10 = 50).

Net Effect

Staff estimates that there will be an increase of 9 transactions requiring HSR filings due to the proposed rule change. This represents a less than 1% increase as a result of the proposed rules over the 968 total transactions that required HSR non-index filings in FY 2003 (9/968 = .009 or 0.9%).[32] Therefore, staff estimates that the total burden hours under the HSR rules as revised will be 87,530 hours, which is an increase of 702 hours from the staff's estimate of 86,828 hours for the current rules.[33] Similarly, staff estimate the labor costs under the proposed rules to be $37,200,000 (rounded to the nearest thousand), an increase of $300,000 from the estimate of $36,902,000.

The Commission invites comments that will enable it to: (1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information technology.

List of Subjects in 16 CFR Parts 801, 802 and 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission proposes to amend 16 CFR parts 801, 802 and 803 as set forth below:

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 § 801.1 by revising paragraphs (b)(1)(ii) and (b)(2), redesignating paragraph (f)(1) as (f)(1)(i) and adding paragraph (f)(1)(ii) to read as follows:

§ 801.1 Definitions.

* * * * *

(b) * * *

(1) *Either.* (i) * * *

(ii) In the case of an unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or

(2) Having the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for-profit corporation.

* * * * *

(f)(1)(i) *Voting securities.* * * *

(ii) *Non-corporate interest.* The term "non-corporate interest'' means an interest in any unincorporated entity which gives the holder the right to any profits of the entity or the right to any assets of the entity in the event of dissolution of that entity. These unincorporated entities include, but are not limited to, general partnerships, limited partnerships, limited liability partnerships, limited liability companies, cooperatives and business trusts; but these unincorporated entities do not include trusts described in paragraphs (c)(3) through (5) of this section and any interest in such a trust is not a non-corporate interest as defined by this rule.

* * * * *

3. Amend § 801.2 by revising paragraph (d)(2)(iii), adding an Example

[30] Delaware Division of Corporations *(www.state.de.us/corp/aboutagency.shtml).*

[31] All calculations in this section are rounded to the nearest whole number.

[32] Clayton Act sections 7A(c)(6) and (c)(8) exempt from the requirements of the premerger notification program certain transactions that are subject to the approval of other agencies, but only if copies of the information submitted to these other agencies are also submitted to the FTC and the Assistant Attorney General. Thus, parties must submit copies of these "index'' filings, but completing the task requires significantly less time than non-exempt transactions which require "non-index'' filings.

[33] As explained in the Notice that solicits comment on the renewal clearance for the rules, the staff estimated the hours burden under the current rules as 86,828 hours [(21 index filings × 2 hours) + (2,174 non-index filings × 39 hours) + (50 transactions requiring more precise valuation × 40 hours)]. *See* 69 FR 7225 (February 13, 2004). Staff estimates that the proposed rules will increase by 9 the number of transactions that require non-index filings, thereby increasing the number of non-index filings by 18 to 2,192 [2,174 + (9 transactions × 2 filings per transaction)]. Accordingly, staff estimates the hours burden for the proposed rule as 87,530 hours [(21 index filings × 2 hours) + (2,192 non-index filings × 39 hours) + (50 transactions × 40 hours)]. [(87,530 hours × $425/hour for executives and attorneys' wages) = $37,200,250].

6 and designating the Examples as Examples 1 through 6 to paragraph (d)(2)(iii), and by adding paragraph (f) to read as follows:

§ 801.2 Acquiring and acquired persons.

* * * * *

(d) * * *

(2) * * *

(iii) All persons party to a transaction as a result of which all parties will lose their separate pre-acquisition identities or will become wholly owned subsidiaries of a newly formed entity shall be both acquiring and acquired persons. This includes any combination of corporations and unincorporated entities consolidating into any newly formed entity. In such transactions, each consolidating entity is deemed to be acquiring all of the voting securities (in the case of a corporation) or interests (in the case of an unincorporated entity) of each of the others. Dual-listed company arrangements under which two entities effectively combine their assets and operations by agreement are governed by this rule.

Examples to paragraph (d)(2)(iii): * * *

6. Partnership A and Corporation B form a new LLC in which they combine their businesses. A and B cease to exist and partners of A and shareholders of B receive membership interests in the new LLC. For purposes of determining reportability, A is deemed to be acquiring 100 percent of the voting securities of B and B is deemed to be acquiring 100 percent of the interests of A. Pursuant to § 803.9(b) of this chapter, even if such a transaction consists of two reportable acquisitions, only one filing fee is required.

* * * * *

(f)(1)(i) In an acquisition of non-corporate interests which results in a person controlling the entity, that person is deemed to hold all of the assets of the entity as a result of the acquisition. The acquiring person is the person acquiring control of the entity and the acquired person is the pre-acquisition ultimate parent entity of the entity.

(ii) The value of an acquisition described in paragraph (f)(1)(i) of this section is determined in accordance with § 801.10(d).

(2) Any contribution of assets or voting securities to an existing unincorporated entity is deemed an acquisition of such voting securities or assets by the ultimate parent entity of that entity. If the only consideration for such contribution or acquisition is interests in the entity, neither the contribution nor the receipt of interests is subject to § 801.50.

Examples to paragraph (f)(2): 1. A, B and C each hold 33⅓ percent of the interests in Partnership X. D contributes assets valued in excess of $50 million to X and as a result D receives 40 percent of the interests in X and A, B and C are each reduced to 20 percent. Partnership X is deemed to be acquiring the assets from D, in a transaction which may be reportable. This is not treated as a formation of a new partnership. Because no person will control Partnership X, no additional filing is required by any of the four partners.

2. LLC X is its own ultimate parent entity. A contributes a manufacturing plant valued in excess of $200 million to X which issues new interests to A resulting in A having a 50% interest in X. A is acquiring non-corporate interests which confer control of X and therefore will file as an acquiring person. LLC X is not an acquiring person with respect to the contribution of the plant by A, because A held the plant prior to the transaction and continues to hold it through its acquisition of control of LLC X after the transaction is completed.

(3) Any person who acquires control of an existing not-for-profit corporation which has no outstanding voting securities is deemed to be acquiring all of the assets of that corporation.

Example to paragraph (f)(3): A becomes the sole corporate member of not-for-profit corporation B and accordingly has the right to designate all of the directors of B. A is deemed to be acquiring all of the assets of B as a result.

4. Amend § 801.4 by revising paragraph (a) to read as follows:

§ 801.4 Secondary acquisitions.

(a) Whenever as the result of an acquisition (the "primary acquisition") an acquiring person controls an entity which holds voting securities of an issuer that entity does not control, then the acquiring person's acquisition of the issuer's voting securities is a secondary acquisition and is separately subject to the act and these rules.

* * * * *

5. Amend § 801.10 by revising the heading and by adding paragraph (d) to read as follows:

§ 801.10 Value of voting securities, non-corporate interests and assets to be acquired.

* * * * *

(d) *Value of interests in an unincorporated entity.* In an acquisition of non-corporate interests that confers control of either an existing or a newly-formed unincorporated entity, the value of the non-corporate interests held as a result of the acquisition is the sum of the acquisition price of the interests to be acquired (provided the acquisition price has been determined), and the fair market value of any of the interests in the same unincorporated entity held by the acquiring person prior to the acquisition; or, if the acquisition price has not been determined, the fair market value of interests held as a result of the acquisition.

6. Amend § 801.13 by revising the heading, by revising paragraph (b)(2), by removing the Example following paragraph (b)(2) and adding four Examples in its place, and adding paragraph (c) and two examples to read as follows:

§ 801.13 Aggregation of voting securities, assets and non-corporate interests.

* * * * *

(b) *Assets.* * * *

(2) If the acquiring person signs a letter of intent or agreement in principle to acquire assets from an acquired person, and within the previous 180 days the acquiring person has:

(i) Signed a letter of intent or agreement in principle to acquire assets from the same acquired person, which is still in effect but has not been consummated, or has acquired assets from the same acquired person which it still holds; and

(ii) The contemplated or consummated previous acquisition was not subject to the requirements of the Act; then for purposes of the size-of-transaction test of Section 7A(a)(2), both the acquiring and the acquired persons shall treat the assets that were the subject of the earlier letter of intent or agreement in principal as though they are being acquired as part of the present acquisition. The value of any assets which are subject to this paragraph is determined in accordance with § 801.10(b).

Examples to paragraph (b)(2): 1. On day 1, A enters into an agreement with B to acquire assets valued at $40 million. On day 90, A and B sign a letter of intent pursuant to which A will acquire additional assets from B, valued at $20 million. The original transaction has not closed, however, the agreement is still in effect. For purposes of the size-of-transaction test in Section 7A(a)(2), A must aggregate the value of both of its acquisitions.

2. On March 30, A enters into a letter of intent to acquire assets of B valued at $45 million. On January 31, earlier the same year, A closed on an acquisition of assets of B valued at $10 million. For purposes of the size-of-transaction test in Section 7A(a)(2), A must aggregate the value of both of its acquisitions.

3. On day 1, A enters into an agreement with B to acquire assets valued at $60 million. A and B file notification and observe the waiting period. On day 60, A signs a letter of intent to acquire an additional $40 million of assets from B. Because the earlier acquisition was subject to the requirements of the Act, A does not aggregate the two acquisitions of assets.

4. On day 1, A consummates an acquisition of assets of B valued at $30 million. On day 60, A consummates a sale of the same assets to an unrelated third party. On day 120, A

enters into an agreement to acquire additional assets of B valued at $30 million. Because A no longer holds the assets from the previous acquisition, no aggregation of the two asset acquisitions is required.

(c) (1) *Non-corporate interests.* In an acquisition of non-corporate interests, any previously acquired non-corporate interests in the same unincorporated entity is aggregated with the newly acquired interests. The value of such an acquisition is determined in accordance with § 801.10(d) of these rules.

(2) *Other assets or voting securities of the same acquired person.* An acquisition of non-corporate interests which does not confer control of the unincorporated entity is not aggregated with any other assets or voting securities which have been or are currently being acquired from the same acquired person.

Examples to paragraph (c)(2): 1. A currently has the right to 30 percent of the profits in LLC. B has the right to the remaining 70 percent. A acquires an additional 30 percent interest in LLC from B for $60 million in cash. As a result of the acquisition, A is deemed to now have a 60 percent interest in LLC. The current acquisition is valued at $60 million, the acquisition price. The value of the 30 percent interest that A already holds is the fair market value of that interest. The value for size-of-transaction purposes is the sum of the two.

2. A acquires the following from B: (1) all of the assets of a subsidiary of B; (2) all of the voting securities of another subsidiary of B; and (3) a 30 percent interest in an LLC which is currently wholly-owned by B. In determining the size-of-transaction, A aggregates the value of the voting securities and assets of the subsidiaries that it is acquiring from B, but does not include the value of the 30 percent interest in the LLC, pursuant to § 801.13(c)(2).

7. Amend § 801.15 by revising paragraphs (b) and (c), adding paragraph (d), designating the Examples as Examples to the entire section, and adding example 9 to read as follows:

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

* * * * *

(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, 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) 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)(11)(A) unless additional voting securities of the same issuer have been or are being acquired; and

(d) 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 §§ 802.50(a), 802.51(a), 802.51(b) of this chapter unless the limitations, in aggregate for §§ 802.50(a), 802.51(a), 802.51(b), 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.

Examples to this section: * * *

9. A acquires assets of B located outside of the U.S. with sales into the U.S. of $20 million. It also acquires voting securities of B's foreign subsidiary X which has sales into the U.S. of $40 million. Both the assets and the voting securities of X are exempt under §§ 802.50 and 802.51 respectively when analyzed separately. However, because § 801.15(d) requires that the sales into the U.S. for both the assets and the voting securities be aggregated to determine whether the $50 million limitation has been exceeded, both are held as a result of the acquisition because the aggregate sales into the U.S. total $60 million.

8. Add new § 801.50 to read as follows:

§ 801.50 Formation of unincorporated entities.

(a) Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of section 7A(a)(1) and 7A(a)(2)(A), an acquiring person is subject to the requirements of the Act if it acquires control of the newly-formed entity.

(b) Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of section 7A(a)(1), the criteria of section 7A(a)(2)(B)(i), and the criteria of paragraph (a) of this section (other than in connection with a consolidation), an acquiring person is subject to the requirements of the Act if:

(1)(i) The acquiring person has annual net sales or total assets of $100 million or more;

(ii) The newly-formed entity has total assets of $10 million or more; and

(iii) The acquiring person acquires control of the newly-formed entity; or

(2)(i) The acquiring person has annual net sales or total assets of $10 million or more;

(ii) The newly-formed entity has total assets of $100 million or more; and

(iii) The acquiring person acquires control of the newly-formed entity.

(c) For purposes of paragraph (b) of this section, the total assets of the newly-formed entity is determined in accordance with § 801.40(d).

(d) Any person acquiring control of the newly-formed entity determines the value of its acquisition in accordance with § 801.10(d).

(e) The commerce criterion of section 7A(a)(1) is satisfied if either the Activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the Activities of the newly-formed entity will be in or will affect commerce.

PART 802—EXEMPTION RULES

9. The authority citation for part 802 continues to read as follows:

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

10. Amend § 802.2 by revising the introductory language in paragraph (g), by revising (g)(1)(ii), and by adding paragraph (g)(1)(iii) 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 (certain activities within NAICS sector 11).

(1) * * *

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

(iii) Timberland or other real property that generates revenues from activities within NAICS subsector 113 (Forestry and logging) or NAICS industry group 1153 (Support activities for forestry and logging).

* * * * *

11. Amend § 802.4 by revising the heading and revising paragraph (a) and adding an example thereunder to read as follows:

§ 802.4 Acquisitions of voting securities of issuers or non-corporate interests in unincorporated entities holding certain assets the acquisition of which is exempt.

(a) An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it

controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to section 7A(c) of the Act, this part 802, or pursuant to § 801.21 of this chapter, is exempt from the reporting requirements if the acquired issuer or unincorporated entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than $50 million. The value of voting or non-voting securities of any other issuer or interests in any non-corporate entity not included within the acquired issuer does not count toward the $50 million limitation for non-exempt assets.

Example to paragraph (a): A and B form a new corporation as an acquisition vehicle to acquire all of the voting securities of C. Each contributes $250 million in cash. Because all of the cash is considered to be exempt assets pursuant to § 801.21, the new corporation does not have non-exempt assets valued in excess of $50 million, and the acquisition of its voting securities by A and B is exempt under § 802.4. Note that the result is the same if the acquisition vehicle is formed as an unincorporated entity. Also see the examples to § 802.30(c) for additional applications of § 802.4.

* * * * *

12. Revise § 802.10 to read as follows:

§ 802.10 Stock dividends and splits; reorganizations.

(a) The acquisition of voting securities pursuant to a stock split or pro rata stock dividend is exempt from the requirements of the Act under section 7A(c)(10).

(b) An acquisition of non-corporate interests or voting securities as a result of the conversion of a corporation or unincorporated entity into a new entity is exempt from the requirements of the Act if:

(1) No new assets will be contributed to the new entity as a result of the conversion; and

(2) Either:

(i) As a result of the transaction the acquiring person does not increase its per centum holdings in the new entity relative to its per centum holdings in the original entity; or

(ii) The acquiring person controlled the original entity.

Examples to paragraph (b): 1. Partners A and B hold 60 percent and 40 percent respectively of the partnership interests in C. C is converted to a corporation in which A and B hold 60 percent and 40 percent respectively of the voting securities. No new assets are contributed. The conversion to a corporation is exempt from notification for both A and B.

2. Shareholder A holds 55% and B holds 45% of the voting securities of corporation C. C is converted to a limited liability company in which A holds 60% and B holds 40% of the membership interests. No new assets are contributed. The conversion to a limited liability company is exempt from notification because A controlled the corporation. If however, B holds 55% and A holds 45% in the new limited liability company, the conversion is not exempt for B and may require notification because control changes.

3. Shareholders A, B and C each hold one third of the voting securities of corporation X. Pursuant to a reorganization agreement, A and B each contribute new assets to X and 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.

13. Revise § 802.30 to read as follows:

§ 802.30 Intraperson transactions.

(a) An acquisition (other than the formation of a corporation or unincorporated entity under § 801.40 or § 801.50 of this chapter) in which the acquiring and at least one of the acquired persons are, the same person by reason of § 801.1(b)(1) of this chapter, or in the case of a not-for-profit corporation which has no outstanding voting securities, by reason of § 801.1(b)(2) of this chapter, is exempt from the requirements of the Act.

Examples: Examples to paragraph (a):

1. A and B each have the right to 50% of the profits of partnership X. A also holds 100% of the voting securities of corporation Y. A pays B $100 million in cash and transfers certain assets of X to Y. Because A is the acquiring person through its control of Y, pursuant to § 801.1(b)(1)(i), and one of the acquired persons through its control of X pursuant to § 801.1(b)(1)(ii) , the acquisition of assets is exempt under § 802.30(a).

2. A and B each have the right to 50% of the profits of partnership X. A contributes assets to X valued in excess of $50 million. B contributes cash to X. Because B is an acquiring person but not an acquired person, its acquisition of the assets contributed to X by A is not exempt under § 802.30(a). However, A is both an acquiring and acquired person, and its acquisition of the assets it is contributing to X is exempt under § 802.30(a).

(b) The formation of any wholly owned entity is exempt from the requirements of the Act.

(c) Assets contributed to a new entity upon its formation are not subject to the requirements of the Act with respect to the person contributing the assets to the formation.

Examples to paragraph (c): 1. A and B form a new partnership to which A contributes a manufacturing plant valued at $51 million and acquires a 51% interest in the partnership. B contributes $49 million in cash and acquires a 49% interest. B is not acquiring non-corporate interests which confer control of the partnership and therefore is not making a reportable acquisition. A is acquiring non-corporate interests which confer control of the partnership, however, the manufacturing plant it is contributing to the formation is exempt under § 802.30(c) and the cash contributed by B is excluded under § 801.21, therefore, the acquisition of non-corporate interests by A is exempt under § 802.4.

2. A and B form a new corporation to which A contributes a plant valued at $120 million and acquires 60% of the voting securities of the new corporation. B contributes a plant valued at $80 million and acquires 40% of the voting securities of the new corporation. While the assets contributed to the formation are exempted by § 802.30(c) for each of A and B, the new corporation holds more than $50 million in non-exempt assets (the plant contributed by the other person) with respect to both acquisitions. A is now acquiring voting securities of an issuer which holds $80 million in non-exempt assets (the plant contributed by B), and B is acquiring voting securities of an issuer which holds $120 million in non-exempt assets (the plant contributed by A). Therefore neither acquisition of voting securities is exempt under § 802.4. Note that in contrast to the formation of the partnership in Example 1, B is not required to acquire a controlling interest in the corporation in order to have a reportable transaction.

3. A and B form a 50/50 partnership. A contributes a plant valued at $60 million and B contributes a plant valued at $40 million and $20 million in cash. Because with respect to A, the new partnership has non-exempt assets of $40 million (the plant contributed by B), A's acquisition of non-corporate interests is exempt under § 802.4. With respect to B, the new partnership holds $60 million in non-exempt assets (the plant contributed by A), therefore B's acquisition of non-corporate interests would not be exempt under § 802.4.

14. Revise § 802.40 to read as follows:

§ 802.40 Exempt formation of corporations or unincorporated entities.

The formation of an entity is exempt from the requirements of the Act if the entity will be not-for-profit within the meaning of sections 501(c)(1)–(4), (6)–(15), (17)–(20) or (d) of the Internal Revenue Code.

15. Amend § 802.41 by revising the heading and the introductory text to read as follows:

§ 802.41 Corporations or unincorporated entities at time of formation.

Whenever any person(s) contributing to the formation of an entity are subject to the requirements of the Act by reason of § 801.40 or § 801.50 of this chapter, the new entity need not file the notification required by the Act and § 803.1 of this chapter.

Examples:

* * * * *

16. Add new § 802.65 to read as follows:

§ 802.65 Exempt acquisition in formation of unincorporated entity.

In a transaction to which § 801.50 of this chapter applies, an acquisition of non-corporate interests that confers control of the newly-formed unincorporated entity is exempt from the notification requirements of the Act if:

(a) The acquiring person is contributing only cash to the formation;

(b) The formation transaction is in the ordinary course of the acquiring person's business;

(c) The terms of the formation agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return; and

(d) The acquiring person will not be a competitor to the new entity.

PART 803—TRANSMITTAL RULES

17. The authority citation for part 803 continues to read as follows:

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

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

BILLING CODE 6750–01–P

Appendix to Part 803

ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM for Certain Mergers and Acquisitions

INSTRUCTIONS

GENERAL

The Answer Sheets (pp. 1-15) constitute the Notification and Report Form ("the Form") required to be submitted pursuant to § 803.1(a) of the premerger notification rules ("the rules"). Filing persons need not, however, record their responses on the Form.

These instructions specify the information which must be provided in response to the Items on the Answer Sheets. Only the completed Answer Sheets, together with all documentary attachments, are to be filed with the Federal Trade Commission and the Department of Justice.

Persons providing responses on attachment pages rather than on answer sheets must submit a complete set of attachment pages with each copy of the Form.

The term "documentary attachments" refers to materials supplied in responses to Item 3(d), Item 4 and to submissions pursuant to §§ 803.1(b) and 803.11 of the rules.

Information-The central office for information and assistance concerning the rules, 16 CFR Parts 801-803, and the Form is Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, phone (202) 326-3100.

Definitions-The definitions and other provisions governing this Form are set forth in the rules, 16 CFR Parts 801-803. The governing statute, the rules, and the Statement of Basis and Purpose for the rules are set forth at 43 FR 33450 (July 31, 1978), 44 FR 66781 (November 22, 1979) 48 FR 34427 (July 29, 1983) and Pub. L. No. 106-533, 114 Stat. 2762.

Affidavit-Attach the affidavit required by § 803.5 to page 1 of the Form. Affidavits are not required if the person filing notification is an acquired person in a transaction covered by § 801.30. (See § 803.5(a)).

Responses-*Each answer* should identify the Item to which it is addressed. Use the reverse side of the corresponding answer sheet or attach separate additional sheets as necessary in answering each Item. Each additional sheet should identify at the top of the page the Item to which it is addressed. Voluntary submissions pursuant to § 803.1(b) should also be identified.

Enter the name of the person filing notification appearing in Item 1(a) on page 1 of the Form and the date on which the Form is completed at the top of each page of the Form, at the top of any sheets attached to complete the response to any Item, and at the top of the first or cover page of each documentary attachment.

If unable to answer any Item fully, give such information as is available and provide a statement of reasons for non-compliance as required by § 803.3. If exact answers to any Item cannot be given, enter best estimates and indicate the sources or bases of such estimates. Estimated data should be followed by the notation, "est." All information should be rounded to the nearest thousand dollars.

Year-All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

North American Industry Classification System (NAICS) Data-This Notification and Report Form requests information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 6-digit NAICS national industry code level. To the extent that dollar revenues are derived from *manufacturing operations* (NAICS Sectors 31-33), data must also be submitted at the *7-digit NAICS product class and 10-digit NAICS product code levels.* The term "dollar revenues" is defined in § 803.2(d).

References-In reporting information by 6-digit NAICS industry code refer to the *North American Industry Classification System - United States, 1997* (*1997 NAICS Manual*) published by the Executive Office of the President, Office of Management and Budget. In reporting information by 7-digit NAICS product class and 10-digit NAICS product code refer to the *1997 Numerical List of Manufactured and Mineral Products* (EC97M31R-NL) published by the Bureau of the Census. Information regarding NAICS also is available at www.census.gov.

Privacy Act Statement-Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of this information is to determine whether the merger or acquisition reported in the Notification and Report Form may violate the antitrust laws.

Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $11,000 per day.

Items 5, 7, 8-Supply information only with respect to operations conducted within the United States, including its commonwealths, territories, possessions and the District of Columbia. (See §§ 801.1(k); 803.2(c)(1).)

Information need not be supplied regarding assets or voting securities currently being acquired, when the acquisition is exempt under the statute or rules. (See § 803.2(c)(2).)

The acquired person should limit its response in the case of an acquisition of assets, to the assets being sold, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. Separate responses may be required where a person is both acquiring and acquired. (See § 803.2(b) and (c).)

Filing-Complete and return two copies (with one notarized original affidavit and certification and one set of documentary attachments) of this Notification and Report Form to the 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, Antitrust Division, Department of Justice, Patrick Henry Bldg., 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.)

ITEM BY ITEM

Affidavit-Attach the affidavit required by § 803.5 to page 1 of the Answer Sheets. Acquiring persons in transactions covered by § 801.30 are required to also submit a copy of the notice served on the acquired person pursuant to § 803.5(a)(1). (See § 803.5(a)(3).)

Fee Information-The fee for filing the Notification and Report Form is based on the aggregate total amount of assets and voting securities to be held as a result of the acquisition:

Value of assets or voting securities to be held	Fee Amount
greater than $50 million but less than $100 million	$45,000
$100 million or greater but less than $500 million	$125,000
$500 million or greater	$280,000

Amount Paid-Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges. Where an explanatory attachment is required, include in your explanation any adjustments to the acquisition price that serve to lower the fee from that which would otherwise be due. If there is no acquisition price or if the acquisition price may fall within a range that straddles two filing fee thresholds, state the transaction value on which the fee is based and explain the valuation method used. Include in your explanation a description of any exempt assets, the value assigned to each, and the valuation method used.

A Valuation Worksheet available from the Premerger Notification Office will be helpful in determining the value of a transaction for filing and fee purposes. This Worksheet need not be submitted with the Notification and Report Form, but it or something similar should be utilized and retained by the acquiring person in the event
Commission staff has questions about the valuation of the transaction.

Payer Identification- Provide the 9-digit Taxpayer Identification Number (TIN) of the acquiring person and, if different from the filing person, the TIN of the payer(s) of the filing fee. A payer or filing person who is a natural person having no TIN must provide the name and social security number (SSN) of the payer. If the payer or filing person is a foreign person, only the name of the payer and the name of the filing person need be supplied if different.

Method of Payment-Check the box indicating the method of fee payment. If paying by electronic wire transfer (EWT), provide the name of the financial institution from which the EWT is being sent and the confirmation number.

To insure filing fees paid by EWT are attributed to the appropriate payer filing notification, the payer must provide the following information to the financial institution initiating the EWT:

The Department of Treasury's ABA Number: 021030004; and
The Federal Trade Commission's ALC Number: 29000001.

If the name used to transmit the EWT differs from the filer's name, provide the alternative name. If the confirmation number is unavailable at the time notification is filed, provide this information by letter within one business day of filing.

Corrective Filing-Put an X in the appropriate box to indicate whether the notification is a corrective filing being made for an acquisition that has already taken place in violation of the statute. Attach a detailed, written explanation signed by a company official explaining (1) how the violation occurred, (2) when and how the violation was discovered and (3) what steps will be taken to ensure compliance in the future.

Transactions Subject to Foreign Antitrust Notification-If to the knowledge or belief of the filing person at the time of filing this notification, a foreign antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority and the date or anticipated date of each such notification. Response to this item is voluntary.

Cash Tender Offer-Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

Bankruptcy-Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or a debtor-in-possession for a transaction that is subject to section 363(b) of the Bankruptcy Code (11USC § 363).

Early Termination-Put an X in the yes box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register as required by § 7A(b)(2) of the Clayton Act and on the FTC web site www.ftc.gov.

ITEM 1

Item 1(a)-Give the name and headquarters address of the person filing notification. The name of the person is the name of the ultimate parent entity included within that person.

Item 1(b)-Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2.)

Item 1(c)-Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, partnership or other (specify).

Item 1(d)-Put an X in the appropriate box to indicate whether data furnished is by calendar year or fiscal year. If fiscal year, specify period.

Item 1(e)-Put an X in the appropriate box to indicate if this Form is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if this Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the reporting person named in Item 1(a) of the Form.

Item 1(f)-If an entity within the person filing notification other than the ultimate parent entity listed in Item 1(a) is the entity which is making the acquisition, or if the assets or voting securities of an entity other than the ultimate parent entity listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities held by the person named in Item 1(a) above. (If control is effected by means other than the direct holding of the entity's voting securities, describe the intermediaries or the contract through which control is effected (see § 801.1(b)).

Item 1(g)-Print or type the name and title, firm name, address, telephone number, fax number and e-mail address of the individual to contact regarding this Notification and Report Form. (See § 803.20(b)(2)(ii).)

Item 1(h)-Foreign filing persons print or type the name and title, firm name, address, telephone number, fax number and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii).)

ITEM 2

Item 2(a)-Give the names of all ultimate parent entities of acquiring and acquired person which are parties to the acquisition whether or not they are required to file notification.

Item 2(b)-Put an X in all the boxes that apply to this acquisition.

Item 2(c)-*Acquiring persons* put an X in the box to indicate the highest threshold for which notification is being filed (see § 801.1(h)): $50 million, $100 million, $500 million, 25% (if value of voting securities to be held is greater than $1 billion), or 50%. The notification threshold selected should be based on voting securities only that will be held as a result of the acquisition.

Item 2(d)-*Assets and voting securities held as a result of the acquisition* (to be completed by both acquiring and acquired persons). State:

Item 2(d)(i)-the value of voting securities;

Item 2(d)(ii)-the percentage of voting securities;

Item 2(d)(iii)-the value of assets:

Item 2(d)(iv)-the aggregate total amount of voting securities and assets of the acquired person to be held by each acquiring person, as a result of the acquisition (see §§ 801.12, 801.13, and 801.14).

Item 2(e)-Acquiring persons must provide the name(s) of the person(s) who performed any fair market valuation used to determine the aggregate total value of the transaction reported in Item 2(d)(iv).

ITEM 3

Item 3(a)-*Description of acquisition.* Briefly describe the transaction. Include a list of the name and mailing address of each acquiring and acquired person, whether or not required to file notification. Indicate for each party whether assets or voting securities (or both) are to be acquired. Also indicate what consideration will be received by each party. In describing the acquisition, include the expected dates of any major events required to consummate the transaction (e.g., stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers) and the scheduled consummation date of the transaction.

If the voting securities are to be acquired from a holder other than the issuer (or an entity within the same person as the issuer) separately identify (if known) such holder and the issuer of the voting securities. Acquiring persons involved in tender offers should describe the terms of the offer.

Item 3(b)(i)-*Assets to be acquired.* This Item is to be completed only to the extent that the transaction is an acquisition of assets. Describe all general classes of assets (other than cash and securities) to be acquired by each party to the transaction, giving dollar values thereof.

Give the total value of the assets to be acquired in this transaction.

Examples of general classes of assets other than cash and securities are land, merchandising inventory, manufacturing plants (specify location and products produced), and retail stores. For each general class of assets, indicate the page or paragraph number of the contract or other document submitted with this Form in which the assets are more particularly described.

Item 3(b)(ii)-*Assets held by acquiring person.* (To be completed by acquiring persons). If assets of the acquired person (see § 801.13) are presently held by the person filing notification, furnish a description of each general class of such assets in the manner required by Item 3(b)(i), and the dollar value or estimated dollar value at the time they were acquired.

Item 3(c)-*Voting securities to be acquired.* Furnish the following information separately for each issuer whose voting securities will be acquired in the acquisition: (If, as a result of the acquisition, the acquiring person will hold 100 percent of the voting securities of the acquired issuer or if the acquisition is a merger or consolidation (see § 801.2(d)), the parties may so state and provide the total dollar value of the transaction instead of responding to Items 3(c)(i)-3(c)(vi).

Item 3(c)(i)-List each class of voting securities (including convertible voting securities) which will be outstanding after the acquisition has been completed. If there is more than one class of voting securities, include a description of the voting rights of each class. Also list each class of non-voting securities which will be acquired in the acquisition;

Item 3(c)(ii)-Total number of shares of each class of securities listed which will be outstanding after the acquisition has been completed;

Item 3(c)(iii)-Total number of shares of each class of securities listed which will be acquired in this acquisition. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(c)(iv)-Identity of each person acquiring any securities of any class listed. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(c)(v)-Dollar value of securities of each class listed to be acquired in this transaction (see § 801.10). If there is more than one acquiring person of any class of securities, show data separately for each acquiring person (If the exact dollar value cannot be determined at the time of filing, provide an estimated value and indicate the basis on which the estimate was made);

Item 3(c)(vi)-Total number of each class of securities listed which will be held by acquiring person(s) after the acquisition has been accomplished. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(d)-Furnish copies of final or most recent versions of all documents which constitute the agreement among the acquiring person(s) and the person(s) whose voting securities or assets are to be acquired. (Do not attach these documents to the Answer Sheets.)

ITEM 4

Furnish one copy of each of the following documents. For each entity included within the person filing notification which has prepared its own such documents different from those prepared by the person filing notification, furnish, in addition, one copy of each document from each such other entity. Furnish copies of:

Item 4(a)-all of the following documents which have been filed with the United States Securities and Exchange Commission (or are to be filed contemporaneously in connection with this acquisition); the most recent proxy statement and Form 10-K, each dated not more than three years prior to the date of this Notification and Report Form; all Forms 10-Q and 8-K filed since the end of the period reflected by the Form 10-K being supplied; any registration statement filed in connection with the transaction for which notification is being filed; if the acquisition is a tender offer, Schedule TO. Alternatively, if the person filing notification does not have copies of responsive documents readily available, identification of such documents and citation to date and place of filing will constitute compliance;

NOTE: In response to Item 4(a), the person filing notification may incorporate by reference documents submitted with an earlier filing as explained in the staff formal interpretations dated April 10, 1979, and April 7, 1981, and in § 803.2(e).

Item 4(b)-the most recent annual reports and most recent annual audit reports (of person filing notification and of each unconsolidated United States issuer included within such person) and, if different, the most recently regularly prepared balance sheet of the person filing notification and of each unconsolidated United States issuer included within such person;

Item 4(c)-all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

Persons filing notification may provide an optional index of documents called for by Item 4 of the Answer Sheets.

NOTE: If the person filing notification withholds any documents called for by Item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and § 803.3(d).

ITEMS 5 through 8

NOTE: For Items 5 through 8, the acquired person should limit its response in the case of an acquisition of assets, to the assets to be sold, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. A person filing as both acquiring and acquired may be required to provide a separate response to these items in each capacity so that it can properly limit its response as an acquired person. (See § 803.2(b) and (c).)

Items 5(a)-5(c): These items request information regarding dollar revenues and lines of commerce at three NAICS levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), data must also be submitted at the 7-digit product class level and 10-digit product code level (NAICS-based codes). Where certain published NAICS industry codes contain only 5 digits, the filing person should add a zero (0) after the fifth (5th) digit.

NOTE: See "References" listed in the General Instructions to the Form. Refer to the *1997 NAICS Manual* for the 6-digit industry codes and the *1997 Numerical List of Manufactured and Mineral Products (1997 Numerical List)* for the 7-digit product classes and 10-digit product codes. Report revenues for the 7-digit NAICS product classes and 10-digit NAICS product codes using the codes in the columns labeled "Product code" in the *1997 Numerical List.*

Nondepository credit intermediation (NAICS Industry Group Code 5222); securities, commodity contracts, and other financial investments (NAICS Subsector 523); funds, trusts, and other financial vehicles (NAICS Subsector 525); real estate (NAICS Subsector 531); lessors of nonfinancial intangible assets, except copyright works (NAICS Subsector 533); and management of companies and enterprises (NAICS Subsector 551) should identify or explain the revenues reported (e.g. dollar sales receipts).

Persons filing notification should include the total dollar revenues for all entities included within the person filing notification at the time this Notification and Report Form is prepared (even if such entities have become included within the person since 1997). For example, if the person filing notification acquired an entity in 1998, it must include that entity's 1997 revenues in items 5(a) and 5(b)(i). It must also include that entity's most recent year's revenues in Item 5(b)(iii) and/or Item 5(c).

Item 5(a)-*Dollar revenues by industry*. Provide aggregate 6-digit NAICS industry data for 1997.

Item 5(b)(i)-*Dollar revenues by manufactured product*. Provide the following information on the aggregate operations for the person filing notification for 1997 for each 10-digit NAICS product of the person in NAICS Sectors 31-33 (manufacturing industries).

NOTE: Where the *1997 Numerical List* denotes footnote 1 at the end of a specific Subsector, refer to Appendices A, and then B for detail collected in a specified Current Industrial Report. You must provide 10-digit NAICS product codes and descriptions listed in Appendix B.

Item 5(b)(ii)-*Products added or deleted*. Within NAICS Sectors 31-33 (manufacturing industries), identify each product of the person filing notification added or deleted subsequent to 1997, indicate the year of addition or deletion, and state total dollar revenues in the most recent year for each product that has been added. Products may be identified either by 10-digit NAICS product code or in the manner ordinarily used by the person filing notification.

Do not include products added since 1997 by reason of mergers or acquisitions of entities occurring since 1997. Dollar revenues derived from such products should be included in response to Item 5(b)(i). However, if an entity acquired since 1997 by the person filing notification (and now included within the person) itself has added any products since 1997, these products and the dollar revenues derived therefrom should be listed here. Products deleted by reason of dispositions of assets constituting less than substantially all of the assets of an entity since 1997 should also be listed here.

Item 5(b)(iii)-*Dollar revenues by manufactured product class*. Provide the following information concerning the aggregate operations of the person filing notification for the most recent year for each 7-digit NAICS product class within NAICS Sectors 31-33 (manufacturing industries) in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 7-digit NAICS product class may be provided if a statement describing the method of estimation is furnished.

Item 5(c)-*Dollar revenues by non-manufacturing industry*. Provide the following information concerning the aggregate operations of the person filing notification for the most recent year for each 6-digit NAICS industry code in NAICS Sectors other than 31-33 (manufacturing industries) in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS industry code may be provided if a statement describing the method of estimation is furnished. Industries for which the dollar revenues totaled less than one million dollars in the most recent year may be omitted.

NOTE: *This million dollar minimum is applicable only to Item 5(c).*

CORPORATIONS AND UNICORPORATED ENTITIES AT THE TIME OF FORMATION

Item 5(d)-Supply the following information only if the acquisition is the formation of corporation pursuant to § 801.40 or the formation of an unincorporated entity pursuant to § 801.50

Item 5(d)(i)-List the name and mailing address of the new corporation or unincorporated entity.

Item 5(d)(ii)(A)-List contributions that each person forming the new corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Item 5(d)(ii)(B)-Describe any contracts or agreements the new corporation or unincorporated entity will obtain assets or capital from sources other than the persons forming it.

Item 5(d)(ii)(C)-Specify whether and in what amount the persons forming the new corporation or unincorporated entity have agreed to guarantee its credit or obligations.

Item 5(d)(ii)(D)-Describe fully the consideration which each person forming the new corporation or unincorporated entity will receive in exchange for its contribution(s).

Item 5(d)(iii)-Describe generally the business in which the new corporation or unincorporated entity will engage, including location of headquarters and principal plants, warehouses, retail establishments or other places of business, its principal types of products or activities, and the geographic areas in which it will do business.

Item 5(d)(iv)-Identify each 6-digit NAICS industry code in which the new corporation or unincorporated entity will derive dollar revenues. If the new corporation or unincorporated entity will be engaged in manufacturing also specify each 7-digit NAICS product class in which it will derive dollar revenues.

ITEM 6

This item need not be completed by a person filing notification only as an acquired person if only assets are to be acquired. Persons filing notification may respond to Items 6(a), 6(b), or 6(c) by referencing a "document attachment" furnished with this Form if the information so referenced is a complete response and is up-to-date and accurate. Indicate for each Item the specific page(s) of the document that are responsive to that Item.

Item 6(a)-*Entities within the person filing notification*. List the name and headquarters mailing address of each entity included within the person filing notification. Entities with total assets of less than $10 million may be omitted.

Item 6(b)-*Shareholders of person filing notification*. For each entity (including the ultimate parent entity) included within the person filing notification the voting securities of which are held (see § 801.1(c)) by one or more other persons, list the issuer and class of voting securities, the name and headquarters mailing address of each other person which holds five percent or more of the outstanding voting securities of the class and the number and percentage held by that person. Holders need not be listed for entities with total assets of less than $10 million.

Item 6(c)-Holdings of person filing notification. If the person filing notification holds voting securities of any issuer not included within the person filing notification, list the issuer and class, the number and percentage held, and (optionally) the entity within the person filing notification which holds the securities. Holdings of less than five percent of the outstanding voting securities of any issuers, and holding of issuers with total assets of less than $10 million may be omitted.

ITEM 7

Item 7-*NAICS codeoverlaps*. If, to the knowledge or belief of the person filing notification, the person filing notification derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which any other person that is a party to the acquisition also derived dollar revenues in the most recent year (or in which the new corporation or unincorporated entity will derive dollar revenues), then for each such 6-digit NAICS industry code:

Item 7(a)-supply the 6-digit NAICS industry code and description for the industry;

Item 7(b)-list the name of each person which is a party to the acquisition which also derived dollar revenues in the 6-digit industry (note: In the formation of a new corporation or unincorporated entity report only overlaps between the person filing notification and the new corporation or unincorporated entity);

Item 7(c)-*Geographic market information*:

Item 7(c)(i)-for each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a) above, list the states or, if desired, portions thereof in which, to the knowledge or belief of the person filing notification, the products in that 6-digit NAICS code produced by the person filing notification are sold without a significant change in their form, whether they are sold by the person filing notification or by others to whom such products have been sold or resold;

Item 7(c)(ii)- for each 6-digit NAICS industry code within NAICS Sectors or Subsectors 11 (agriculture, forestry, fishing and hunting); 21 (mining); 22 (utilities); 23 (construction); 48-49 (transportation and warehousing); 511(publishing industries); 513 (broadcasting and telecommunications); and 71 (arts, entertainment and recreation) listed in item 7(a) above, list the states or, if desired, portions thereof in which the person filing notification conducts such operations;

Item 7(c)(iii)-for each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a) above, list the states or, if desired, portions thereof in which the customers of the person filing notification are located;

Item 7(c)(iv)-for each 6-digit NAICS industry code within NAICS Sectors or Subsectors 44-45 (retail trade); 512 (motion picture and sound recording industries); 521 (monetary authorities-central bank); 522 (credit intermediation and related activities); 532 (rental and leasing services); 62 (health care and social assistance); 72 (accommodations and food services); 811 (repair and maintenance); and 812 (personal and laundry services) listed in Item 7(a) above, provide the address, **arranged by state, county and city or town,** of each establishment from which dollar revenues were derived in the most recent year by the person filing notification;

Item 7(c)(v)- for each 6-digit NAICS industry code within NAICS Subsectors 514 (information services and data processing services); 523 (securities, commodity contracts and other financial investments and related activities); 525 (funds, trusts and other financial vehicles); 531 (real estate); 533 (lessors of nonfinancial intangible assets, except copyright works); 54 (professional, scientific and technical services); 55 (management of companies and enterprises); 56 (administrative and support and waste management and remediation services); 61 (educational services); 813 (religious, grantmaking, civic, professional, and similar organizations); and NAICS Industry Group 5242 (insurance agencies and brokerages, third party administration of insurance and pension funds, claims adjusting, and other insurance related activities) listed in Item 7(a) above, list the states or, if desired, portions thereof in which establishments were located from which the person filing notification derived revenues in the most recent year; and

Item 7(c)(vi)-for each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

NOTE: Except in the case of those NAICS major industries in the Sectors and Subsectors mentioned in Item 7(c)(iv) above, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

ITEM 8

Item 8-*Previous acquisitions* (to be completed by acquiring persons). Determine each 6-digit NAICS industry code listed in Item 7(a) above, in which the person filing notification derived dollar revenues of $1 million or more in the most recent year and in which either the acquired issuer derived revenues of $1 million or more in the recent year (or, in which, in the case of the formation of a new corporation or unincorporated entity, the new corporation or unincorporated entity reasonably can be expected to derive revenues of $1 million or more), or revenues of $1 million or more in the most recent year were attributable to the acquired assets. For each such 6-digit NAICS industry code, list all acquisitions made by the person filing notification in the five years prior to the date of filing of entities deriving dollar revenues in that 6-digit NAICS industry code. List only acquisitions of 50 percent or more of the voting securities of an issuer which had annual net sales or total assets greater than $10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

(a) the name of the entity acquired;

(b) the headquarters address of the entity prior to the acquisition;

(c) whether securities or assets were acquired;

(d) the consummation date of the acquisition; and

(e) the 6-digit (NAICS code) industries by (number and description) identified above in which the acquired entity derived dollar revenues.

CERTIFICATION- (See § 803.6.)

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 05/31/04

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 |_____| 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 |_____| TOTAL DOLLAR REVENUES

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

6-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR |_____| TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

5(d) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A NEW CORPORATION OR UNICORPORATED ENTITY

5(d)(i) NAME AND ADDRESS OF THE NEW CORPORATION OR UNICORPORATED ENTITY

5(d)(ii)

(A) CONTRIBUTIONS THAT EACH PERSON FORMING THE NEW CORPORATION OR UNICORPORATED ENTITY 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 NEW CORPORATION OR UNICORPORATED ENTITY WILL RECEIVE

5(d)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE NEW CORPORATION OR UNICORPORATED ENTITY 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 NAICS CODE OVERLAPS

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]

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 04–7537 Filed 4–7–04; 8:45 am]

BILLING CODE 6750–01–C