Signed at Washington, DC, on July 22, 2005.

James R. Little,

Administrator, Farm Service Agency.

[FR Doc. 05–16107 Filed 8–12–05; 8:45 am]

BILLING CODE 3410–05–P

FEDERAL TRADE COMMISSION

16 CFR Part 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'') to enable filing parties to provide Internet links to certain documents in lieu of paper copies, and to address ''stale filing'' situations, in which parties make premerger notification filings but then fail to comply with a Request for Additional Information and Documentary Material (''second request''). Section 7A of the Clayton Act (''the Act'') requires the parties to certain mergers and acquisitions to file notification with the Federal Trade Commission (''the Commission'' or ''FTC'') and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''the Assistant Attorney General'' or ''DOJ'') 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. If either agency determines during the waiting period that further inquiry is necessary, it can issue a second request, which extends the waiting period for a specified period after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). The Commission is proposing a change to relieve the burden of complying with Items 4(a) and (b) of the Notification and Report Form (''the Form''). Currently, paper copies of annual reports, annual audit reports and regularly prepared balance sheets and copies of certain documents, such as 10Ks filed with the Securities and Exchange Commission (''SEC''), must be provided in response to these Items. The proposed modification would allow filing persons to provide an Internet address linking directly to the documents required by Items 4(a) and (b) in lieu of providing paper copies. The Commission is also proposing an amendment to the rules to specify that an acquiring person's notification, and an acquired person's notification in certain types of transactions, shall expire after eighteen months if a second request to them remains outstanding.

DATES: Comments must be received on or before October 14, 2005.

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, with two complete copies, to the following address: Federal Trade Commission/ Office of the Secretary, Room 135–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Because paper mail in the Washington area and at the Agency is subject to delay, please consider submitting your comments in electronic form, as prescribed below. Comments containing confidential material, however, must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible.

Comments filed in electronic form should be submitted by clicking on the following Weblink: *https://secure.commentworks.com/ftc-hsrexpirationofnotification* and following the instructions on the Web-based form. To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the *https://secure.commentworks.com/ftc-hsrexpirationofnotification* Weblink. You also may visit *http://www.regulations.gov* to read this request for comment, and may file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

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, or B. Michael Verne, Compliance Specialist, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Section 803.2 Instructions Applicable to Notification and Report Form

In response to Items 4(a) and (b) of the Form, filing parties currently must provide paper copies of annual reports, annual audit reports and regularly prepared balance sheets and copies of certain documents, such as 10K's, filed with the SEC. Many of these documents are routinely submitted in electronic form to the SEC and are available on the SEC's Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system, or via the Internet on company Web sites. Responses to these Items may often be voluminous and can account for the bulk of documents submitted with the Form.

In view of the ease with which the antitrust agencies can access these documents via the Internet, the proposed modification of paragraph 803.2(e) and Instructions to the Form would allow filing parties to provide an Internet address linking directly to the documents required by Items 4(a) and 4(b) in lieu of providing paper copies. Incorporating documents by reference to Internet Web pages would only apply to Items 4(a) and 4(b) and would not be available for responding to other items on the Form.

It would remain the filer's duty to ensure that the filing is accurate and complete, as attested by the filer's certification signature. Accordingly, it is proposed that Section 803.2 be further amended to provide that if an Internet link submitted is, or becomes, inoperative or the document that is linked to is incomplete, such that the

[1] The comment must be accompanied by an explicit 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).

documents required by Items 4(a) or 4(b) are not available for review by the FTC and DOJ, the filer shall make the document(s) available by referencing operative Internet link(s) or provide paper copies of the relevant document(s) by 5 p.m. on the business day following any request by the FTC or the Assistant Attorney General. Failure to provide requested documents by the close of the next business day would result in notice of a deficient filing under Section 803.10(c)(2). Given the ability to incorporate such documents by linking, the previous option to cite the date and place of filing if copies are not readily available would no longer be necessary, and it is proposed that it be deleted from the Instructions.

Section 803.7 Expiration of Notification

The Commission and the DOJ have encountered instances in which, after parties make premerger notification filings and after second requests are issued, the parties make no effort to comply with the second requests. Generally this occurs when the parties have decided not to go forward with the proposed acquisition, either because of the issuance of second requests or for business reasons unrelated to the government's antitrust investigation. In nearly all of these instances, the parties have voluntarily withdrawn their premerger notification filings. The agency is then able to close its investigation, as there no longer is a transaction pending with a waiting period.

In some instances, however, the parties have refused to withdraw their notification even though they lack a present intention to undertake the acquisition. In such instances, the agency's investigation remains open indefinitely because the waiting period is suspended, and would only begin to run for the final 30 days if and when there was compliance with the second requests.

The information contained in the parties' notifications becomes stale with the passage of time. In order to conduct the meaningful review contemplated by the Act, the agencies require information pertaining to the competitive implications of transactions. Indeed, since the rules' inception in 1978, Section 803.7 of the Rules has provided that notification with respect to an acquisition shall expire one year following expiration of the waiting period. As the Statement of Basis and Purpose (''SBP'') states, ''If the acquisition is to be consummated after that time, the possibility of changed circumstances warrants a fresh review by the enforcement agencies.''43 FR 33450 , 33512 (July 31, 1978). Fresh review of a proposed acquisition cannot be assured when the information contained in the parties' notification has become outdated. Further, both Section 803.7 and the requirement in Section 803.5 of an affidavit attesting to a good faith intention to make the acquisition are intended in part to ensure that the parties intend to consummate the acquisition, so that the agencies are not forced to waste resources investigating hypothetical transactions. *See* 43 FR 33450, 33510–12 (July 31, 1978).

Parties should already be on notice, by virtue of Section 803.21, that they cannot toll their HSR waiting period indefinitely by failing to comply with a second request. Section 803.21 requires that all additional information or documentary material sought via a second request (or partial submission accompanied by a Section 803.3 statement of reasons for noncompliance) ''be supplied within a reasonable time.'' Although the SBP accompanying the promulgation of Section 803.21 states that the rule was ''designed primarily to prevent an acquired person in a transaction subject to Section 801.30 from frustrating the acquisition[,]'' [2] the wording of the rule itself is not limited to certain types of transactions or persons.

While Section 803.21 requires compliance with all second requests ''within a reasonable time[,]'' it does not define ''a reasonable time'' and does not expressly provide the consequences for noncompliance. The Commission believes that there would come a point when the agency would have sound legal basis under Section 803.21 for disregarding, rejecting or deeming withdrawn or expired a notification where the party had failed to comply with a second request.

The Commission believes, however, that it is preferable and would improve the certainty of the premerger notification process to clearly identify the specific time at which an acquiring person's Notification (or an acquired person's notification in a non-Section 801.30 transaction) will expire when a second request remains outstanding to that person. The Commission proposes that such date be 18 months from the date of the initial notification (which typically would be approximately 17 months from the issuance of the second request). We are not aware of second request compliance ever having taken that long. Even in instances where the parties may have reason to delay their second request response for some period of time,[3] eighteen months should provide them ample time. Beyond that time, the Commission believes that a more up-to-date Notification should be provided, triggering a new waiting period.

The Commission proposes specifying this 18-month requirement in Section 803.7, entitled ''Expiration of Notification''. Section 803.7 would be split into two parts: one (the current provision) addressing expiration of notification when the waiting period has expired; the other (new language) addressing expiration of the waiting period due to failure to comply with a second request. The current text of Section 803.7 would thus be redesignated ''*(a) Waiting period expired.*'' A new paragraph (b) would be added, along with a new example:

(b) *Failure to comply with request for additional information.* An acquiring person's notification and, in the case of an acquisition to which section 801.30 does not apply, an acquired person's notification shall expire eighteen months following the date of receipt of such person's notification if a request for additional information or documentary material remains outstanding to such person (or entities included therein, officers, directors, partners, agents or employees thereof), without a certification as required by section 803.6(b), on such date. If either person's notification expires pursuant to this paragraph, both parties must file a new notification and observe the waiting period in order to carry out the transaction.

Example: A files notification on January 15 of Year 1 to acquire voting securities of B. On February 15 of Year 1, prior to expiration of the waiting period, requests for additional information or documentary material are

[2] 43 FR 33450, 33516 (July 31, 1978). The SBP goes on to state that absent Section 803.21, ''an uncooperative acquired person could delay the expiration of the waiting period indefinitely by not responding'' to a second request. Section 801.30 transactions are essentially non-consensual transactions, including tender offers, purchases from third parties, and open market purchases. While the Act addresses this problem in the context of tender offers by providing that a second request to an acquired person in a tender offer does not extend the waiting period, the problem existed for other types of non-consensual, Section 801.30 transactions without Section 803.21. ''Rather than extend [tender offer] treatment to all other Section 801.30 transactions, the Commission opted to impose a general obligation on all recipients to respond within a reasonable time.'' *Id.*

[3] For example, the transaction may be subject to approval by a regulatory agency, which might take longer than HSR review. In that situation, the parties may not want their notification to expire before the expected regulatory agency approval is received. In such an extreme instance, the parties could also help themselves by delaying making their HSR filings to coincide more closely with the regulatory agency approval.

issued to A and B. Before A supplies the information and documentary material requested, business conditions change and A and B decide not to go forward with the transaction. A does not withdraw its filing and takes the position that it will comply with the request for additional information and documentary material if and when the proposed transaction is ever revived. A's notification expires July 15 of Year 2, eighteen months following the date of receipt of its notification. If A and B wish to revive their transaction, both parties must file a new notification and observe the waiting period in order to carry out the transaction.

The Commission is proposing the modification to Section 803.7 rather than Section 803.21 because the ''stale filings'' situations that the agencies have encountered are separate and distinct from the problem, addressed by the ''reasonable time'' requirement of Section 803.21, of an acquired person in a Section 801.30 transaction trying to frustrate the acquisition. Indeed, the proposed rule is drafted to exclude acquired persons in Section 801.30 transactions so as not to recreate the problem that Section 803.21 was designed to address. The new rule also fits well within the caption of Section 803.7, because it deals with expiration of notification.

The Commission anticipates that if the proposed new rule is adopted, it will apply upon its adoption to pending transactions. Thus, for example, if there are any pending transactions in which the acquiring person (or the acquired person in a non-Section 801.30 transaction) has failed to comply with a second request within 18 months of that person's notification, that notification will expire upon adoption of the rule.

Request for Public Comment

All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before October 14, 2005.

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[4]. 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, 2007.

The Commission's proposed revisions to the Form and rules do not ''substantive [ly] or material[ly] modify'' the existing terms of the currently approved collection of information (OMB Control Number 3084–0005) to necessitate OMB's further review and approval. *See* 44 U.S.C. 3507(h)(3); 5 CFR 1320.5(g). It is highly unlikely that a Notification which expires under the proposed rule change would need to be re-filed by the parties because the rule changes are intended to apply to situations in which the parties have already abandoned the transaction.

List of Subjects in 16 CFR Part 803

Antitrust.

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

PART 803—TRANSMITTAL RULES

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

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

[4] That figure is now $53.1 million, adjusted for the change in the Gross Domestic Product, and will be adjusted annually.

2. Amend § 803.2 by revising paragraph (e) to read as follows:

§ 803.2 Instructions applicable to Notification and Report Form.

* * * * *

(e) A person filing notification may incorporate by reference:

(1) To a previous filing, only documentary materials required to be filed in response to items 4(a) and 4(b) of the Notification and Report Form, which were previously filed by the same person and which are the most recent versions available; except that when the same parties file for a higher threshold no more than 90 days after having made filings with respect to a lower threshold, each party may incorporate by reference in the subsequent filing any documents or information in its earlier filing provided that the documents and information are the most recent available;

(2) To an Internet address directly linking to the document, only documents required to be filed in response to item 4(a) of the Notification and Report Form and in response to item 4(b). If an Internet address is inoperative or becomes inoperative during the waiting period, or the document that is linked to is incomplete, upon notification by the Commission or Assistant Attorney General, the parties must make these documents available to the agencies by either referencing an operative Internet address or by providing paper copies to the agencies as provided in § 803.10(c)(1) by 5 p.m. on the next regular business day. Failure to make the documents available, by the Internet or by providing paper copies, by 5 p.m. on the next regular business day will result in notice of a deficient filing pursuant to § 803.10(c)(2).

3. Revise § 803.7 to read as follows:

§ 803.7 Expiration of notification.

(a) *Waiting period expired.* Notification with respect to an acquisition shall expire 1 year following the expiration of the waiting period. If the acquiring person's holdings do not, within such time period, meet or exceed the notification threshold with respect to which the notification was filed, the requirements of the act must thereafter be observed with respect to any notification threshold not met or exceeded.

Example: ''A'' files notification that in excess of $100 million (as adjusted) of the voting securities of corporation B are to be acquired. One year after the expiration of the waiting period, ''A'' has acquired less than $100 million (as adjusted) of B's voting securities. Although § 802.21 will permit ''A''

to purchase any amount of B's voting securities short of $100 million (as adjusted) within 5 years from the expiration of the waiting period, A's holdings may not meet or exceed the $100 million (as adjusted) notification threshold without ''A'' and ''B'' again filing notification and observing a waiting period.

(b) *Failure to comply with request for additional information.* An acquiring person's notification and, in the case of an acquisition to which § 801.30 does not apply, an acquired person's notification shall expire eighteen months following the date of receipt of such person's notification if a request for additional information or documentary material remains outstanding to such person (or entities included therein, officers, directors, partners, agents or employees thereof), without a certification as required by § 803.6(b), on such date. If either person's notification expires pursuant to this paragraph, both parties must file a new notification in order to carry out the transaction.

Example: A files notification on January 15 of Year 1 to acquire voting securities of B. On February 15 of Year 1, prior to expiration of the waiting period, requests for additional information or documentary material are issued to A and B. Before A supplies the information and documentary material requested, business conditions change, and A and B decide not to go forward with the transaction. A does not withdraw its filing and takes the position that it will comply with the request for additional information and documentary material if and when the proposed transaction is ever revived. A's notification expires July 15 of Year 2, eighteen months following the date of receipt of its notification. If A and B wish to revive their transaction, both parties must file a new notification and observe the waiting period in order to carry out the transaction.

4. Revise page IV of the Instructions in the Appendix to part 803 to read as follows:

Appendix to Part 803

* * * * *

BILLING CODE 6750–01–P

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, the person filing notification may incorporate a document by reference to an internet address directly linking to the documents (see § 803.2(e)(2));

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. The person filing notification may incorporate a document by reference to an internet address directly linking to the documents (see § 803.2(e)(2));

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, in the case of an acquisition of non-corporate interests, to the unincorporated entity being acquired, 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).

Instructions to FTC Form **C4** (rev. 04/07/05)

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 05–16087 Filed 8–12–05; 8:45 am]

BILLING CODE 6750–01–P