FOURTEENTH ANNUAL REPORT

TO CONGRESS

PURSUANT TO SECTION 201

OF THE

HART-SCOTT-RODINO ANTITRUST

IMPROVEMENTS ACT OF 1976

(Fiscal Year 1991)

INTRODUCTION

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, amended the Clayton Act by adding a new Section 7A, 15 U.S.C. Section 18a ("the Act"). Subsection (j) of Section 7A provides as follows:

> Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and the need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

This is the fourteenth annual report to Congress pursuant to this provision. It covers fiscal year 1991.

In general, Section 7A requires that certain proposed acquisitions of stock or assets must be reported to the Federal Trade Commission and the Department of Justice prior to consummation. The parties must then wait a specified period, usually thirty days (fifteen days in the case of a cash tender offer and ten days in the case of a bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to review mergers and acquisitions before they occur. The premerger notification program, with its filing and waiting period requirements, provides the agencies with both the time and the information to conduct this antitrust review. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies and thus is immediately available for review during the waiting period.

If either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) to request additional information or documentary materials from either or both of the parties to a reported transaction. Such a request extends the waiting period for a specified period, usually twenty days (ten days in the case of a cash tender offer), after the parties have complied with the request (or in

the case of a tender offer, after the acquiring person complies). This additional time provides the agencies with the opportunity to review the information and to take appropriate action before the transaction is consummated. If either agency believes that a proposed transaction may violate the antitrust laws, the agency may seek an injunction in federal district court to prohibit consummation of the transaction.

Final rules implementing the premerger notification program were promulgated by the Commission, with the concurrence of the Assistant Attorney General, on July 31, 1978.[1] At that time, a comprehensive Statement of Basis and Purpose was also published containing a section-by-section analysis of the rules and an item-by-item analysis of the Premerger Notification and Report Form. The program became effective on September 5, 1978. In 1983, the Commission, with the concurrence of the Assistant Attorney General, made several changes in the premerger notification rules. Those amendments became effective on August 29, 1983.[2] Additional amendments were published in the Federal Register on March 6, 1987,[3] and May 29, 1987.[4]

STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this report provide a statistical summary of the operation of the premerger notification program. Appendix A shows for each fiscal year in which the program has been in operation the number of transactions reported,[5] the number of

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[1] 43 Fed. Reg. 33,450 (1978). The rules also appear in 16 C.F.R. Parts 801 through 803. For more information concerning the development of the rules and operating procedures of the premerger notification program, see the second, third and seventh annual reports covering the years 1978, 1979 and 1983, respectively.

[2] 48 Fed. Reg. 34,427 (1983) (codified at 16 C.F.R. Parts 801 through 803).

[3] 52 Fed. Reg. 7,066 (1987) (codified at 16 C.F.R. Parts 801 through 803).

[4] 52 Fed. Reg. 20,058 (1987) (codified at 16 C.F.R. Parts 801 through 803).

[5] The term "transactions", as used in Appendices A, B, and C, and Exhibit A to this report, does not refer to separate mergers or deals; rather, it refers to types of structures such as cash tender offers, options to acquire voting securities from the issuer, options to acquire voting securities from someone

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filings received, the number of merger investigations in which requests for additional information or documentary material (hereinafter referred to as "second requests") were issued, and the number of transactions in which requests for early termination of the waiting period were received, granted, and not granted. Appendix A also shows for calendar years 1981 through 1984 and fiscal years 1985 through 1991 the number of transactions in which second requests could have been issued. (This information appears in Appendix C and is explained in footnote 1 of that appendix.) Appendix B provides a month-by-month comparison of the number of filings received (Table 1) and the number of transactions reported (Table 2) for fiscal years 1979 through 1991. Appendix C shows, for calendar years 1981 through 1984 and fiscal years 1985 through 1991, the number of transactions in which the agencies could have issued second requests, the number of merger investigations in which second requests were issued, and the percentage of transactions in which second requests were issued. As we explained in the Eighth Annual Report, we believe that Appendix C provides a more meaningful measure of the second request rate than Appendix A because Appendix C eliminates from the total number of transactions certain transactions in which the agencies could not, or as a practical matter would not, issue second requests.[6]

The statistics set out in these appendices show that the number of transactions reported in 1991 decreased approximately 32.4 percent from the number of transactions reported in 1990 (1,529 transactions were reported in 1991 while 2,262 were

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[5](...continued)
other than the issuer, and multiple acquiring or acquired persons that necessitate separate HSR identification numbers to track the filing parties and waiting periods. A particular merger or deal may involve more than one transaction. Indeed, some have involved as many as four or five transactions.

[6] See Appendix C, note 1. As we explained in the Eleventh, Twelfth and Thirteenth Annual Reports, the information regarding second requests in Appendices A and C differs from that reported in those appendices in the annual reports for fiscal years 1979-1987. Appendix A and C in prior reports identified the number of <u>transactions</u> in which a second request was issued, while Appendices A and C in the present report show the number of merger <u>investigations</u> in which second requests were issued. A merger investigation may include several transactions. We believe that reporting the number of merger investigations in which second requests were issued better reflects the agencies' enforcement activities because it represents the number of mergers or acquisitions that were investigated to this extent under the Act by the agencies.

reported in 1990). The statistics in Appendix A also show that the number of merger investigations in which second requests were issued in 1991 decreased approximately 28.1 percent over the number of merger investigations in which second requests were issued in 1990 (second requests were issued in 64 merger investigations in 1991 while second requests were issued in 89 merger investigations in 1990). These numbers indicate an increase in the number of second requests issued as a percentage of reported transactions from 1990 to 1991 (from 3.9 percent in 1990 to 4.2 percent in 1991 based on Appendix A, and from 4.6 percent in 1990 to 4.7 percent in 1991, based on Appendix C).

The statistics also show that in recent years, early termination was requested for most transactions. In 1991, early termination was requested in 86.4 percent (1,321) of the transactions reported, while in 1990 it was requested in 87.3 percent (1,975) of the transactions reported. The number of requests granted decreased in 1991 compared to 1990 (from 1,299 in 1990 to 907 in 1991). However, the percentage of requests granted increased (from 65.8 percent in 1990 to 68.7 percent in 1991).

We have also included in the report, as Exhibit A, statistical tables (Tables I - XI) containing information about the agencies' enforcement interest in transactions reported in fiscal year 1991. The tables provide, for various statistical break downs, the number and percentage of transactions in which clearances to investigate were granted by one antitrust agency to the other and the number of merger investigations in which second requests were issued; the number of transactions based on the dollar value of transactions reported and the reporting threshold indicated in the notification; the number of transactions based on the sales or assets of the acquiring person or the sales or assets of the acquired entity; and the number of transactions based on the industry group (2-digit SIC code) in which the acquiring person or the acquired entity derived most of their revenues. These statistics have been included in prior annual reports for the calendar years 1981-1984, and for fiscal years 1985-1990 (excluding 1986).[7]

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[7] See the Thirteenth Annual Report, Exhibit A, for fiscal year 1990 transactions; the Twelfth Annual Report, Exhibit A, for fiscal year 1989 transactions; the Eleventh Annual Report, Exhibits A and B, for fiscal years 1987 and 1988 transactions; the Tenth Annual Report, Exhibit A, for fiscal year 1985 transactions; the Ninth Annual Report, Exhibit A, for calendar year 1984 transactions; the Eighth Annual Report, Exhibit A, for calendar year 1983 transactions; the Seventh Annual Report, Exhibit B, for calendar year 1982 transactions; and the Sixth Annual Report, Exhibit A, for calendar year 1981 transactions.

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DEVELOPMENTS IN FISCAL YEAR 1991 RELATING TO PREMERGER NOTIFICATION RULES AND PROCEDURES

1. Hart-Scott-Rodino Premerger Notification Program Guides

On February 7, 1991, the Commission released two guides regarding the Hart-Scott-Rodino Premerger Notification Program.[8] Guide I presents a basic introduction to the premerger notification program. It provides an overview of the program, describing in general what transactions are covered by the program and how the program operates. Guide II explains how to determine whether a transaction is subject to premerger notification and waiting requirements. It deals with more specific questions concerning the application of the Act and the premerger notification rules.

Guides I and II are the first and second in a planned series of six informational pieces. The series is designed to provide general information about the program to businessmen and lawyers to promote compliance with the program's requirements. Neither Guide constitutes an interpretation, formal or informal, of the Act or of the Commission's Premerger Notification Rules.

2. Joint Agreement to Expedite Civil Penalty Cases

On July 31, 1991, the Department of Justice and the Commission entered into a Memorandum of Agreement with respect to the handling of civil penalty actions under Section 7A(g)(1) of the Act[9] for violations of the Act and/or the premerger notification rules. The agreement reflects the close and cooperative relationship of the two antitrust enforcement agencies and is designed to achieve effective deployment of the Government's resources and assure consistent approaches to enforcement of the Act's requirements.

Under the Agreement, the Commission will submit civil penalty recommendations to the Department. Within 45 days, the Department will advise the Commission that it: (1) will file the recommended action; (2) disapproves the recommended action; or (3) requires further information. If the Department does not communicate one of these determinations to the Chairman of the Commission within 45 days, the Chairman may designate Commission

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[7](...continued)
Due to resource constraints, statistics for fiscal 1986 transactions have not been prepared.

[8] See Exhibit B for copies of Guides I and II.

[9] See Exhibit C for a copy of the Memorandum of Agreement.

attorneys for appointment by the Attorney General to file the case in federal court on behalf of the United States. Under the Agreement, the Attorney General will retain full authority to make, decline to make, or revoke such appointments and also will retain control over the ensuing litigation, including approval of any proposed settlement agreements with defendants.

The Agreement does not affect the ability of either agency to bring suits seeking injunctions under Section 7A(g)(2) of the Act. In cases in which the Department designates Commission attorneys to prosecute civil penalty actions, the Commission attorneys will be appointed by the Attorney General as Special Attorneys or Special Assistant United States Attorneys.

3. International Agreement to Cooperate in Enforcement of Competition Laws

On September 23, 1991, the Commission and the Department, representing the United States, signed an agreement with the European Community designed to promote cooperation and coordination in the enforcement of their competition laws.[10]

The agreement will enable the United States and the EC to exchange information between their governmental competition or antitrust authorities to lessen the possibility or impact of differences between the EC and the United States in the application of their respective laws. Under the terms of the agreement, each party will notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other party. With respect to mergers, acquisitions or other competition matters, this notification will occur far enough in advance of any type of official action -- or early enough in an investigation -- to enable the other party's views to be taken into consideration. The agreement also provides that the competition agencies of the United States and the EC will coordinate and provide mutual assistance in enforcement activities to the extent that their laws are compatible and within available resources.

To avoid conflict over enforcement activities, the United States and EC have agreed to take into account the important interests of each other at all stages in their enforcement activities. Factors to be considered include:

- whether the alleged anticompetitive activities will affect consumers, suppliers or competitors within the enforcing party's territory; and

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[10] See Exhibit D for a copy of the bilateral agreement.

- the degree of conflict or consistency between the enforcement action and the other party's laws or economic policies.

The agreement also contains a provision regarding the confidentiality of information. It provides that neither party is required to disclose information that it is prohibited by law from disclosing. It also provides for the maintaining of confidentiality of information shared pursuant to the agreement.

4. Compliance

The Commission and the Department of Justice continue to monitor compliance with the premerger notification program's filing requirements and initiated a number of investigations to assure compliance in fiscal year 1991. The agencies monitor compliance through a variety of methods, including the review of newspapers and industry publications for announcements of transactions that may not have been reported in accordance with the requirements of the Act. Industry sources, such as competitors, customers and suppliers, and interested members of the public often provide the agencies with information about transactions and possible violations of the filing requirements.

As a result of the agencies' efforts to assure compliance, the Department of Justice filed seven complaints, five of which were filed at the Commission's request, in fiscal year 1991. The complaints alleged violations of the Act and sought civil penalties under Section 7A(g)(1) of the Act.[11]

In *United States v. Reliance Group Holdings, Incorporated*,[12] the Antitrust Division filed a complaint at the Commission's request alleging that Reliance had violated the Act when it acquired voting securities of Spectra-Physics, Inc., of San Jose, California. The complaint alleged that Reliance was in violation of the Act from August 27, 1986, when its holdings of Spectra-Physics stock exceeded the $15 million threshold, through at least February 15, 1987. Reliance filed premerger notification for the acquisition of Spectra-Physics' stock on January 16, 1987, but withdrew it on February 13. The complaint alleged that Reliance's acquisitions of Spectra-Physics' stock were in violation of the Act because they were not made solely for the purpose of investment as contended by Reliance. Under

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[11] Under Section 7A(g)(1) of the Act, any person or company that fails to comply with the Act's notification and waiting period requirements is liable for a civil penalty of up to $10,000 for each day the violation continues.

[12] United States v. Reliance Group Holdings, Incorporated, Cv. No. 90-2698 (D.D.C. filed October 31, 1990).

the terms of the final judgment, Reliance agreed to pay a civil penalty of $550,000 to settle the charges.

In *United States v. General Cinema Corporation*,[13] the Antitrust Division filed a complaint at the Commission's request alleging that General Cinema had violated the Act when it acquired voting securities of Cadbury Schweppes plc of London, England. The complaint alleged that General Cinema was in violation from September 11, 1986, when its holdings of Cadbury Schweppes' stock exceeded the $15 million threshold, until February 25, 1987. General Cinema filed its premerger notification form under the Act on January 26, 1987, and the waiting period expired February 25. The complaint alleged that General Cinema's acquisitions of Cadbury Scheppes' stock were in violation of the Act because they were not made solely for the purpose of investment as General Cinema contended. Under the terms of the final judgment, General Cinema agreed to pay a civil penalty of $950,000 to settle the case.

In *United States v. Service Corporation International*,[14] the Antitrust Division filed a complaint at the Commission's request alleging that Service Corporation International ("SCI") had violated the Act when it acquired the voting securities of Centurion National Group, Inc. The complaint alleged that SCI violated the Act on December 30, 1986, when it acquired Centurion through an agent without filing a premerger notification. SCI filed premerger notification on January 27, 1987, to acquire the stock of Centurian from its agent. Under the terms of the final judgment, SCI agreed to pay a civil penalty of $500,000 to settle the charges.

In *United States v. Equity Group Holdings*,[15] the Antitrust Division filed a complaint at the Commission's request alleging that Equity Group, a partnership equally controlled by Steven M. Rales and Mitchell P. Rales, had violated the Act when it acquired the voting securities of Interco, Inc. The complaint alleged that Equity Group was in violation of the Act from May 18, 1987, when its holdings of Interco stock exceeded the $15 million threshold, through November 25, 1987. Equity Group acquired Interco's stock through May 24. The complaint also alleged that on May 24 the Rales brothers, through two wholly-owned corporations, and two associates formed a limited

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[13] United States v. General Cinema Corporation, Cv. No. 91-0008 (D.D.C. filed January 3, 1991).

[14] United States v. Service Corporation International, Cv. No. 91-0025 (D.D.C. filed January 14, 1991).

[15] United States v. Equity Group Holdings, Cv. No. 91-0153 (D.D.C. filed January 25, 1991).

partnership (City Capital Associates Limited Partnership) that continued to acquire Interco shares in violation of the Act. On November 10, 1988, City Capital filed premerger notification to acquire 100 percent of Interco's stock. The complaint alleged that the use of two corporations as 49 percent owners of the limited partnership was an avoidance device under Section 801.90 of the premerger notification rules. Under the terms of the final judgment, Equity Group agreed to pay a civil penalty of $850,000 to settle the charges.

In *United States v. The Atlantic Richfield Company, ARCO Chemical Company, Union Carbide Corporation and Union Carbide Chemicals & Plastic Co. Inc.*,[16] the Antitrust Division filed a complaint at the Commission's request alleging that Atlantic Richfield ("ARCO") had violated the Act when it acquired beneficial ownership of the assets of Union Carbide Chemicals and Plastic Co. from Union Carbide. The complaint alleged that on September 27, 1989, ARCO and Union Carbide entered into an agreement pursuant to which ARCO agreed to purchase from Union Carbide the assets of Union Carbide Chemicals. The complaint alleged that upon execution of the agreement, ARCO paid Union Carbide the full agreed-upon purchase price and, thereafter, Union Carbide continued to operate the assets; the purchase price would be increased or decreased to reflect the loss or profit reported by the assets; and the assets would be sold, with the proceeds to ARCO, should ARCO not receive government clearance for the transaction. The complaint further alleged that the acquisition agreement, upon execution, had the effect of transferring beneficial ownership of the assets to ARCO. Both parties subsequently filed premerger notification for the acquisition. Under the terms of the final judgment, ARCO and Union Carbide each agreed to pay a civil penalty of $1 million to settle the charges.

In *United States v. Cox Enterprises, Incorporated*,[17] the Antitrust Division alleged in the complaint that Cox had violated the Act when it acquired voting securities of Knight-Ridder Inc. of Miami, Florida. The complaint alleged that Cox was in violation of the Act for the 367 days that it held in excess of $15 million worth of Knight-Ridder voting securities as a result of a series of stock purchases that Cox made from January 27 through November 20, 1986, until the stock was sold on January

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[16] United States v. The Atlantic Richfield Company, ARCO Chemical Company, Union Carbide Corporation and Union Carbide Chemicals & Plastic Co. Inc., Cv. No. 91-0205 (D.D.C. filed January 31, 1991).

[17] United States v. Cox Enterprises, Incorporated, Cv. No. 91-505 (N.D.Ga. filed March 8, 1991).

28, 1987. Under the terms of the final judgment, Cox agreed to pay a civil penalty of $1,750,000 to settle the case.

In *United States v. Aero Limited Partnership, c/o Trans World Airlines, Inc.*,[18] the Antitrust Division filed suit alleging that the defendant was in violation of the Act from August 13, 1986, through March 24, 1987, with respect to its acquisitions of USAir stock. Aero is a partnership that owns the majority interest in Trans World Airlines. The complaint alleged that Aero's acquisitions of USAir stock during the period from August 13, 1986, through March 6, 1987, were not solely for the purpose of investment. Under the terms of the final judgment, Aero agreed to pay a civil penalty of $1,125,000 to settle the case.

MERGER ENFORCEMENT ACTIVITY DURING FISCAL YEAR 1991[19]

1. Department of Justice

The Antitrust Division filed four complaints in merger cases during fiscal year 1991.[20] Three of these cases, *U.S. v. First Hawaiian, Inc. and First Interstate of Hawaii, Inc.*, *U.S. v. Fleet/Norstar Financial Group, Inc.*, and *U.S. v. General Binding Corporation and VeloBind Incorporated* were settled by the entry of consent decrees.

A preliminary injunction was sought in one case, *U.S. v. Nippon Sanso K.K., Matheson Gas Products, Inc., Hercules*

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[18] *United States v. Aero Limited Partnership, c/o Trans World Airlines, Inc.*, Cv. No. 91-1315 (D.D.C. filed May 30, 1991).

[19] The cases mentioned in this report were not necessarily reportable under the premerger notification program. Because of the Act's provisions regarding the confidentiality of the information obtained pursuant to this program, it would be inappropriate to identify which cases were initiated under the premerger notification program.

[20] *United States v. First Hawaiian, Inc. and First Interstate of Hawaii, Inc.*, Cv. No. 90-00904 DAE (D.Hawaii filed December 28, 1990); *United States V. Nippon Sanso K.K., Matheson Gas Products, Inc., Hercules Incorporated and Semi-Gas Systems, Inc.*, Cv. No. 91-0041 (E.D.Pa. filed January 3, 1991); *United States v. Fleet/Norstar Financial Group, Inc.*, Cv. No. 91-0221-P (D.Me. filed July 5, 1991) and *United States v. General Binding Corporation and VeloBind Incorporated*, Cv. No. 91-1822 (D.D.C. filed July 24, 1991).

Incorporated, and Semi-Gas Systems, Inc. The Division's complaint challenged the proposed $23 million acquisition of Semi-Gas Systems of San Jose, California, by Nippon Sanso of Tokyo, Japan. The complaint alleged that the acquisition would lessen competition substantially in the production and sale of gas cabinets in the United States. Gas cabinets are used to distribute specialty gases for semiconductor fabrication. The complaint also alleged that the acquisition would combine the two leading producers of gas cabinets in the world and substantially increase Semi-Gas Systems' dominant position in the United States market. Nippon Sanso produces gas cabinets in the United States through a wholly owned subsidiary, Matheson Gas Products of Secaucus, New Jersey. On March 26, 1991, after a hearing on the government's motion for a preliminary injunction, the district court denied the government's motion. Thereafter, the case was dismissed.

In *United States v. First Hawaiian, Inc. and First Interstate of Hawaii, Inc.*, the Division challenged the proposed acquisition of First Interstate of Hawaii, Inc., the fourth largest bank in Hawaii, by First Hawaiian, Inc., the second largest bank in Hawaii, for approximately $140 million. Both parties are located in Honolulu, Hawaii. On October 5, 1990, the Department advised the Federal Reserve System that the acquisition was likely substantially to lessen competition. The acquisition was approved by the Federal Reserve Board on November 30, 1990. The complaint alleged that the transaction would lessen competition in the provision of business banking services in five geographic markets in Hawaii - Honolulu County, East Hawaii, West Hawaii, Kauai and Maui. Business banking services are services, such as checking accounts and loans, offered to business customers. On March 7, 1991, a consent decree settling the case was filed. The consent decree directed the defendants to relinquish all control and use of the "First Interstate System" franchise license and to divest certain bank branch assets and deposits on each of the four major islands of Hawaii. The sale of the bank branches to financial institutions that do not currently have significant competitive presences in each of the relevant markets, along with the relinquishment of control and use of the First Interstate System franchise license, was designed to provide structural relief so as to ensure that the markets remain competitive after the acquisition. A buyer has been approved by the Division and is awaiting bank regulatory approval to operate as a bank.

In *United States v. Fleet/Norstar Financial Group, Inc.*, the Division challenged the proposed acquisition of the New Maine National Bank of Portland, Maine, by Fleet/Norstar Financial Group, Inc., of Providence, Rhode Island. Simultaneously, a consent decree was filed. New Maine was one of three "bridge" banks created by the Federal Deposit Insurance Corporation (FDIC) in its capacity as receiver of the failed Bank of New England

Corporation. In April, the FDIC announced it would sell the three bridge banks to Fleet/Norstar. The acquisition was approved by the Board of Governors of the Federal Reserve System on July 1, 1991. The complaint alleged that the transaction would lessen competition in the provision of business banking services such as checking accounts and loans to small and medium-size businesses in Bangor, Presque Isle-Caribou and Pittsfield, Maine. The consent decree directs Fleet/Norstar to divest certain bank branch assets and deposits in Bangor, Presque Isle-Caribou and Pittsfield. Division review of a proposed purchaser is currently pending.

In *United States v. General Binding Corporation and VeloBind Incorporated*, the Division challenged the proposed acquisition of VeloBind Inc. of Freemont, California, by General Binding Corporation of Northbrook, Illinois. The Department had announced on December 28, 1990, that it would file a civil antitrust suit challenging the proposed acquisition because, as then structured, it would have violated Section 7 of the Clayton Act since the proposed acquisition would likely lessen competition substantially in the high-volume mechanized binding machine market in the United States. High-volume mechanized binding machines are electric machines that can easily and securely bind numerous documents in a professional-looking manner. General Binding's United States sales of high-volume binding machines in 1989 were about $17 million. VeloBind, the only manufacturer of plastic strip-binding machines for sale in the United States, sold about $5 million of such machines in this country in 1989. Together, the two firms accounted for about 88 percent of all domestic sales of high-volume mechanized binding machines. Pursuant to a consent decree filed simultaneously with the complaint, the transaction was restructured. By means of a supply agreement and license agreement, General Binding established Gestetner Corporation of Greenwich, Connecticut, as a competing seller of these plastic strip-binding machines and supplies. The consent decree requires General Binding to notify the Department 60 days prior to making any modification, cancellation, rescission, or amendment to the supply and license agreements. General Binding cannot proceed with any such modification, cancellation, rescission, or amendment without the written permission of the Department. The decree also enjoins General Binding and Gestetner from discussion or exchanging any information relating to the prices at which General Binding or Gestetner will sell high-volume binding machines and related supplies.

In one case brought in fiscal year 1990, *United States v. United Tote, Inc.*,[21] the district court entered judgment on May

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[21] *United States v. United Tote, Inc.*, 768 F.Supp. 1064 (D.Del. filed March 14, 1990; judgment entered May 10, 1991).

10, 1991, in favor of the United States and ordered United Tote to divest all of its direct and indirect ownership and control of Autotote. The suit challenged the acquisition of Autotote Systems Inc. of Newark, Delaware, by United Tote, Inc., of Shepherd, Montana, and is described more fully in the Thirteenth Annual Report. Divestiture was completed on October 31, 1991.

Additionally, two consent decrees were entered in cases brought in fiscal year 1990.[22]

During fiscal year 1991, the Division investigated one bank merger transaction for which divestiture was required prior to or concurrently with the acquisition. The transaction involved the acquisition of four New Mexico banks from First Interstate Bancorp, Los Angeles, California, by United New Mexico Financial Corporation, Albuquerque, New Mexico. A "not significantly adverse" letter conditioned on divestiture prior to or concurrently with consummation of the transaction was sent to the Board of Governors of the Federal Reserve System on March 26, 1991, and to the Federal Deposit Insurance Corporation on April 19, 1991.

Finally, on nine occasions during fiscal year 1991 the Antitrust Division informed the parties to a proposed transaction that it would file suit challenging the transaction unless the parties restructured the proposal to avoid competitive problems or abandoned the proposal altogether.[23] In all instances, the

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[22] *United States v. American Safety Razor Company, et al.*, Cv. No. 90-0188 (E.D.Pa. consent decree filed October 24, 1990, and entered February 22, 1991); *United States v. Brown & Root, Inc., et al.*, Cv. No. 90-1986 (D.D.C. consent decree entered November 16, 1990). These cases and consent decrees are discussed in the Thirteenth Annual Report.

[23] Department of Justice Press Release issued December 17, 1990, involving Unimin Corporation's proposed acquisition of Indusmin, Inc.; Department of Justice Press Release issued December 20, 1990, involving ECC Group plc's proposed acquisition of Georgia Kaolin Company from Combustion Engineering; Department of Justice Press Release issued February 14, 1991, involving various airlines', including Delta, United, Northwest and American, proposed acquisitions of Eastern Airlines assets; Department of Justice Press Release issued March 25, 1991, involving Hershey Foods Corporation's acquisition of American Italian Pasta Company; Department of Justice Press Release issued March 25, 1991, involving Caterpillar, Inc.'s, proposed acquisition of the paving equipment of Barber-Greene Company from Astec Industries, Inc.; Department of Justice Press Release issued April 12, 1991, involving Fiat Group's proposed

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parties either restructured or abandoned the proposed transactions.

On May 10, 1991, the Department announced that it would not sue to enjoin consummation of the cash tender offer by Schneider S.A. of Paris, France, for the common stock of Square D Company of Palatine, Illinois.

2. Federal Trade Commission

The Commission authorized its staff to seek preliminary injunctions in seven merger cases in fiscal year 1991. In four of these cases, the parties abandoned the transaction before the motion for preliminary injunction was filed in court.[24] In one

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[23](...continued)
acquisition of Ford Motor Company's Farm Equipment Operations; Department of Justice Press Release issued April 25, 1991, involving AMR Corporation's proposed acquisition of Trans World Airlines, Inc.'s, International Route Authority; Department of Justice Press Release issued July 26, 1991, involving Fairmount Minerals, Ltd.'s, proposed acquisition of Hepworth Minerals and Chemicals, Inc. In one instance, involving Overseas Shipholding Group, Inc.'s, proposal to acquire seven U.S. Flag tankers from American Trading and Production Corporation, the parties issued a press release announcing the Department's objection after the Division informed the parties of its opposition to their proposed acquisition.

[24] FTC news release issued November 9, 1990, involving the proposed acquisition by Ingersoll-Rand Company of Universal Bearings, Inc. The press release reported that the Commission had reason to believe the acquisition would lessen competition substantially in the manufacture and sale of needle rollers. Needle rollers are cylindrical steel parts, built to exacting specifications, that are used for anti-friction purposes in bearings and a variety of other products, such as automobile transmissions, drive shafts, and power steering units. Ingersoll-Rand and Universal were the two largest producers of needle rollers in the United States. Although the parties abandoned the transaction, a final consent agreement places restrictions on future acquisitions in the industry by either party.

FTC news release issued January 18, 1991, involving the proposed acquisition by Oy Wartsila Ab of Computerized Security Systems, Inc., and Winfield Lock, Inc. (collectively "CSS"). The press release reported that the Commission had reason to believe that the acquisition would reduce competition substantially in the manufacture and sale of recodable hotel lock systems.
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of the abandoned transactions, the parties subsequently restructured the transaction to eliminate the portions which raised antitrust concerns.[25] In another transaction the parties abandoned the transaction after the motion for preliminary injunction was filed in court.[26]

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[24](...continued)
Recodable locks are those that can be changed after a person leaves a hotel, either mechanically (by recoding the individual lock) or electronically and automatically as each new guest card is issued. Wartsila's wholly-owned subsidiary, VingCard Systems, Inc., and CSS were two of the leading suppliers of recordable hotel lock systems in the world.

FTC news release issued May 23, 1991, involving the proposed acquisition by Instruments SA, of the Molecular Beam Epitaxy Equipment Division of INTEVAC, Inc. The press release reported that the Commission had reason to believe that the proposed acquisition would lessen competition substantially in the manufacture and sale of molecular beam epitaxy systems. Epitaxy is a process by which thin crystalline layers of materials are deposited onto a wafer. Molecular beam epitaxy ("MBE") is used to grow unique artificially structured crystals one atomic layer at a time. The resulting materials are used in advanced semiconductor devices for high speed and optoelectronic devises, such as lasers, transistors, night vision devices and other research and development and production applications. Instruments SA and INTEVAC were two of the leading suppliers of MBE systems in the world.

FTC news release issued August 8, 1991, involving the proposed acquisition by EG&G, Inc., of Heimann GmbH. The press release reported that the Commission had reason to believe that the acquisition would lessen competition substantially in the manufacture and sale of electronic x-ray screening equipment in the United States. Electronic x-ray screening equipment is commonly found in airports and high-security areas. EG&G was the industry leader in the U.S. and worldwide markets. Over a period of three and one-half years preceding the proposed acquisition, Heimann had obtained a significant share of the U.S. market and was the largest manufacturer of x-ray screening equipment outside the United States.

[25] See footnote 24 involving the proposed acquisition by EG&G, Inc., of Heimann GmbH.

[26] FTC news release issued March 8, 1991, involving the proposed acquisition by Wiggins Teape Appleton, p.l.c., of a Vancouver, Washington, paper mill owned by Boise Cascade

(continued...)

In *Federal Trade Commission v. Meade Instruments Corporation and Celestron International*,[27] the Commission filed for a preliminary injunction alleging that the proposed joint venture between Meade, a wholly-owned subsidiary of Harbour Group Investments, L.P., and Celestron, a wholly-owned subsidiary of Diethelm & Co., Ltd., of Switzerland, would create a virtual monopoly in the manufacture and sale of mid-size Schmidt-Cassegrain telescopes. These telescopes use mirrors and lenses and are suited for observation of both nearby planets and deep-sky objects, as well as for astrophotography. They are generally used by "serious amateur" astronomers and usually cost $1,000 or more. Meade and Celestron were the two largest producers of such telescopes. On November 8, 1990, the district court granted the Commission's motion for a preliminary injunction. The Commission also issued an administrative complaint. Subsequently, Meade and Celestron agreed to settle the charges. On August 19, 1991, the Commission issued a decision and order.[28] The order requires Harbour Group and Diethelm to obtain Commission approval, for a period of ten years, before acquiring any company that has manufactured or sold these telescopes in the United States, or is considering doing so.

In *Federal Trade Commission v. University Health, Inc.*,[29] the Commission filed for a preliminary injunction alleging that University Health's acquisition of St. Joseph Hospital would

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[26](...continued)
Corporation. The press release reported that the Commission had reason to believe that the acquisition would lessen competition substantially in the production of chemical carbonless paper in the United States. Chemical carbonless paper is coated paper that enables writing on the top page to be copied onto pages underneath without the use of carbon paper. It is used in many business forms, including credit-card slips. In 1989, Appleton was the largest U.S. producer of chemical carbonless paper and Boise was the fourth largest.

[27] Federal Trade Commission v. Meade Instruments Corporation and Celestron International, 1990-2 Trade Cases ¶ 69,247 (D.D.C. filed October 15, 1990; preliminary injunction order entered November 8, 1990).

[28] Meade Instruments Corporation and Celestron International, Docket No. D.9244 (complaint issued November 29, 1990; decision and order issued August 19, 1991).

[29] Federal Trade Commission v. University Health, Inc., 1991-1 Trade Cases ¶ 69,508 (11th Cir. 1991), rev'g 1991-1 Trade Cases ¶ 69,400, ¶ 69,444 (S.D.GA filed March 20, 1991; preliminary injunction denied, April 4, 1991).

lessen competition substantially for acute care hospital services in the Augusta, Georgia, area. The complaint alleged that the market for general acute care hospital services in Augusta was highly concentrated, and that it was difficult for new hospitals to enter the market because of state regulations requiring a certificate-of-need and the substantial amount of time required to establish a new hospital. The district court denied the preliminary injunction on April 4, 1991. The Commission appealed the decision to the United States Court of Appeals for the Eleventh Circuit which reversed the district court and ordered that a preliminary injunction be issued. The Commission issued a decision and order in fiscal year 1992.[30]

In fiscal year 1991, the Commission also issued one administrative complaint in a matter in which the United States District Court had denied the Commission's motion for preliminary injunction filed in fiscal year 1990.

In *R.R. Donnelley & Sons Co.*,[31] the Commission's motion for preliminary injunction alleged that Donnelley's proposed acquisition of Meredith/Burda companies would lessen competition substantially in high volume publication rotogravure printing in the United States and the western United States. On August 27, 1990, the district court denied the Commission's motion for a preliminary injunction. The Commission issued an administrative complaint on October 11, 1990.[32] The complaint alleges that as a result of its acquisition of Meredith/Burda, Donnelley has achieved the power and position of a dominant firm in the market for high volume publication gravure printing in the continental United States as well as in a twelve-state region west of the Rockies. Also, the complaint alleges that the acquisition has increased the likelihood of successful anticompetitive conduct, nonrivalrous behavior, and actual or tacit collusion among the remaining companies in those markets.

During fiscal year 1991, the Commission accepted consent agreements for public comment in seven merger matters. The Commission issued a complaint and decision and order in two of those cases during the fiscal year and in four of the other cases after the end of the fiscal year. One case is still pending.

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[30] University Health, Inc., Docket No. D.9246 (order issued June 23, 1992).

[31] Federal Trade Commission v. R. R. Donnelley & Sons Co., 1990-2 Trade Cas. ¶ 69,240 (D.D.C. filed August 27, 1990; preliminary injunction denied August 27, 1990).

[32] R. R. Donnelley & Sons Co., Docket No. D.9243 (complaint issued October 11, 1990).

In *Allegheny Corporation/New TC Holding*,[33] the complaint alleged that Allegheny's acquisition (through its subsidiary Chicago Title & Trust Company) of the title insurance-related assets of Westwood Equities Corporation (a subsidiary of New TC Holding Corporation) would lessen competition substantially in the provision of title plant and back plant information in California, Illinois, Indiana, Tennessee, and Washington. Title plants and back plants are privately-owned sets of records depicting who owns and has interests in real property. A title plant's records are regularly updated, whereas the records of a back plant are historical, frequently dating back to the early part of the century. Under the order, Allegheny was required to divest, within 12 months, all rights in:

> -- either its own title plant or Westwood's in Imperial County, California; in Du Page County, Lake County, and Will County, Illinois; in Johnson County, Lake County, and Porter County, Indiana; and in Benton County and Franklin County, Washington; and
>
> -- either its own back plant or Westwood's in Orange County, Riverside County, San Bernardino County, San Luis Obispo County, Santa Barbara County, and Tulare County, California; in Cook County, Illinois; in Marion County, Indiana; and in Davidson County, Tennessee.

In *American Stair-Glide Corporation*,[34] the complaint alleged that Stair-Glide's acquisition of the Cheney Company, Inc., would lessen competition substantially in the markets for straight stairlifts, curved stairlifts and vertical wheelchair-lifts in the United States. Under the order, Cheney must grant a non-exclusive, perpetual license for the technology used in the production of these lifts, and a license to Cheney's trade names, to a Commission-approved licensee within a year. In addition, for five years, Stair-Glide and Cheney are prohibited from marketing products under the Cheney name and will not be able to enter into exclusive agreements limiting distributors' ability to sell the straight and curved stairway lifts or vertical wheelchair lifts of any other manufacturer.

In *PepsiCo, Inc./Twin Ports Seven-Up*,[35] the complaint alleged that PepsiCo's acquisition of Twin Ports Seven-Up

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[33] Allegheny Corporation/New TC Holding, Docket No. C3335 (issued July 11, 1991).

[34] American Stair-Glide Corporation, Docket No. C3331 (issued May 17, 1991).

[35] PepsiCo,Inc./Twin Ports Seven-Up, Docket No. C3347 (issued October 15, 1991).

Bottling Company would lessen competition substantially in the carbonated soft drink industry in the Duluth, Minnesota, area. Under the order, PepsiCo must divest Twin Ports within a nine-month period.

In *RWE Aktiengesellschaft/Vista Chemical Co.*,[36] the complaint alleged that RWE's acquisition of Vista Chemical Company would lessen competition substantially in the world market for high-purity alcohol process alumina. Alumina is used as an abrasive, as a catalyst for chemical and oil processing, and in the manufacture of automotive catalytic converters. Under the order, RWE, within six months, must grant to a licensee the rights to patents, trade secrets and other information relating to the processing of this alumina. The licensee would operate a joint venture in which RWE would hold a minority ownership share.

In *Nippon Sheet Glass Company*,[37] the complaint alleged that Nippon's acquisition of 20 percent of the voting securities of the Libby-Owens-Ford Company ("LOF"), a subsidiary of Pilkington, plc, would lessen competition substantially in the North American wired glass market. Wired glass is a specialty flat glass used primarily in shower and bath enclosures and in fire-retarding applications, such as fire doors. It is made by rolling wire netting into glass, after which the glass is polished to remove surface imperfections. All wired glass sold in the United States is imported. (LOF does not manufacture wired glass.) Under the order, Nippon and Pilkington are prohibited, for a period of ten years, from jointly manufacturing, marketing or distributing polished wired glass through LOF or any other entity in North America without obtaining the Commission's prior approval.

In *Sentinel Group, Inc.*,[38] the complaint alleged that Sentinel's numerous acquisitions of funeral homes in recent years substantially lessened competition for funeral services in six cities in Georgia and Arkansas. Under the order, Sentinel was required to divest one of its funeral homes in each of Waycross, Summerville and Gainesville, Georgia. For a period of ten years Sentinel is prohibited from acquiring any additional funeral homes in Waycross, Summerville, Gainesville, Savannah, and Rome, Georgia, and Fort Smith, Arkansas, without obtaining the Commission's prior approval.

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[36] RWE Aktiengesellschaft/Vista Chemical Co., Docket No. C3349 (issued October 29, 1991).

[37] Nippon Sheet Glass Company, Docket No. C3346 (issued October 7, 1991).

[38] *Sentinel Group, Inc.*, Docket No. C3348 (issued October 23, 1991).

In *Service Corporation International*,[39] the complaint alleged that Service Corporation International's ("SCI") acquisition of the Sentinel Group, Inc., would lessen competition substantially among funeral establishments in areas of Georgia and Tennessee. Under the consent, SCI was permitted to consummate the acquisition but it was required to hold certain assets separate until it divested six funeral homes in designated cities. Under the consent, SCI also would be required to obtain Commission approval before acquiring any additional funeral homes in Savannah and LaFayette, Georgia; in Hamilton County (Chattanooga) Tennessee; and in the Chattanooga suburbs of Rossville and Fort Ogelthorpe.

The Commission issued decisions and orders in two merger cases during fiscal year 1991 involving acquisitions in which the administrative complaint was issued before October 1, 1990.

In *Harold Honickman*,[40] Harold Honickman and the Brooklyn Beverage Acquisition Corp. agreed to settle charges stemming from the 1987 acquisition of Seven-Up Brooklyn Bottling Company, Inc. The Commission's complaint alleged that Mr. Honickman's acquisition substantially lessened competition in the production, distribution and sale of branded carbonated soft drinks in the New York Metropolitan area. Under the order, Mr. Honickman and Brooklyn Beverage are required to obtain the Commission's prior approval for certain soft drink mergers or acquisitions for a period of ten years.

In *Hoechst AG*,[41] Hoechst agreed to settle charges stemming from its 1987 acquisition of the Celanese Corp. The Commission alleged in the complaint that Hoechst's acquisition substantially lessened competition in the manufacture and sale of acetal in world markets, including the United States. Acetal is an engineering thermoplastic polymer noted for its hardness, lubricity, gasoline and chemical resistance, and dimensional stability. It is used as a replacement for metal in small mechanical parts such as gears and rollers in automobiles and in consumer products, including videotape recorders, lawn sprinklers, pens and disposable lighters. Under the order, Hoechst is prohibited, for a period of ten years, from entering into an agreement with any producer of acetal products to allocate, divide or restrict competition in the market. Although

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[39] Service Corporation International, (consent agreement accepted for public comment July 25, 1991).

[40] Harold Honickman, Docket No. D.9233 (order issued July 25, 1991).

[41] Hoechst AG, Docket No. D.9216 (order issued September 12, 1991).

Hoechst is not required to divest any of its acetal assets or businesses, the order requires that it remove contractual and managerial constraints in the joint venture agreement with Daicel Chemical Industries, Ltd., a Japanese company. The joint venture, Polyplastics Company, Ltd., owned 45 percent by Hoechst and 55 percent by Daicel, produces acetal in Japan. The elimination of these restrictions will allow Daicel and Polyplastics to expand their acetal business into the U.S. market, thus restoring the competitive rivalry that once existed prior to the acquisition.

The Commission issued a decision and order in four merger cases during fiscal year 1991 in which it had previously accepted consent agreements for public comment before October 1, 1990.

In *E-Z-EM, Inc.*,[42] E-Z-EM, Inc., ("EZM") agreed to settle charges that its acquisition of Lafayette Pharmacal, Inc., substantially lessened competition and created a monopoly in the United States market for barium diagnostic products. EZM manufactured medical products, including barium sulfate products used by radiologists in x-ray diagnostic applications. Prior to its acquisition by EZM in 1988, Lafayette manufactured barium sulfate diagnostic products at its Lafayette, Indiana, plant. Under the order, EZM agreed to divest all of the assets it acquired from Lafayette. Also, it agreed to obtain Commission approval before selling or acquiring assets related to the barium diagnostic products business or before selling any EZM shares to anyone already engaged in the business in the United States, or acquiring the same assets or interest from anyone already engaged in the business in the United States.

In *T&N PLC*,[43] T&N PLC ("T&N") agreed to settle charges that its proposed acquisition of J.P. Industries, Inc., ("JPI") would lessen competition substantially or tend to create a monopoly in the manufacture and sale of thinwall and tri-metal heavywall engine bearings in the United States. T&N and JPI both manufactured and sold engine bearings. Under the order, T&N was permitted to complete the acquisition, but it was required to divest certain assets used in the production, manufacture and sale of thinwall and tri-metal heavywall engine bearings.

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[42] E-Z-EM, Inc., Docket No. C3311 (order issued October 29, 1990).

[43] T&N PLC, Docket No. C3312 (order issued November 8, 1990).

In *Roche Holding Ltd.*,[44] Roche Holdings Ltd. ("Roche") agreed to settle charges that its acquisition of a controlling interest in Genentech, Inc., would lessen competition substantially in certain markets for vitamin C; for therapeutic drugs for the treatment of growth deficiency, including human-growth hormone and growth hormone releasing factor; and for CD4-based therapeutics for the treatment of AIDS/HIV infection. Roche is a Swiss pharmaceutical company which had developed and marketed many pharmaceutical products in the United States and has conducted extensive research and development in biotechnology. Genentech is a leading biotechnology company based in San Francisco. Under the order, Roche was required to divest either Genentech's interest in GLC Associates (a partnership between Genentech and Lubrizol, which had researched and patented a new vitamin C production process) or the partnership's vitamin C assets. Roche also was required to divest its human growth hormone releasing factor business. In addition, Roche must license its CD4-based therapeutic United States' patents for a modest royalty to anyone who requests a license for ten years after the date of the final order.

In *Atlantic Richfield Company*,[45] Atlantic Richfield Company ("ARCO") agreed to settle charges that its acquisition of certain chemical assets of Union Carbide Corporation resulted in a vertical acquisition that increased barriers to entry and eliminated perceived potential and actual potential competition in the manufacture and sale of propylene oxide ("PO") in the United States and Canada. Union Carbide is a significant purchaser of PO, and ARCO is a leading producer of PO. The Commission stated that the acquisition could reduce substantially actual horizontal competition in the manufacture and sale in the United States and Canada of two important products made from PO, urethane polyether polyol ("UPP") and propylene glycol ("PG"). UPP is the major raw material for polyurethanes, which are used for such applications as flexible foam (cushions) and rigid foam (picnic coolers). PG is used in a variety of applications, including fiberglass, cellophane, paints, anti-freeze, foods, drugs, and cosmetics. ARCO and Union Carbide were reported to be leading producers in both of these highly concentrated markets. Under the order, ARCO was required to divest the PG and UPP assets and businesses to a Commission approved purchaser within twelve months.

Two other matters came before the Commission in fiscal year 1991 involving complaints issued prior to October 1, 1990.

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[44] Roche Holding Ltd., Docket No. C3315 (order issued November 28, 1990).

[45] Atlantic Richfield Company, Docket No. C3314 (order issued November 26, 1990).

In *The Coca-Cola Bottling Company of the Southwest and Dr. Pepper/Seven-Up Company*,[46] Dr. Pepper/Seven-Up Company ("Dr. Pepper") agreed to settle charges stemming from the acquisition by The Coca-Cola Bottling Company of the Southwest ("CCSW") of certain assets of San Antonio Dr. Pepper Bottling Company from Dr. Pepper in 1984. The Commission's complaint alleged that CCSW's acquisition substantially lessened competition in the production, distribution and sale of carbonated soft drinks in at least a ten county area, which included San Antonio, Texas. Under the order, Dr. Pepper agreed not to take actions that would interfere with any relief the Commission might order if it is determined that CCSW violated the law. An administrative law judge subsequently dismissed the complaint against CCSW. The dismissal is on appeal to the Commission.

In *Adventist Health System/West*,[47] the Commission reversed an administrative law judge's order dismissing a complaint in which the Commission had charged that an acquisition by Ukiah Adventist Hospital, a nonprofit hospital, of substantially all the assets of Ukiah Hospital Corp, a nonprofit hospital, would lessen competition substantially in general acute care hospital services in the Ukiah, California, area. The judge had held that the Commission lacked jurisdiction to challenge an assets acquisition by a nonprofit entity, and dismissed the complaint without ruling on the antitrust issues. The Commission's action reverses the judge's order and holds that the Clayton Act gives the Commission the necessary authority to challenge acquisitions of assets by nonprofit entities. The case was remanded to the judge for a decision on the merits.

ASSESSMENT OF THE EFFECTS OF THE PREMERGER NOTIFICATION PROGRAM

Although a complete assessment of the impact of the premerger notification program on the business community and on antitrust enforcement is not possible in this limited report, the following observations can be made.

First, as indicated in past annual reports, one of the premerger notification program's primary objectives, eliminating the so-called "midnight merger," has been achieved. The requirement that parties file and wait ensures that virtually all

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[46] The Coca-Cola Bottling Company of the Southwest and Dr. Pepper/Seven-Up Company, Docket No. D.9215 (order issued, with respect to Dr. Pepper/Seven-Up Company, on December 20, 1989; dismissed, regarding The Coca-Cola Bottling Company of the Southwest, by the administrative law judge on June 14, 1991).

[47] Adventist Health System/West, Docket No. D.9234 (decision issued August 2, 1991).

significant mergers or acquisitions occurring in the United States will be reviewed by the antitrust agencies prior to consummation. The agencies generally have the opportunity to challenge unlawful transactions before they occur, thus avoiding the problem of constructing effective post-acquisition relief.

Second, in most cases the parties provide sufficient information to allow the enforcement agencies to determine promptly whether a transaction raises any antitrust problems. In addition, over the years, parties have increasingly supplied information voluntarily to the Commission and the Antitrust Division. This cooperation has resulted in fewer second requests than would otherwise have been necessary.

Finally, the existence of the premerger notification program alerts businesses to the antitrust concerns raised by proposed transactions. In addition, the greatly increased probability that antitrust violations will be detected prior to consummation may deter some competitively questionable transactions. Prior to the premerger notification program, businesses could, and frequently did, consummate transactions which raised significant antitrust concerns, before the antitrust agencies had the opportunity to adequately consider their competitive effects. The enforcement agencies were forced to pursue lengthy post-acquisition litigation during the course of which the consummated transaction continued in place (and afterwards as well, where effective post-acquisition relief was not possible or available). Because the premerger notification program requires reporting before consummation, this problem has been significantly reduced.

The Acting Assistant Attorney General of the Antitrust Division concurs with this annual report.

Insert date MAY 27 1988

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Exhibit B	-	Hart-Scott-Rodino Premerger Notification Program Guides I and II.
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Exhibit D	-	International agreement to cooperate in enforcement of competition laws.

Appendix A

Summary of Transactions;

Fiscal Years 1979-1991

APPENDIX A
SUMMARY OF TRANSACTIONS
FISCAL YEARS

	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
TRANSACTIONS REPORTED	861	784	996	1203	1093	1340	1603	1949	2533	2746	2883	2262	1529
FILINGS RECEIVED 1/	1643	1552	1804	2056	1971	2418	2975	3611	4742	5172	5530	4272	2914
TRANSACTIONS IN WHICH A SECOND REQUEST COULD HAVE BEEN ISSUED 2/	NA	NA	762	713	903	1119	1301	1660	2170	2391	2535	1955	1376
INVESTIGATIONS IN WHICH SECOND REQUESTS WERE ISSUED	113	68	69	65	34	61	67	71	58	68	64	89	64
FTC 3/	63	31	34	39	12	25	24	32	18	39	35	55	33
DOJ 3/	50	37	35	26	22	36	43	39	40	29	29	34	31
NUMBER OF TRANSACTIONS INVOLVING A REQUEST FOR EARLY TERMINATION 4/ 5/	123	100	164	222	606	963	1281	1639	2264	2440	2582	1975	1321
GRANTED 4/	60	75	135	142	495	781	975	1263	1752	1885	1937	1299	907
NOT GRANTED 4/	62	22	26	63	103	153	288	362	512	555	645	676	414

1 Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one filing is received when an acquiring party files for an exemption under sections 7A(c)(6) or (c)(8) of the Clayton Act.

2 These figures are from Appendix C and are explained in footnote 1 of that Appendix. The figures for 1981 - 1984 are on a calendar basis, and for 1985 - 1991 on a fiscal year basis.

3 These statistics are based on the date the request was issued and not the date the investigation was opened.

4 These statistics are based on the date of the H-S-R filing and not the date action was taken on the request.

5 Includes the following number of non-reportable transactions: three in both 1979 and 1980; two in 1981; fifteen in 1982; eight in 1983; twenty in 1984; eighteen in 1985; fourteen in 1986; sixteen in 1987; twenty-four in 1988; fifty-four in 1989 and fifty-seven in 1990 and twenty-four in 1991.

Appendix B

Number of Filings Received and Transactions Reported by Month; Fiscal Years 1979-1991.

APPENDIX B

Table 2. Number of Transactions Reported by Month for the Fiscal Years 1979 - 1991

	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
October	63	78	91	116	89	89	132	195	290	245	259	267	148
November	80	85	78	117	100	107	145	187	494	216	316	371	198
December	67	54	88	111	96	124	103	144	199	243	267	139	121
January	71	56	73	92	91	76	111	108	96	161	160	160	96
February	75	64	60	67	57	98	110	120	104	204	201	138	97
March	75	58	75	105	80	136	153	149	163	224	236	179	113
April	57	60	64	95	81	118	149	131	162	230	202	168	120
May	84	55	92	105	88	107	156	211	185	228	254	187	130
June	76	64	87	131	104	112	126	145	197	241	264	182	122
July	88	60	107	102	92	120	160	180	218	223	223	156	130
August	75	82	92	91	116	144	136	187	194	310	273	163	156
September	50	68	89	71	99	109	122	192	231	221	228	152	98
TOTAL	861	784	996	1203	1093	1340	1603	1949	2533	2746	2883	2262	1529

APPENDIX B

TABLE 1. NUMBER OF FILINGS RECEIVED 1/ BY MONTH FOR FISCAL YEARS 1979 - 1991

	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
October	122	228	159	249	199	155	229	350	523	443	550	489	270
November	158	207	142	200	181	210	269	348	921	421	602	693	376
December	108	108	152	200	167	212	194	263	404	455	485	289	236
January	127	105	134	144	149	131	211	199	177	311	350	298	184
February	150	113	108	104	116	180	210	221	193	358	362	269	180
March	146	103	145	181	148	255	295	287	278	437	468	343	216
April	112	108	111	152	129	212	267	236	314	445	371	306	223
May	166	94	163	169	139	199	286	350	351	442	472	351	253
June	142	110	161	213	191	193	232	308	360	453	504	349	228
July	168	104	183	178	169	211	302	337	417	403	423	288	235
August	141	143	162	144	199	260	239	351	376	583	517	315	319
September	103	129	184	122	184	200	241	361	428	421	426	282	194
TOTAL	1643	1552	1804	2056	1971	2418	2975	3611	4742	5172	5530	4272	2914

1/ Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

Appendix C

Transactions in Which Additional Information Was Requested; Calendar Years 1981-1984 and Fiscal Years 1985-1991.

Appendix C

Investigations Where Additional Information Was Requested
Calendar Years 1981 - 1984 and Fiscal Years 1985 - 1991

	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
Transactions 1/	762	713	903	1119	1301	1660	2170	2391	2535	1955	1376
Investigations In Which Second Requests Were Issued 2/											
FTC											
Number 3/	34	39	12	25	24	32	18	39	35	55	33
Percent	4.5	5.5	1.3	2.2	1.8	1.9	0.8	1.6	1.4	2.8	2.4
DOJ											
Number 3/	35	26	22	36	43	39	40	29	29	34	31
Percent	4.6	3.6	2.4	3.2	3.3	2.3	1.8	1.2	1.1	1.7	2.3

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1 These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a compliant notification); (2) transactions reported pursuant to the exemption provisions of sections 7A(c)(6) and 7A(c)(8) of the Act; and (3) transactions which were found to be non-reportable. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing for the 15% threshold and later filing for the 25% threshold, only a single consolidated transaction has been counted because, as a practical matter, the agencies do not issue more than one second request in such a case. Similarly, where a party has filed for a cash tender offer to acquire 50% of a target's voting securities and has also filed for the exercise of an option to acquire shares from the target issuer and for a subsequent merger, the transaction is assigned three numbers by the Premerger Office but is treated in this table as one transaction. In contrast, the same transaction would be counted as three transactions in the "transactions reported" category in Appendix A. These statistics also omit from the total number of transactions reported secondary acquisitions filed pursuant to §801.4 of the premerger notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports. Appendix C in the Eighth Annual Report did not exclude secondary acquisitions. Accordingly, the numbers of transactions for 1981 - 1984 appearing herein differ from those that appear in Appendix C in that report. Note also that Appendix C in the Ninth Annual Report contained calendar year 1985 figures while this chart shows fiscal 1985 figures.

2 Based on the date the second request was issued, not the date the investigation was opened.

3 Second request investigations as a percentage of the total number of transactions listed in this table.

Exhibit A

Statistical tables;

fiscal year 1991.

Data profiling Hart-Scott-Rodino premerger notification filings and enforcement interest.

TABLE I

FISCAL YEAR 1991 1/
ACQUISITIONS BY SIZE OF TRANSACTION 2/
(BY SIZE RANGE)

TRANSACTION RANGE ($MILLIONS)	H-S-R TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS3/				
			NUMBER		PERCENT6/			NUMBER		PERCENT6/		
	NUMBER4/	PERCENT5/	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	128	9.3	11	6	8.6	4.7	13.3	2	2	1.6	1.6	3.1
15 UP TO 25	331	24.1	30	12	9.1	3.6	12.7	3	2	.9	.6	1.5
25 UP TO 50	358	26.0	37	15	10.3	4.2	14.5	12	5	3.4	1.4	4.7
50 UP TO 100	262	19.0	27	22	10.3	8.4	18.7	7	9	2.7	3.4	6.1
100 UP TO 150	98	7.1	10	10	10.2	10.2	20.4	4	1	4.1	1.0	5.1
150 UP TO 200	58	4.2	6	5	10.3	8.6	19.0	-	1	-	1.7	1.7
200 UP TO 300	45	3.3	6	8	13.3	17.8	31.1	2	4	4.4	8.9	13.3
300 UP TO 500	40	2.9	6	3	15.0	7.5	22.5	2	2	5.0	5.0	10.0
500 UP TO 1000	31	2.3	2	4	6.5	12.9	19.4	1	4	3.2	12.9	16.1
1000 AND UP	25	1.8	1	2	4.0	8.0	12.0	-	1	-	4.0	4.0
ALL TRANSACTIONS	1376	100.0	136	87	9.9	6.3	16.2	33	31	2.4	2.3	4.7

* The footnotes for all tables in this exhibit appear at the end following Table XI.

TABLE II

FISCAL 1991 1/
ACQUISITIONS BY SIZE OF TRANSACTION 2/
(CUMULATIVE)

TRANSACTION RANGE	H-S-R TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS 3/				
			NUMBER		PERCENTAGE OF TOTAL NUMBER OF CLEARANCES GRANTED			NUMBER		PERCENTAGE OF TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS 3/		
	NUMBER 4/	PERCENT 5/	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	128	9.3	11	6	4.9	2.7	7.6	2	2	3.1	3.1	6.3
LESS THAN 25	459	33.4	41	18	18.4	8.1	26.5	5	4	7.8	6.3	14.1
LESS THAN 50	817	59.4	78	33	35.0	14.8	49.8	17	9	26.6	14.1	40.6
LESS THAN 100	1079	78.4	105	55	47.1	24.7	71.7	24	18	37.5	28.1	65.6
LESS THAN 150	1177	85.5	115	65	51.6	29.1	80.7	28	19	43.8	29.7	73.4
LESS THAN 200	1235	89.8	121	70	54.3	31.4	85.7	28	20	43.8	31.2	75.0
LESS THAN 300	1280	93.0	127	78	57.0	35.0	91.9	30	24	46.9	37.5	84.4
LESS THAN 500	1320	95.9	133	81	59.6	36.3	96.0	32	26	50.0	40.6	90.6
LESS THAN 1000	1351	98.2	135	85	60.5	38.1	98.7	33	30	51.6	46.9	98.4
ALL TRANSACTIONS	1376	100.0	136	87	61.0	39.0	100.0	33	31	51.6	48.4	100.0

TABLE III

FISCAL YEAR 1991 1/
TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY

TRANSACTION RANGE ($MILLIONS)	CLEARANCE GRANTED BY AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF: TOTAL NUMBER OF TRANSACTIONS 4/			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP 7/			TOTAL NUMBER OF CLEARANCES GRANTED		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
LESS THAN 15	11	6	17	.8	.4	1.2	8.6	4.7	13.3	4.9	2.7	7.6
15 UP TO 25	30	12	42	2.2	.9	3.1	9.1	3.6	12.7	13.5	5.4	18.8
25 UP TO 50	37	15	52	2.7	1.1	3.8	10.3	4.2	14.5	16.6	6.7	23.3
50 UP TO 100	27	22	49	2.0	1.6	3.6	10.3	8.4	18.7	12.1	9.9	22.0
100 UP TO 150	10	10	20	.7	.7	1.5	10.2	10.2	20.4	4.5	4.5	9.0
150 UP TO 200	6	5	11	.4	.4	.8	10.3	8.6	19.0	2.7	2.2	4.9
200 UP TO 300	6	8	14	.4	.6	1.0	13.3	17.8	31.1	2.7	3.6	6.3
300 UP TO 500	6	3	9	.4	.2	.7	15.0	7.5	22.5	2.7	1.3	4.0
500 UP TO 1000	2	4	6	.1	.3	.4	6.5	12.9	19.4	.9	1.8	2.7
1000 AND UP	1	2	3	.1	.1	.2	4.0	8.0	12.0	.4	.9	1.3
ALL CLEARANCES	136	87	223	9.9	6.3	16.2	9.9	6.3	16.2	61.0	39.0	100.0

TABLE IV

FISCAL YEAR 1991 1/
INVESTIGATIONS IN WHICH SECOND REQUESTS WERE ISSUED

TRANSACTION RANGE	INVESTIGATIONS IN WHICH SECOND REQUESTS WERE ISSUED 3/			SECOND REQUEST INVESTIGATIONS 3/ AS A PERCENTAGE OF: TOTAL NUMBER OF TRANSACTIONS 4/			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP 7/			TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS 3/		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
($MILLIONS)												
LESS THAN 15	2	2	4	.1	.1	.3	1.6	1.6	3.1	3.1	3.1	6.3
15 UP TO 25	3	2	5	.2	.1	.4	.9	.6	1.5	4.7	3.1	7.8
25 UP TO 50	12	5	17	.9	.4	1.2	3.4	1.4	4.7	18.8	7.8	26.6
50 UP TO 100	7	9	16	.5	.7	1.2	2.7	3.4	6.1	10.9	14.1	25.0
100 UP TO 150	4	1	5	.3	.1	.4	4.1	1.0	5.1	6.3	1.6	7.8
150 UP TO 200	-	1	1	-	.1	.1	-	1.7	1.7	-	1.6	1.6
200 UP TO 300	2	4	6	.1	.3	.4	4.4	8.9	13.3	3.1	6.3	9.4
300 UP TO 500	2	2	4	.1	.1	.3	5.0	5.0	10.0	3.1	3.1	6.3
500 UP TO 1000	1	4	5	.1	.3	.4	3.2	12.9	16.1	1.6	6.3	7.8
1000 AND UP	-	1	1	-	.1	.1	-	4.0	4.0	-	1.6	1.6
ALL TRANSACTIONS	33	31	64	2.4	2.3	4.7	2.4	2.3	4.7	51.6	48.4	100.0

TABLE V

FISCAL YEAR 1991 1/
ACQUISITIONS BY REPORTING THRESHOLD

THRESHOLD	H-S-R TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS 3/				
			NUMBER		PERCENTAGE OF THRESHOLD GROUP			NUMBER		PERCENTAGE OF THRESHOLD GROUP		
	NUMBER 4/	PERCENT	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$15 MILLION	66	4.8	2	3	3.0	4.5	7.6	1	1	1.5	1.5	3.0
15%	44	3.2	-	4	-	9.1	9.1	-	-	-	-	-
25%	58	4.2	5	3	8.6	5.2	13.8	-	-	-	-	-
50%	611	44.4	71	37	11.6	6.1	17.7	19	16	3.1	2.6	5.7
ASSETS ONLY	597	43.4	58	40	9.7	6.7	16.4	13	14	2.2	2.3	4.5
ALL TRANSACTIONS	1376	100.0	136	87	9.9	6.3	16.2	33	31	2.4	2.3	4.7

TABLE VI

FISCAL YEAR 1991 1/
TRANSACTIONS BY ASSETS OF ACQUIRING PERSONS

ASSET RANGE ($MILLIONS)	H-S-R TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS 3/				
			NUMBER		PERCENTAGE OF ASSET RANGE GROUP			NUMBER		PERCENTAGE OF ASSET RANGE GROUP		
	NUMBER 1/	PERCENT	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	36	2.6	3	1	8.3	2.8	11.1	1	1	2.8	2.8	5.6
15 UP TO 25	13	.9	1	-	7.7	-	7.7	-	-	-	-	-
25 UP TO 50	47	3.4	3	2	6.4	4.3	10.6	2	2	4.3	4.3	8.5
50 UP TO 100	58	4.2	3	1	5.2	1.7	6.9	1	1	1.7	1.7	3.4
100 UP TO 150	62	4.5	7	2	11.3	3.2	14.5	-	-	-	-	-
150 UP TO 200	59	4.3	4	4	6.8	6.8	13.6	2	2	3.4	3.4	6.8
200 UP TO 300	78	5.7	5	2	6.4	2.6	9.0	1	1	1.3	1.3	2.6
300 UP TO 500	102	7.4	11	6	10.8	5.9	16.7	3	2	2.9	2.0	4.9
500 UP TO 1000	126	9.2	14	9	11.1	7.1	18.3	2	2	1.6	1.6	3.2
1000 AND UP	787	57.2	85	60	10.8	7.6	18.4	21	20	2.5	2.5	5.2
ASSETS NOT AVAILABLE 2/	8	.6	-	-	-	-	-	-	-	-	-	-
ALL TRANSACTIONS	1376	100.0	136	87	9.9	6.3	16.2	33	31	2.4	2.3	4.7

TABLE VII

FISCAL YEAR 1991 1/
TRANSACTIONS BY SALES OF ACQUIRING PERSONS

	H-S-R TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS 3/				
			NUMBER		PERCENTAGE OF SALES RANGE GROUP			NUMBER		PERCENTAGE OF SALES RANGE GROUP		
	NUMBER4/	PERCENT	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	64	4.7	-	-	-	1.6	1.6	-	1	-	1.6	1.6
15 UP TO 25	33	2.4	2	1	6.1	3.0	9.1	-	1	-	3.0	3.0
25 UP TO 50	50	3.6	3	1	6.0	2.0	8.0	1	1	2.0	2.0	4.0
50 UP TO 100	66	4.8	8	3	12.1	4.5	16.7	2	1	3.0	1.5	4.5
100 UP TO 150	53	3.9	4	2	7.5	3.8	11.3	2	1	3.8	1.9	5.7
150 UP TO 200	38	2.8	4	2	10.5	5.3	15.8	1	-	2.6	-	2.6
200 UP TO 300	95	6.9	5	3	5.3	3.2	8.4	-	1	-	1.1	1.1
300 UP TO 500	102	7.4	11	10	10.8	9.8	20.6	3	5	2.9	4.9	7.8
500 UP TO 1000	138	10.0	14	5	10.1	3.6	13.8	6	1	4.3	.7	5.1
1000 AND UP	715	52.0	84	59	11.7	8.3	20.0	18	19	2.5	2.7	5.2
SALES NOT AVAILABLE 2/	22	1.6	1	0	4.5	-	4.5	-	-	-	-	-
ALL TRANSACTIONS	1376	100.0	136	87	9.9	6.3	16.2	33	31	2.4	2.3	4.7

TABLE VIII

FISCAL YEAR 1991 1/
TRANSACTIONS BY ASSETS OF ACQUIRED ENTITIES 10/

ASSET RANGE	H-S-R TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS 3/				
			NUMBER		PERCENTAGE OF ASSET RANGE GROUP			NUMBER		PERCENTAGE OF ASSET RANGE GROUP		
($MILLIONS)	NUMBER4/	PERCENT	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	120	8.7	11	5	9.2	4.2	13.3	2	1	1.7	.8	2.5
15 UP TO 25	224	16.3	26	8	11.6	3.6	15.2	2	1	.9	.4	1.3
25 UP TO 50	297	21.6	32	17	10.8	5.7	16.5	8	6	2.7	2.0	4.7
50 UP TO 100	214	15.6	19	14	8.9	6.5	15.4	7	7	3.3	3.3	6.5
100 UP TO 150	87	6.3	14	11	16.1	12.6	28.7	3	3	3.4	3.4	6.9
150 UP TO 200	42	3.1	5	3	11.9	7.1	19.0	1	1	2.4	2.4	4.8
200 UP TO 300	69	5.0	6	5	8.7	7.2	15.9	1	3	1.4	4.3	5.8
300 UP TO 500	63	4.6	6	11	9.5	17.5	27.0	1	4	1.6	6.3	7.9
500 UP TO 1000	58	4.2	3	4	5.2	6.9	12.1	3	2	5.2	3.4	8.6
1000 AND UP	90	6.5	5	7	5.6	7.8	13.3	-	3	-	3.3	3.3
ASSETS NOT AVAILABLE 11/	112	8.1	9	2	8.0	1.8	9.8	5	-	4.5	-	4.5
ALL TRANSACTIONS	1376	100.0	136	87	9.9	6.3	16.2	33	31	2.4	2.3	4.7

TABLE IX

FISCAL YEAR 1991 1/
TRANSACTIONS BY SALES OF ACQUIRED ENTITIES 12/

SALES RANGE	H-S-R TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS 3/				
			NUMBER		PERCENTAGE OF SALES RANGE GROUP			NUMBER		PERCENTAGE OF SALES RANGE GROUP		
($MILLIONS)	NUMBER4/	PERCENT	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	249	18.1	15	6	6.0	2.4	8.4	4	2	1.6	.8	2.4
15 UP TO 25	115	8.4	16	4	13.9	3.5	17.4	-	1	-	.9	.9
25 UP TO 50	269	19.5	38	20	14.1	7.4	21.6	7	9	2.6	3.3	5.9
50 UP TO 100	204	14.8	15	5	7.4	2.5	9.8	7	2	3.4	1.0	4.4
100 UP TO 150	111	8.1	14	10	12.6	9.0	21.6	4	3	3.6	2.7	6.3
150 UP TO 200	63	4.6	5	7	7.9	11.1	19.0	3	2	4.8	3.2	7.9
200 UP TO 300	62	4.5	8	7	12.9	11.3	24.2	2	2	3.2	3.2	6.5
300 UP TO 500	72	5.2	8	10	11.1	13.9	25.0	3	4	4.2	5.6	9.7
500 UP TO 1000	57	4.1	7	4	12.3	7.0	19.3	3	2	5.3	3.5	8.8
1000 AND UP	98	7.1	5	11	5.1	11.2	16.3	-	4	-	4.1	4.1
SALES NOT AVAILABLE 13/	76	5.5	5	3	6.6	3.9	10.5	-	-	-	-	-
ALL TRANSACTIONS	1376	100.0	136	87	9.9	6.3	16.2	33	31	2.4	2.3	4.7

TABLE X

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRING PERSON					
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/	
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
02	Agricultural Production-Livestock and Animal Specialties	3	-	-	-	-	-	-
08	Forestry	1	-	1	1	-	-	-
10	Metal Mining	6	-	-	-	-	-	-
12	Bituminous Coal and Lignite Mining	1	-	-	-	-	-	-
13	Oil and Gas Extraction	45	-	-	-	-	-	-
14	Mining and Quarrying of Nonmetallic	2	-	1	1	-	1	1
15	Building Construction - General Contractors and Operative Builders	1	-	-	-	-	-	-
16	Construction other than Building Construction-General Contractors	1	-	-	-	-	-	-
17	Construction-Special Grade Contractors	4	-	-	-	-	-	-

TABLE X

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRING PERSON					
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/	
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
20	Food and Kindred Products	40	6	2	8	1	2	3
22	Textile Mill Products	2	-	-	-	-	-	-
23	Apparel and other Finished Products made from Fabrics and Similar Materials	1	-	1	1	-	-	-
24	Lumber and Wood Products, Except Furniture	6	-	1	1	-	1	1
25	Furniture and Fixtures	1	-	-	-	-	-	-
26	Paper and Allied Products	11	4	1	5	-	-	-
27	Printing, Publishing and Allied Products	16	5	2	7	-	1	1
28	Chemicals and Allied Products	24	7	-	7	2	-	2
29	Petroleum Refining and Related Industries	5	-	-	-	-	-	-
30	Rubber and Misc. Plastics Products	9	-	-	-	-	-	-
31	Leather and Leather Products	1	-	-	-	-	-	-

TABLE X

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRING PERSON					
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/	
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
32	Stone, Clay, Glass, and Concrete Products	4	-	-	-	1	-	1
33	Primary Metal Industries	10	-	4	4	-	1	1
34	Fabricated Metal Products, Except Machinery and Transportation Equipment	16	4	3	7	2	1	3
35	Machinery, Except Electrical	16	4	2	6	2	2	4
36	Electrical and Electronic Machinery, Equipment and Supplies	20	3	3	6	-	1	1
37	Transportation Equipment	13	1	-	1	-	-	-
38	Measuring, Analyzing and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks	7	3	-	3	-	-	-
39	Miscellaneous Manufacturing Industries	2	-	-	-	-	-	-
40	Railroad Transportation	3	-	1	1	-	-	-
42	Motor Freight Transportation and Warehousing	1	-	-	-	-	-	-

TABLE X

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRING PERSON					
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/	
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
44	Water Transportation	6	-	1	1	-	1	1
45	Transportation by Air	16	-	13	13	-	2	2
46	Pipelines, Except Natural Gas	2	-	-	-	-	-	-
47	Transportation Services	3	-	-	-	1	-	1
48	Communication	58	1	5	6	-	-	-
49	Electric, Gas, and Sanitary Services	42	5	2	7	1	1	2
50	Wholesale Trade-Durable Goods	47	8	3	11	2	2	4
51	Wholesale Trade-Nondurable Goods	33	5	1	6	-	-	-
53	Supply and Mobile Home Dealers General Merchandise Stores	15	3	-	3	1	-	1
54	Food Stores	11	2	-	2	1	-	1
55	Automotive Dealers and Gasoline Service Stations	4	-	-	-	-	-	-
56	Apparel and Accessory Stores	1	-	-	-	-	-	-

TABLE X

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRING PERSON					
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/	
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
57	Furniture, Home Furnishing, and Equipment Stores	4	-	-	-	-	-	-
58	Eating and Drinking Places	2	-	-	-	-	-	-
59	Miscellaneous Retail	5	1	-	1	1	-	1
60	Banking	22	-	1	1	-	-	-
61	Credit Agencies other than Banks	8	-	-	-	-	-	-
62	Security and Commodity Brokers, Dealers, Exchanges, and Services	13	-	-	-	-	-	-
63	Insurance	38	-	-	-	-	-	-
64	Insurance Agents, Brokers, and Services	2	-	-	-	-	-	-
65	Real Estate	18	-	-	-	-	-	-
67	Holding and other Investment Offices	48	-	1	1	-	-	-
70	Hotels, Rooming Houses, Camps, and other Lodging Places	10	-	-	-	-	-	-

TABLE X

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRING PERSON					
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/	
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
72	Personal Services	7	2	-	2	2	-	2
73	Business Services	28	1	4	5	-	2	2
75	Automotive Repair, Services, and Garages	2	1	1	2	1	1	2
78	Motion Pictures	7	1	-	1	1	-	1
79	Amusement and Recreation Services	2	-	-	-	-	-	-
80	Health Services	34	2	3	5	3	-	3
82	Educational Services	1	-	-	-	-	-	-
87	Engineering, Accounting, Research, Management, and Related Services	2	-	-	-	-	-	-
99	Nonclassifiable Establishments	9	-	-	-	-	-	-
DV	Diversified Companies	567	65	30	95	11	12	23
00	Not Available 15/	37	-	-	-	-	-	-
	ALL TRANSACTIONS	1376	136	87	223	33	31	64

TABLE XI

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRED ENTITY

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRED ENTITY						
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/			NUMBER OF 2-DIGIT INTRA-INDUSTRY TRANSACTIONS
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
01	Agricultural Production-Crops	1	-	-	-	-	-	-	-
02	Agricultural Production-Livestock and Animal Specialties	1	-	-	-	-	-	-	1
10	Metal Mining	6	1	-	1	-	-	-	-
12	Bituminous Coal and Lignite Mining	4	-	-	-	-	-	-	2
13	Oil and Gas Extraction	78	-	-	-	-	-	-	35
14	Mining and Quarrying of Nonmetallic Minerals, Except Fuels	9	1	1	2	-	1	1	1
15	Building Construction-General Contractors and Operative Builders	2	-	-	-	-	-	-	1
16	Construction other than Building Construction-General Contractors	2	-	1	1	-	-	-	-
17	Construction-Special Grade Contractors	8	-	-	-	-	-	-	1
20	Food and Kindred Products	53	11	3	14	2	2	4	29

TABLE XI

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRED ENTITY

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRED ENTITY						
			CLEARANCE GRANTED TO FTC OF DOJ			SECOND REQUEST INVESTIGATIONS 3/			NUMBER OF 2-DIGIT INTRA-INDUSTRY TRANSACTIONS
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
22	Textile Mill Products	7	-	-	-	-	-	-	2
23	Apparel and other Finished Products made from Fabrics and Similar Materials	5	-	1	1	-	1	1	-
24	Lumber and Wood Products, Except Furniture	12	1	1	2	-	1	1	4
25	Furniture and Fixtures	5	-	-	-	-	-	-	-
26	Paper and Allied Products	17	1	4	5	1	-	1	2
27	Printing, Publishing and Allied Products	22	5	2	7	-	1	1	8
28	Chemicals and Allied Products	47	14	3	17	3	1	4	15
29	Petroleum Refining and Related Industries	10	1	-	1	1	-	1	2
30	Rubber and Misc. Plastics Products	22	4	-	4	1	-	1	5
31	Leather and Leather Products	3	-	-	-	-	-	-	-

TABLE XI

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRED ENTITY

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRED ENTITY						NUMBER OF 2-DIGIT INTRA-INDUSTRY TRANSACTIONS
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/		
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
32	Stone, Clay, Glass, and Concrete Products	13	2	-	2	1	-	1	2
33	Primary Metal Industries	16	2	5	7	-	1	1	6
34	Fabricated Metal Products, Except Machinery and Transportation Equipment	20	5	1	6	1	-	1	6
35	Machinery, Except Electrical	63	10	6	16	4	4	8	9
36	Electrical and Electronic Machinery, Equipment and Supplies	41	7	5	12	-	1	1	13
37	Transportation Equipment	16	1	3	4	-	2	2	2
38	Measuring, Analyzing and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks	16	4	-	4	-	-	-	3
39	Miscellaneous Manufacturing Industries	7	1	-	1	-	-	-	2
40	Railroad Transportation	2	-	-	-	-	-	-	2

TABLE XI

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRED ENTITY

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRED ENTITY						NUMBER OF 2-DIGIT INTRA-INDUSTRY TRANSACTIONS
			CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS 3/		
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
42	Motor Freight Transportation and Warehousing	6	1	-	1	-	-	-	-
44	Water Transportation	9	-	2	2	-	1	1	2
45	Transportation by Air	16	-	14	14	-	2	2	15
46	Pipe Lines, Except Natural Gas	6	-	-	-	-	-	-	-
47	Transportation Services	5	1	-	1	1	-	1	3
48	Communication	62	4	3	7	3	-	3	32
49	Electric, Gas, and Sanitary Services	33	4	2	6	1	1	2	23
50	Wholesale Trade-Durable Goods	45	1	2	3	-	2	2	17
51	Wholesale Trade-Nondurable Goods	43	6	2	8	-	-	-	15
53	General Merchandise Stores	17	4	-	4	1	-	1	9
54	Food Stores	13	3	-	3	1	-	1	6
55	Automotive Dealers and Gasoline	7	-	-	-	-	-	-	1

TABLE XI

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRED ENTITY

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRED ENTITY						
			CLEARANCE GRANTED TO FTC OF DOJ			SECOND REQUEST INVESTIGATIONS 3/			NUMBER OF 2-DIGIT INTRA-INDUSTRY TRANSACTIONS
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
	Service Stations								
56	Apparel and Accessory Stores	2	-	-	-	-	-	-	1
57	Furniture, Home Furnishing, and Equipment Stores	12	-	-	-	-	-	-	2
58	Eating and Drinking Places	9	-	-	-	-	-	-	1
59	Miscellaneous Retail	20	1	-	1	1	-	1	4
60	Banking	20	-	-	-	-	-	-	11
61	Credit Agencies other than Banks	39	-	-	-	-	-	-	3
62	Security and Commodity Brokers, Dealers, Exchanges, and Services	11	-	1	1	-	-	-	7
63	Insurance	47	1	-	1	1	-	1	25
64	Insurance Agents, Brokers, and Services	4	-	-	-	-	-	-	2
65	Real Estate	40	1	1	2	-	-	-	7

TABLE XI

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRED ENTITY

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRED ENTITY						NUMBER OF 2-DIGIT INTRA-INDUSTRY TRANSACTIONS
			CLEARANCE GRANTED TO FTC OF DOJ			SECOND REQUEST INVESTIGATIONS 3/		
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
67	Holding and other Investment Offices	14	-	-	-	-	-	-	3
70	Hotels, Rooming Houses, Camps, and other Lodging Places	18	-	-	-	-	-	-	9
72	Personal Services	7	2	-	2	2	-	2	6
73	Business Services	61	3	5	8	-	3	3	23
75	Automotive Repair, Services, and Garages	6	2	-	2	1	-	1	1
76	Miscellaneous Repair Services	1	-	-	-	-	-	-	-
78	Motion Pictures	13	1	-	1	1	-	1	4
79	Amusement and Recreation Services, Except Motion Pictures	5	-	1	1	-	1	1	2
80	Health Services	44	2	3	5	3	1	4	32
82	Educational Services	2	-	-	-	-	-	-	-
87	Engineering, Accounting, Research,	8	1	-	1	-	-	-	1

TABLE XI

FISCAL YEAR 1991 1/
INDUSTRY GROUP OF ACQUIRED ENTITY

2-DIGIT SIC CODE 14/	INDUSTRY DESCRIPTION	ACQUIRED ENTITY						NUMBER OF 2-DIGIT INTRA-INDUSTRY TRANSACTIONS
			CLEARANCE GRANTED TO FTC OF DOJ			SECOND REQUEST INVESTIGATIONS 3/		
		NUMBER 4/	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
	Management, and Related Services							
DV	Diversified Companies	143	21	11	32	3	4	7	104
00	Not Available 16/	80	5	4	9	-	1	1	1
	ALL TRANSACTIONS	1376	136	87	223	33	31	64	525

FISCAL YEAR 1991
FOOTNOTES

1/ Fiscal 1991 includes transactions reported between October 1, 1990 and September 30, 1991.

2/ The size of transaction is based on the aggregate total amount of voting securities and assets to be held by the acquiring person as a result of the transaction and is taken from the response to Item 3 (c) of the notification and report form.

3/ Based on the date the second request was issued.

4/ During fiscal year 1991, 1529 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number, 1376, reflects adjustments to eliminate the following types of transactions: (1) 29 transactions reported under Section (c)(6) and 69 transactions reported under Section (c)(8) (transactions involving certain regulated industries and financial businesses); (2) 10 transactions which were followed by separate notifications for one or more additional transactions between the same parties during fiscal 1991 (such transactions are listed here as a single consolidated transaction); (3) 26 transactions found to be non-reportable; (4) 10 incomplete transactions (only one party in each transaction filed a compliant notification); and (5) 9 transactions withdrawn before the waiting period began. The table does not, however, exclude 7 competing offers or 114 multiple-party transactions (transactions involving two or more acquiring or acquired persons).

5/ Percentage of total transactions.

6/ Percentage of transaction range group.

7/ Percentages also appear in TABLE I.

8/ This category is composed of newly-formed acquiring persons and transactions withdrawn before staff could make a detailed analysis of the acquisition.

9/ This category is composed of newly-formed acquiring persons, foreign acquiring persons with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

10/ The assets of the acquired entity were taken from responses to Item 2(d)(i) (Assets to be Acquired) or from Items 4(a) or (b) (SEC documents and annual reports) of the premerger notification and report form.

11/ The assets were not available primarily because the acquired firms' financials were consolidated with those of each respective acquired ultimate parent.

12/ The sales of the acquired entity were taken from Items 4(a) and (b) (SEC documents and annual reports) or responses to Item 5 (dollar revenues) of the premerger notification and report form.

13/ Transactions in this category are represented by the acquisitions of newly-formed corporations or corporate joint ventures from which no sales were generated, and acquisitions of assets which had produced no sales or revenues during the year prior to filing the notification and report form.

14/ 2-Digit SIC codes are part of the system of Standard Industrial Classification established by the UNITED STATES GOVERNMENT STANDARD CLASSIFICATION MANUAL, 1987, Executive Office of the President - Office of Management and Budget. The SIC groupings used in this table were determined from responses submitted by filing parties to Item 5 of the premerger notification and report form.

15/ Transactions included in this category represent newly-formed companies, companies with no United States operations, notifications filed by some individuals, and filings withdrawn before the industry classification could be determined.

16/ Transactions in this category include filings withdrawn before an industry group could be determined and newly-formed entities.

NOTE: Detail may not add to total due to rounding.

Exhibit B

Hart-Scott-Rodino

Premerger Notification Program

Guides I and II.

INTRODUCTORY GUIDES
TO THE
PREMERGER NOTIFICATION PROGRAM
GUIDE I

WHAT IS THE PREMERGER NOTIFICATION PROGRAM?

AN OVERVIEW

Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

January 1991

Note: This Guide is the first in a series of guides prepared by the Premerger Notification Office and the Compliance Division of the Federal Trade Commission. Neither this Guide, nor any other guide in this series, constitutes an interpretation, formal or informal, of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or the Commission's Premerger Notification Rules, 16 C.F.R. Parts 801, 802 and 803. Rather, they are designed as an introduction to the act and the rules in their current form for persons who are unfamiliar with them.

TABLE OF CONTENTS

I. INTRODUCTION

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (referred to in this Guide as § 7A of the Clayton Act or 15 U.S.C. § 18a) established the federal premerger notification program. The act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission and the Department of Justice (the federal antitrust enforcement agencies) before consummating the proposed acquisition. The parties must wait a specified period of time while the enforcement agencies review the proposed transaction. The premerger notification program became effective September 5, 1978, after final promulgation of the Federal Trade Commission's extensive premerger notification rules.

The premerger notification program was established to avoid some of the difficulties that antitrust enforcement agencies encounter when they challenge anticompetitive acquisitions after they occur. The enforcement agencies have found that it is often impossible to restore competition fully because circumstances change once a merger takes place; furthermore, any attempt to reestablish competition is usually costly for the parties and the public. Prior review under the premerger notification program has created an opportunity to avoid these problems by enabling the enforcement agencies to challenge many anticompetitive acquisitions before they are consummated.

The premerger notification program has been a success. Compliance with the act's notification requirements has been excellent. As a result, since the inception of the program, the two enforcement agencies generally have been able to challenge anticompetitive transactions before they are completed. These premerger enforcement actions have been less costly and more effective. In addition, although the agencies retain the power to challenge mergers after they are consummated and will do so under appropriate circumstances, the fact that they rarely do so has led many members of the private bar to view the premerger notification review process as a helpful procedure in giving antitrust advice to their clients.

The rules of the premerger notification program are necessarily technical and complex. We have prepared this Guide and the others in this series to introduce some of the program's specially defined terms and concepts. These should assist you in determining which proposed business transactions are subject to the premerger notification requirements and how to comply with them.

Guide I is intended only as an overview of the program; it describes in general what transactions the program covers, how the program operates, and what other sources of information are available regarding application of the act and the rules. It is not intended to resolve specific questions; rather, it is designed to alert you to the reporting requirements for certain transactions and to familiarize you with the procedures that the antitrust enforcement agencies follow for reviewing such transactions. Guide II deals with more specific questions concerning the applicability of the act and the rules. Guides III and IV explain how to complete the required reporting form, focusing on the mistakes most commonly made. Guide V contains suggested language that the Commission staff may use in preparing requests for additional information; these requests may be issued to parties if the Commission has determined that their transaction warrants further investigation.[1]

Once again, we emphasize that these guides are not intended to resolve specific questions or deal with the many unique issues that arise under the act or the rules. If you are analyzing a transaction, we suggest that you consult not only the act, the rules, and the other guides in this series, but also the additional material referred to in this Guide. In addition, if you have questions about the premerger notification program or a particular transaction, the Federal Trade Commission's Premerger Notification Office can provide assistance. Its telephone number is (202) 326-3100 and it responds to a large number of telephone inquiries each day.

II. DETERMINING REPORTABILITY

The Hart-Scott-Rodino Antitrust Improvements Act requires that persons contemplating proposed business transactions that satisfy certain size criteria report their intentions to the antitrust enforcement agencies before consummating the transaction. If the proposed transaction is reportable, then both the acquiring business and the business that is being acquired must submit information about their respective business operations to the Federal Trade Commission and to the Department of Justice and wait a specified period of time before consummating the proposed transaction. During that waiting period, the enforcement agencies review the antitrust implications of the proposed transaction. Whether a particular transaction is reportable is determined by application of the act and the premerger notification rules. The rules are found at 16 C.F.R. Parts 801, 802, and 803.

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[1] Guides III, IV and V have not yet been published. They will be made available as soon as they are completed.

As a general matter, the act and the rules require both parties to file notifications under the premerger notification program if all of the following conditions are met:

1. One person has sales or assets of at least $100 million;

2. The other person has sales or assets of at least $10 million (see § 7A(a)(2) of the act); and

3. As a result of the transaction, the acquiring person will hold a total amount of stock or assets of the acquired person valued at more than $15 million, or, in some stock transactions, even if the stock held is valued at $15 million or less, if it represents 50% or more of the outstanding stock of the issuer being acquired and the issuer is of a certain size (see § 7A(a)(3) of the act and Rule 802.20(b), 16 C.F.R. § 802.20(b)).

A. Acquiring and Acquired Persons

The first step in determining reportability is to determine who the "acquiring person" is and who the "acquired person" is. These technical terms are defined in the rules and must be applied carefully. In an assets acquisition, the acquiring person is the buyer, and the acquired person is the seller. In a voting securities acquisition, the acquiring person is the buyer, but the acquired entity is the business that issued the voting securities to be acquired. Thus, in many voting securities acquisitions, the sellers are shareholders of the acquired person, but not the acquired person itself. The rules impose a reporting obligation on that acquired person despite the fact that, in such voting securities transactions, the acquired person may have no direct dealings with the acquiring person. See Rule 801.1, 16 C.F.R. § 801.1; Rule 801.30, 16 C.F.R. § 801.30. The rules require that a person proposing to acquire voting securities directly from shareholders rather than from the issuer itself serve notice on the issuer of those shares to make sure the acquired person knows about its reporting obligation. See Rule 803.5, 16 C.F.R. § 803.5.

B. Size-of-Person Test

Once you have determined who the acquiring and acquired persons are, you must determine whether the size of each person meets the act's minimum size criteria. This "size of person" test generally measures a company based on the company's last regularly-prepared annual statement of income and expenses and its last regularly-prepared balance sheet. See Rule 801.11, 16 C.F.R. § 801.11. The size of a person includes not only the

business entity that is making the acquisition or the business entity whose assets are being acquired or which issued the voting securities being acquired, but also the parent of that business entity and any other entities that the parent controls. See Rule 801.1(a)(1), 16 C.F.R. § 801.1(a)(1).

C. Size-of-Transaction Test

The next step is to determine what voting securities, assets, or combination of voting securities and assets are being transferred in the proposed transaction. Then you must determine the value of the voting securities and/or assets or the percentage of voting securities that will be "held as a result of the transaction." Calculating what will be held as a result of the transaction (referred to as the "size of transaction" test) is complicated and requires application of several rules, including Rules 801.10, 801.12, 801.13, 801.14, and 801.15 (16 C.F.R. §§ 801.10, 801.12, 801.13, 801.14, 801.15). The securities "held as a result of the transaction" include those that will be transferred in the proposed transaction as well as voting securities of the acquired person that the acquiring person already owns. The assets "held as a result of the transaction" include those that will be transferred in the proposed transaction as well as certain assets of the acquired person that the acquiring person has purchased within the time limits outlined in Rule 801.13, 16 C.F.R. § 801.13. The rules on when to aggregate the value of previously acquired voting securities and assets with the value of the proposed acquisition are discussed in greater detail in Guide II.

D. Notification Thresholds

An acquisition that will result in a buyer holding more than $15 million worth of the assets or the stock of another company crosses the first of four "notification thresholds" as that term is used in the rules. See Rule 801.1(h), 16 C.F.R. § 801.1(h). The rules identify three additional thresholds for stock acquisitions at which point a new notification may be required: 15% of the issuer's stock, if valued at more than $15 million; 25% of the issuer's stock, if valued at more than $15 million; and 50% of the issuer's stock. For acquisitions of assets, notification may be required each time a person will accumulate more than $15 million worth of assets from a single seller. See Rule 801.13, 16 C.F.R. § 801.13.

The Notification and Report Form requires you to identify which notification threshold you intend to cross. You then have one year from the expiration of the statutory waiting period in which to consummate the transaction that will bring you over

that particular threshold without having to file again. See Rule 803.7, 16 C.F.R. § 803.7.

Once you have consummated a voting securities transaction for which you have filed notification, you may acquire additional voting securities of the same issuer any time within the next five years without incurring additional filing and waiting requirements as long as you do not meet or exceed a subsequent threshold. If, for example, you have filed for the 15 percent threshold and, within one year of the expiration of the waiting period you have acquired 16 percent of the issuer's voting securities, then you are permitted to acquire, during the five-year period, additional voting securities of the issuer: you may acquire up to, but not including, the share that would constitute 25 percent of the issuer's outstanding voting securities. See Rule 802.21, 16 C.F.R. § 802.21. If you want to buy enough stock to bring you over a higher threshold (or if you want to buy any stock of the same issuer after the five-year period has expired), then you may have to file another Notification and Report Form. In some situations, a person acquiring voting securities could have to file four sets of notifications, to cross each of the four notification thresholds. Multiple notifications can sometimes be avoided by filing an initial notification that identifies the highest threshold the person intends to cross within one year.

As discussed above, you should consult each of the sources mentioned in this Guide in order to determine whether a particular transaction must be reported to the enforcement agencies. Guide II in this series is specifically designed to introduce you to these and other basic concepts that determine reportability.

E. Exempt Transactions

In some instances, a transaction may not be reportable even if the size of person and the size of transaction tests have been satisfied. The act and the rules set forth a number of exemptions, describing particular transactions or classes of transactions that need not be reported despite the fact that the threshold criteria have been satisfied. See §7A(c) of the act, 15 U.S.C. § 18a(c), and Part 802 of the premerger notification rules, 16 C.F.R. Part 802. For example, an acquisition of voting securities of an issuer is exempt if the acquiring person owns 50 percent or more of that issuer prior to the proposed acquisition. See § 7A(c)(3) of the act, 15 U.S.C. § 18a(c)(3). The acquisition of voting securities of a foreign issuer may be exempt if the foreign company did no business in the United States and holds no assets in the United States. See Rule 802.50(b), 16 C.F.R. § 802.50(b).

Once it has been determined that a particular transaction is reportable, each party must submit its notification to the Premerger Notification Office of the Federal Trade Commission and to the Director of Operations of the Antitrust Division of the Department of Justice. In addition, each acquiring person must pay a $20,000 filing fee to the Premerger Notification Office for each transaction that it reports.

III. THE FILING FEE

In 1989, Congress mandated that the Federal Trade Commission collect a filing fee of $20,000 from persons acquiring voting securities or assets who are required to file premerger notifications by the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In other words, no notification is considered filed and the statutory waiting period will not begin until the Premerger Notification Office has received payment. For transactions in which more than one person is deemed to be the acquiring person, each acquiring person must pay the $20,000 fee. In addition, an acquiring person will have to pay multiple filing fees if a series of acquisitions are separately reported. Payment must be payable to the "Federal Trade Commission" and may be made by electronic wire transfer, United States postal money order, bank money order, bank cashier's check or certified check in U.S. currency. The procedures for paying the fee are described in more detail in the "Statement of the Federal Trade Commission on Hart-Scott-Rodino Filing Fees." The Statement can be obtained from the Commission's Public Reference Section in room 130 of its headquarters building or by calling (202) 326-2222. The Premerger Notification Office also provides information concerning the fees.

IV. THE FORM

The requirement that parties complete the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions is established by the Appendix to 16 C.F.R. Part 803. That form is referred to in this Guide as the Notification and Report Form or simply as the Form. The Form solicits information that the enforcement agencies use to help evaluate the antitrust effects of the proposed transaction. Guides III and IV in this series explain in greater detail how to complete the Form. The Form has been revised a number of times since the rules became effective. Filing parties must, therefore, confirm that they are using the current Form.

A. Information Reported

In general, a reporting person is required to describe the parties involved and the structure of the transaction. Reporting persons are required to submit certain documents such as balance sheets and other financial data and copies of certain documents that will have been filed with the Securities and Exchange Commission. In addition, reporting persons must submit certain planning documents that pertain to the proposed transaction. Each party must submit sales information by Standard Industrial Classification (SIC) code[2] for its most recent fiscal year and for the most recent year that the Commerce Department's Bureau of the Census has collected and published aggregate, industry-wide data. The party must identify all subsidiaries, significant holders of its voting securities, and significant holdings of the party unless the party is filing solely as an acquired person in an asset acquisition. In asset acquisitions, a party filing solely as an acquired person need not complete this item. An acquiring person must submit this information for all of its operations; an acquired person, on the other hand, must submit this information only for the business or businesses being acquired.

The Form also requires the reporting persons to identify whether the acquiring and acquired persons currently derive income from businesses that fall within any of the same four-digit industry SIC codes. Identification of overlapping SIC codes may indicate whether the parties might be operating in the same line of business. In addition, each person must state whether a vendor/vendee relationship has existed between the acquiring and acquired persons in the past. Acquiring persons must also describe any previous acquisitions in the last five years of companies engaged in businesses in any of the overlapping four-digit SIC codes previously identified.

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[2] The SIC code is employed by the U.S. Bureau of the Census to identify products and services for which aggregate data are published in the Bureau's various economic census reports and its annual survey of manufactures. Reporting companies submit annual data to the Census for each plant or other facility operated by the reporting company by specific classifications referred to as SIC codes. The SIC codes are divided into four-digit (industry), five-digit (product group), and seven-digit (product) categories. See 43 Fed. Reg. 33526 (1978) for further discussion. Most parties who are subject to the premerger notification program have this data readily available because they have compiled it for submission to the Bureau of the Census.

B. Contact Person

The parties are required to identify a contact person (referred to as the "item 10 person"), a representative of the reporting person who can be contacted about information in the Form. The item 10 person is, in most cases, the attorney who is responsible for preparing the Form. The Form must also be certified by the reporting person in the manner specified by Rule 803.6, 16 C.F.R. § 803.6. This person is not necessarily the same as the item 10 person and for certain reporting persons, the certifying person cannot be the same as the item 10 person.

C. Affidavits

Rule 803.5, 16 C.F.R. § 803.5, describes the affidavit that must accompany certain Forms. The required statements that must be included in the affidavits accompanying the Forms establish the earliest stage in a transaction when the parties are permitted to file a premerger notification. This requirement is intended to assure that the enforcement agencies will not be presented with hypothetical transactions for review. See Statement of Basis and Purpose to Rule 803.5, 43 Fed. Reg. 33510 (1978).

In transactions where the acquiring person is purchasing voting securities from third parties and not directly from the acquired person, then only the acquiring person must submit an affidavit; the acquiring person must state in the affidavit that it has a good faith intention of completing the proposed transaction and that it has served notice on the acquired person as to its potential reporting obligations. In all other transactions, both the acquired and acquiring persons must submit an affidavit with their Forms, attesting to the fact that a contract, an agreement in principle, or a letter of intent has been executed.

D. Voluntary Information

The rules provide that reporting persons may submit information that is not required by the notification form. See Rule 803.1(b), 16 C.F.R. § 803.1(b). The antitrust agencies' review of a proposed transaction may be more rapid if the parties voluntarily provide information or documentary material that is relevant to the competitive analysis of the proposed transaction, but that is not specifically required by the Form. While helpful, such voluntary submissions do not guarantee a speedy review.

E. Confidentiality

Neither the information submitted nor the fact that a notification has been filed is made public by the agencies except as part of a legal or administrative action to which one of the agencies is a party or in other narrowly-defined circumstances permitted by the act. See Section 7A(h) of the act, 15 U.S.C § 18a(h). The fact that a transaction is under investigation may become apparent if the agencies interview third parties during their investigation.

F. Filing Procedures

The rules require that two notarized copies of the Form (with one set of documentary attachments) be filed at the Federal Trade Commission with the:

Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

and that three notarized copies of the Form (with one set of documentary attachments) be filed at the Department of Justice with the:

Director of Operations
Antitrust Division
Room 3218
Department of Justice
Washington, D.C. 20530

At the time of your filing, you should check to determine current notification requirements. There is, for example, at the time this Guide is being drafted a proposal to increase the number of documentary attachments that must be submitted.

V. THE WAITING PERIOD

After filing, the parties must then observe a statutory waiting period during which they may not consummate the transaction. The waiting period is 15 days in the case of a cash tender offer and 30 days for all other types of reportable transactions, but may be extended by issuance of a request for additional information and documentary material (see Section

VIII.C., below).[3] During this waiting period, the antitrust enforcement agencies review the information submitted and determine whether any further action by them is warranted.

A. Beginning of Period

In most cases, the initial waiting period begins after both the acquiring and acquired persons file completed Forms with both agencies. However, for certain transactions in which a person buys voting securities from someone other than the issuer, the waiting period begins after the acquiring person submits a complete Form. It is important to note that a failure to pay the filing fee or submission of an incorrect or incomplete filing will delay the start of the waiting period. The waiting period will begin to run only when the fee is paid and a completed Form, or an incomplete Form with an adequate statement of reasons explaining why the person is unable to complete the Form, is filed. See Rules 803.3 and 803.10(a), 16 C.F.R. §§ 803.3 and 803.10(a).

B. Early Termination

Either party or both parties may request that the waiting period be terminated before the statutory period expires. In a formal interpretation[4] issued August 20, 1982, the Commission stated that such a request will be granted only if: it is made in writing; all parties have submitted completed Forms and any other information required; and both the Commission and the Assistant Attorney General have completed their antitrust review and determined not to take any enforcement action during the waiting period.

The Commission's Premerger Notification Office is responsible for informing the parties that their request for early termination has been granted. As required by the act, the Commission publishes a notice in the Federal Register that identifies the parties to the transaction whenever a request for

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[3] If the premerger notification requirements apply to the sale of property subject to federal bankruptcy provisions, then the applicable waiting period is ten days. 11 U.S.C. § 363(b)(2).

[4] Rule 803.30, 16 C.F.R. § 803.30, establishes the procedure whereby the Commission or its staff, with concurrence of the Assistant Attorney General, may render interpretations as to a party's obligations under the act and the rules. The Commission and its staff have issued a number of formal interpretations on a variety of subjects.

early termination of the waiting period has been granted. In addition, the Commission makes available daily a list of the transactions in which early terminations were granted on the previous working day. The information is available from the Public Reference Section, room 130 of the headquarters building, or can be retrieved using a touchtone telephone by calling (202) 326-2222.

Early termination is granted for most transactions. In fiscal year 1987, for example, requests for early termination were made with regard to approximately 89% of all transactions reported. Over 75% of those requests were granted. On the average, requests for early termination have been granted within two weeks of the filing date. In any particular transaction, however, the time that it takes to grant a request for early termination depends on many factors, including the complexity of the proposed transaction, its likely competitive impact, and the number of contemporaneous filings from other parties that the enforcement agencies must review at the same time.

VI. REVIEW OF THE FORM

Once a Form has been filed with the enforcement agencies, the agencies begin their review. The Federal Trade Commission is responsible for the administration of the premerger notification program. As a result, the Commission's Premerger Notification Office makes an initial determination whether the Form complies with the act and the rules.

The Form is assigned to a member of the Premerger Notification Office staff to determine first, whether the transaction was subject to the reporting requirements and second, whether the Form was completed correctly. If the filing appears to be deficient, the staff member will notify the item 10 person as quickly as possible so that errors can be corrected. See Guides III and IV in this series for further discussion of the most frequent errors in filing. It may be important to correct the errors quickly because the waiting period does not begin to run until the Form is filled out correctly and all required information and documentary material and payment of the filing fee are supplied.

As soon as the staff member has concluded that the reporting persons appear to have complied with all requirements, letters are sent to all parties identifying the date that the Forms were deemed filed correctly and the date the waiting period expires. The staff of the Premerger Notification Office attempts to mail these confirming letters as expeditiously as possible. The conclusions that the parties appear to have complied with the Act and the rules may be modified later if circumstances warrant.

VII. ANTITRUST REVIEW OF THE TRANSACTION

Both agencies undertake a preliminary substantive review of the proposed transaction. The agencies analyze the filings to determine whether the acquiring and acquired firms are competitors, have a vertical relationship, or are related in any other way such that a combination of the two firms might adversely affect competition. Staff members rely not only on the information included on the Form but also on publicly available information. The individuals analyzing the Form often have experience either with the markets or the companies involved in the particular transaction. As a result, they may have industry expertise to aid in evaluating the likelihood that a merger may be unlawful.

Only one of the two enforcement agencies will conduct an investigation of a proposed transaction. If, after preliminary review, both agencies decide that a particular transaction warrants closer examination, the agencies decide between themselves which one will be responsible for the investigation. Other than members of the Premerger Notification Office, no one at either agency will have initiated contact with any of the parties or any third parties until it has been decided which agency will be responsible for investigating the proposed transaction. This clearance procedure is designed to minimize the duplication of effort and the confusion that could result if both agencies contacted individual parties at the same time. The clearance decision is made pursuant to a long-standing agreement that divides the antitrust work between the two agencies.

Of course, any interested person, including either of the parties themselves, is free to present information to either or both agencies at any time; however, if the clearance decision has not yet been resolved, the person that makes a presentation to only one agency may be requested to make a second presentation after the clearance decision is resolved. If you are representing a party to the transaction that wishes to make a presentation, you may inform the Premerger Notification Office of that fact; the Premerger Notification Office will let staff attorneys at both agencies who are reviewing the matter know that persons wish to come in and make a presentation. In that way, you may avoid the necessity of making separate presentations to each enforcement agency.

VIII. SECOND REQUESTS

Once the investigating agency has clearance to proceed, it may ask any or all parties to the transaction to submit

additional information or documentary material to the requesting agency. The request for additional information is commonly referred to as a "second request." As discussed above, although both agencies review each Form submitted to them, only one agency will issue second requests to the parties in a particular transaction.

A. Information Requested

Generally, a second request will solicit information on particular products in an attempt to assist the investigative team in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as requests for the production of documents. The staff attorneys work closely with the staff economists in formulating these requests. A second request is different from a subpoena in that it can require the responding party to prepare information specifically for the purpose of responding to the request. A sample second request has been produced by the Federal Trade Commission for internal use by its attorneys and is available from the Public Reference Section, Federal Trade Commission, room 130, Washington, D.C. 20580, (202) 326-2222. Because every transaction is unique, however, the sample second request should be regarded only as an example.

B. Narrowing the Request

Parties that receive a second request and believe that it is broader than necessary to obtain the information that the enforcement agency needs are encouraged to discuss the possibility of narrowing the request with the staff attorneys reviewing the proposed transaction. Often, the investigative team drafts a second request based only on information contained in the initial filing and whatever other information is publicly available. At this point, the team may not have access to specific information about the structure of the company or the products it makes or the services it provides. As a result, the second request may be broader than is necessary in terms of both the issues addressed and the scope of the required search. By meeting with the team, representatives of the company have an opportunity to narrow the issues and to limit the required search for documents. Any modifications to the request, however, must be made by agency representatives in writing. The responding party cannot resolve relevancy or burden questions without the agreement of those representatives.

C. Extension of the Waiting Period

The issuance of a second request extends the statutory waiting period until 20 days (or, in the case of a cash tender offer, 10 days) after the parties comply with the second request (or in the case of a tender offer, until after the acquiring person complies). See § 7A(e) of the act, 15 U.S.C. § 18a(e). The 20-day (or 10-day) period will not begin if the parties' submissions are determined to be noncompliant. During this time, the attorneys investigating the matter may also be interviewing relevant parties and using other forms of compulsory process to obtain other information.

The second request must be issued by the enforcement agency before the 30-day waiting period (15-day waiting period, if a cash tender offer) expires. If the waiting period expires and the agencies have not issued a second request to any party to the transaction, then the parties are free to consummate the transaction. The fact that the agencies do not issue second requests does not preclude them from initiating an enforcement action at a later time. All of the agencies' other investigative tools are available to them in such investigations.

IX. AGENCY ACTION

A. No Further Action

After analyzing all of the information available to them, the investigative team will make a recommendation to either the Commission or the Assistant Attorney General. If they find no reason to believe competition will be reduced in any market, they will recommend no further action. Assuming that the agency concurs in that recommendation, the parties are then free to consummate their transaction upon expiration of the waiting period. As with a decision not to issue a second request, a decision not to seek injunctive relief at this time does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later time.

B. Seeking Injunctive Relief

If, on the other hand, the investigative team believes that the transaction is likely to be anticompetitive, they may recommend that the agency initiate injunction proceedings in U.S. district court to halt the merger or acquisition. If the Commission or the Assistant Attorney General concurs in the staff's recommendation, then the agency will file suit in the appropriate district court. If it is a Commission case, the Commission is required to file an administrative complaint

within twenty days (or a lesser time if the court so directs) of the granting of its motion for a temporary restraining order or for a preliminary injunction. The administrative complaint initiates the Commission's administrative proceeding that will decide the legality of the transaction. If it is a Department of Justice case, the legality of the transaction is litigated entirely in district court.

C. Settlements

During an investigation, the investigative team will, if appropriate, discuss terms of settlement with the parties. The staff of the Commission is permitted to negotiate a proposed settlement with the parties; however, it must then be presented to the Commission, accepted by a majority vote, and placed on the public record for a notice and comment period before it can be made final by the Commission. A proposed settlement negotiated by Department of Justice staff must be approved by the Assistant Attorney General and also placed on the public record for a notice and comment period before it will be entered by a district court pursuant to the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

X. FAILURE TO FILE

A. Civil Penalties

If you make an acquisition without filing the required prior notification or without waiting until the expiration of the statutory waiting period, you may be subject to civil penalties. The Hart-Scott-Rodino Antitrust Improvements Act provides that "any person, or any officer, director or partner thereof" shall be liable for a penalty of up to $10,000 a day for each day the person is in violation of the act. The enforcement agencies may also obtain other relief to remedy violations of the act, such as an order requiring the person to divest assets or voting securities acquired in violation of the act. See § 7A(g) of the act, 15 U.S.C. § 18a(g).

B. Reporting Omissions

If you have completed a transaction in violation of the act, it is important to bring the matter to the attention of the Premerger Notification Office as soon as possible. Even a late filing provides information to the enforcement agencies that assists them in conducting antitrust screening of transactions and antitrust investigations. In most transactions, the enforcement agencies have taken the position that no additional

penalties should be assessed after a filing is made and the waiting period expires.

C. Deliberate Avoidance

The premerger notification rules specifically provide that structuring a transaction to avoid the act does not alter notification obligations if the substance of the transaction is reportable. See Rule 801.90, 16 C.F.R. § 801.90. For example, the agencies have sought penalties where parties changed the form of a transaction for the purpose of avoiding notification obligations but did not change the substance of their transaction.

XI. OTHER GUIDES IN THIS SERIES

The Premerger Notification Office has prepared a series of guides, of which this is one, to introduce you to the program. The others are:

Guide II: To File Or Not To File -- When you must file a premerger notification report form.

Guide III: What Goes Where -- How to complete the premerger notification report form.

Guide IV: Sample Forms

Guide V: A Guide to preparing requests for additional information.

Guide II: To File Or Not To File explains certain basic requirements of the program and takes you through a step-by-step analysis for determining whether a particular transaction must be reported. Guide III: What Goes Where will assist you in completing the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions. We have identified mistakes that are commonly made by parties filling out the Form, and have devoted special attention in Guide III to clarifying the correct way of providing the required information. To be used in conjunction with Guide III, Guide IV includes two sets of sample Forms which illustrate the proper manner of completing the Form for an asset acquisition and for a voting securities acquisition.

Guide V will contain materials that were initially designed for Federal Trade Commission attorneys in preparing requests for additional information. It is included in this series to provide an example of what you might expect if the enforcement

agency issues a second request to you. Because all transactions are unique, second requests may vary significantly from transaction to transaction as well as from the language suggested in this Guide. The contents of Guide V should, therefore, be regarded only as illustrative. As noted above, an earlier version of this document under the title "A Guide To Preparing Requests For Additional Information" is available from the Public Reference Section, Federal Trade Commission, Washington D.C. 20580, (202) 326-2222.

XII. OTHER MATERIALS

To make effective use of these guides, you must be aware of their limitations. They are intended to provide only a very general introduction to the act and rules and should be used only as a starting point. Because it would be impossible, within the scope of these guides, to explain all of the details and nuances of the premerger requirements, you must not rely on them as a substitute for reading the act and the rules themselves. To determine premerger notification requirements, you should consult:

1. The statute, Section 7A of the Clayton Act, 15 U.S.C. § 18a (additional provisions are found in, 11 U.S.C. § 363(b)(2) and Pub. L. No. 101-62, § 605 (1989)).

2. The premerger notification rules, 16 C.F.R. Parts 801, 802, 803. (1990);

3. The statement of basis and purpose for the rules, 43 Fed. Reg. 33452-33535, July 31, 1978; 48 Fed. Reg. 34428-34442, July 29, 1983; 52 Fed. Reg. 7066-7101, March 6, 1987; and 52 Fed. Reg. 20058-20063, May 29, 1987.

4. The formal interpretations issued pursuant to the rules, (compiled in the Premerger Notification Source Book and 4 Trade Reg. Rep. (CCH) at ¶ 42,475).

Also bear in mind that from time to time the Commission amends its rules and issues additional formal interpretations. It would be advisable to check the Federal Register for more recent rules changes that have not yet been incorporated into the Code of Federal Regulations or these guides. If you are uncertain about the existence of more recent rules changes, feel free to call the Premerger Notification Office and ask for copies of the most recent amendments to the rules. Amendments and formal interpretations, as well as the other material referenced above, are compiled in the Premerger Notification Source Book, 1990, available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

There are also non-governmental publications that, while not certified by the Commission, contain useful compilations of materials relevant to the premerger notification program:

1. Commerce Clearing House's Trade Regulation Reporter reprints the act, the rules, the Form, and the formal interpretations.

2. The American Bar Association's Section of Antitrust Law published a Premerger Notification Practice Manual that collected, characterized and indexed how the Premerger Notification Office has resolved many issues that arise under the act and the rules. Although this is not an official summary of advice, these are an often useful collection of the Office's practices based on public correspondence to the office confirming oral advice of the Premerger Notification Office staff.

3. In addition, there is a looseleaf treatise by Axinn, Fogg, Stoll and Prager, Acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act (published by Law Journal Seminar Press). It explains requirements of the Form, the rules, and the act, and includes discussion of the legislative history and of court proceedings arising under the act.

We recommend that you use these introductory guides as a starting point, but you should refer to the act and the rules in analyzing any issue under the program. In addition, the statements of basis and purpose can be very helpful in understanding the meaning and intent of any particular rule. Finally, if you still have questions about the program or a particular transaction, the staff of the Premerger Notification Office is available to assist you (telephone (202) 326-3100). The office answers over two hundred inquiries in an average week and is prepared to provide prompt advice on whether transactions are subject to the notification requirements, how matters should be reported on the Form, and other questions that arise under the act.

INTRODUCTORY GUIDES
TO THE
PREMERGER NOTIFICATION PROGRAM
GUIDE II

erial

TO FILE OR NOT TO FILE

When you must file a premerger notification report form

Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

January 1991

Note: This Guide is the second in a series of guides prepared by the Premerger Notification Office and the Compliance Division of the Federal Trade Commission. Neither this Guide, nor any other guide in this series, constitutes an interpretation, formal or informal, of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or the Commission's Premerger Notification Rules, 16 C.F.R. Parts 801, 802, and 803. Rather, they are designed as an introduction to the act and the rules in their current form for persons who are unfamiliar with them.

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INTRODUCTION

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, § 7A of the Clayton Act, 15 U.S.C. § 18a, established the federal premerger notification program. The program is designed to provide the Antitrust Division of the Department of Justice and the Federal Trade Commission with information about large mergers and acquisitions before they occur. Parties to certain proposed transactions must submit an Antitrust Premerger Notification and Report Form with information about their businesses to the enforcement agencies and wait a specified period of time before consummating their proposed transactions.

During that "waiting period," the antitrust enforcement agencies analyze the likely competitive effects of the proposed transaction. If either agency believes that it needs further information in order to complete its competitive analysis, then it may request additional information and documentary material from the parties to the transaction. Issuance of this "second request" extends the statutory waiting period until a specified time after the parties respond. If, after analyzing all of the information available to it, either agency believes that consummation of the proposed transaction will violate the antitrust laws, then it will seek to enjoin the transaction in federal court.

Because the premerger notification program applies to many different types of reporting persons and to many different types of transactions, the rules implementing the program are technical and complex. Determining whether a particular transaction may be subject to the requirements of the premerger notification program can be rather complicated. In order to assist those of you who are unfamiliar with the program in determining whether any particular transaction is subject to the requirements of the program, the Premerger Notification Office of the Federal Trade Commission has issued a series of compliance guides. This is the second in the series.

Guide I is a brief overview of the program and the way it operates. It introduces the terms used and directs you to the additional sources that should be consulted in evaluating a proposed transaction. This is Guide II. It explains in greater detail certain terms used in the act and the rules, and analyzes a hypothetical transaction to determine whether it is reportable. Guide III explains how to complete the Premerger Notification and Report Form. Guide IV includes sample forms, one set for a voting securities acquisition and one set for an assets acquisition. Guide V contains "A Guide To Preparing

Requests for Additional Information," originally drafted for the internal use of attorneys at the Federal Trade Commission to aid them in preparing requests for additional information.[1]

This Guide is divided into four sections: Section I briefly describes the criteria used to determine whether a transaction is subject to the requirements of the premerger notification program. Section II provides a series of questions that can help you determine whether these criteria are satisfied. It uses a hypothetical transaction to illustrate the premerger notification rules. Section III analyzes and discusses in greater depth the rules and concepts introduced in Section II and applies them to the hypothetical transaction. Section IV discusses additional matters that determine whether a transaction is reportable.

If you conclude that a transaction must be reported, you may want to consult Guides III and IV in this series for help in completing the Premerger Notification and Report Form. If, after consulting each of the sources mentioned here and in Guide I, you still have questions, contact the Premerger Notification Office, Bureau of Competition, Federal Trade Commission, Washington, D.C. 20580, or call for telephone advice at (202) 326-3100.

It is important to note that each of the guides in this series is intended only as introductory material. Reading these guides cannot be a substitute for consulting the act and the rules. The examples used in the guides cannot cover every situation. If you are analyzing a particular transaction, these guides should be a starting point only. The act, the rules, the Statements of Basis and Purpose to the rules, as well as the other materials referred to in Guide I should all be examined.

I. THE REPORTING CRITERIA

In general, a proposed transaction may be subject to the premerger notification requirements if it:

(1) involves one "person" with sales or assets of at least $10 million and

(2) another "person" with sales or assets of at least $100 million, and

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[1] Guides III, IV, and V have not yet been published. They will be made available as soon as they are completed.

(3) if, as a result of the proposed transaction, the "acquiring person" will "hold" more than $15 million worth of assets or voting securities of the "acquired person."

Under some circumstances, an acquisition of voting securities worth $15 million or less will be reportable if the buyer is acquiring 50% or more of an individual company. In other words, transactions are subject to the act and the rules only if two statutory tests are satisfied: both parties must be covered under the "size of person" test and the acquisition must be covered under the "size of transaction" test. This Guide provides a step-by-step analysis to help determine if a proposed transaction satisfies each of these criteria.

In addition, this Guide explains how separate purchases may be subject to separate notification obligations since acquisitions do not necessarily occur all at once. The acquisition of voting securities of an issuer may, for example, be accomplished through a series of stock market purchases. In some circumstances, however, a single notification can avoid the requirement to submit multiple filings.

A. The Size of Person Test

To calculate either the size of the persons involved in the transaction or the size of the transaction itself requires an understanding of the concept of "person" as that term is used in the rules and of a number of other terms that are defined in the premerger notification rules, such as "entity," "ultimate parent entity," "control," and "hold." See Rules 801.1(a), (b), and (c), 16 C.F.R. §§ 801.1(a), (b), and (c), for the definition of these terms.

You must first identify the "acquiring person" and the "acquired person." To determine who the acquiring person is, you must identify the entity making the acquisition, and then determine who its "ultimate parent entity" or "UPE" is and all entities that the ultimate parent entity "controls," as that term is defined in the rules. In effect, you proceed up the chain of control from the buyer to determine who the ultimate parent entity is and down the chain of control from the UPE to determine which entities are to be included in the "person."

Similarly, the acquired person is the entity whose assets are being acquired or who issued the voting securities being acquired, its "ultimate parent entity," and all entities that UPE "controls" as that term is defined in the rules. The size of person test is then applied to the entire acquiring person and the entire acquired person.

Thus, if the shoe business of one conglomerate buys the shoe business of another conglomerate, the size of person test counts all of the sales and assets of each conglomerate, not simply those of the shoe businesses. Nor does it matter which person meets the $100 million size criteria. If the acquiring firm is an $11 million firm buying a small division of a $1 billion enterprise, the transaction may be reportable.

B. The Size of Transaction Test

The size of transaction test, as its name suggests, is concerned with the value or percentage of what is being acquired. Because the objective of the premerger notification program is to analyze the effects of combining once separate businesses, the premerger notification rules generally require that assets or voting securities of the acquired person that have already been acquired be aggregated with those that would be acquired in the proposed transaction. When what has been bought plus what will be bought meets the size of transaction criteria, the transaction becomes reportable unless it is otherwise exempt.

In many instances, it will be clear to you without performing the calculations discussed later in this Guide, that the transaction you are proposing is a potentially reportable transaction: The parties involved may be billion dollar corporations, and the transaction may be valued at hundreds of millions of dollars. Even though you are sure that the parties and the transaction satisfy the size of person test and the size of transaction test, it might nonetheless be helpful for you to read this Guide and to conduct the analysis discussed here. You still need to be familiar with the concepts of ultimate parent entity, acquiring and acquired person, control, hold, and others in order to complete the Notification and Report Form accurately.[2]

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[2] The premerger notification rules apply to two different kinds of transactions: acquisitions of assets and acquisitions of voting securities. For asset transactions, the act requires the seller to report to the antitrust agencies about the proposed sale of the business properties it operates as the "acquired person." For voting securities transactions, the act does not necessarily require the seller to report the sale. Instead, the entity that issued the voting securities (or controls the issuer) must file notification as the "acquired person" because it operates the business being sold and has the information the agencies require. In other words, for both types of transactions, it is the person that operates the business being acquired that must file as the acquired person.
(continued...)

The following sections in this Guide will define these and other terms as well as illustrate how these initial tests should be applied. You should not, however, rely on this Guide alone to determine whether the transaction you are considering is a reportable one, subject to the premerger notification program. You should also consult the act and the rules and the additional material mentioned in Guide I of this series.

II. OVERVIEW

A. Hypothetical Transaction

We will refer throughout this Guide to the following hypothetical transaction. The hypothetical places you in the position of legal counsel to a corporation that is about to be acquired. The principles it illustrates, however, should be of use to readers and firms in other circumstances.

> *The President of Beta Products, Inc., walks into your law office and informs you that the company is selling out to the Zed Corporation. She asks you to make sure there are no antitrust problems, and says that Zed Corporation mentioned something about filing a Hart-Scott-Rodino report form next week. Although you have handled many business transactions for Beta Products in the past, this is the first time that the possibility of a premerger notification filing has been involved. You want to determine, therefore, whether the transaction must be reported, and if so, how.*

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[2](...continued)
Because both transactions can have the same competitive consequence, the rules frequently impose the same obligations on the parties regardless of which form of transaction is used. This introductory Guide uses as its principal example a voting securities acquisition. Guide III, which explains how to fill out the Notification and Report Form and the sample Form of Guide IV treat the different types of transactions separately.

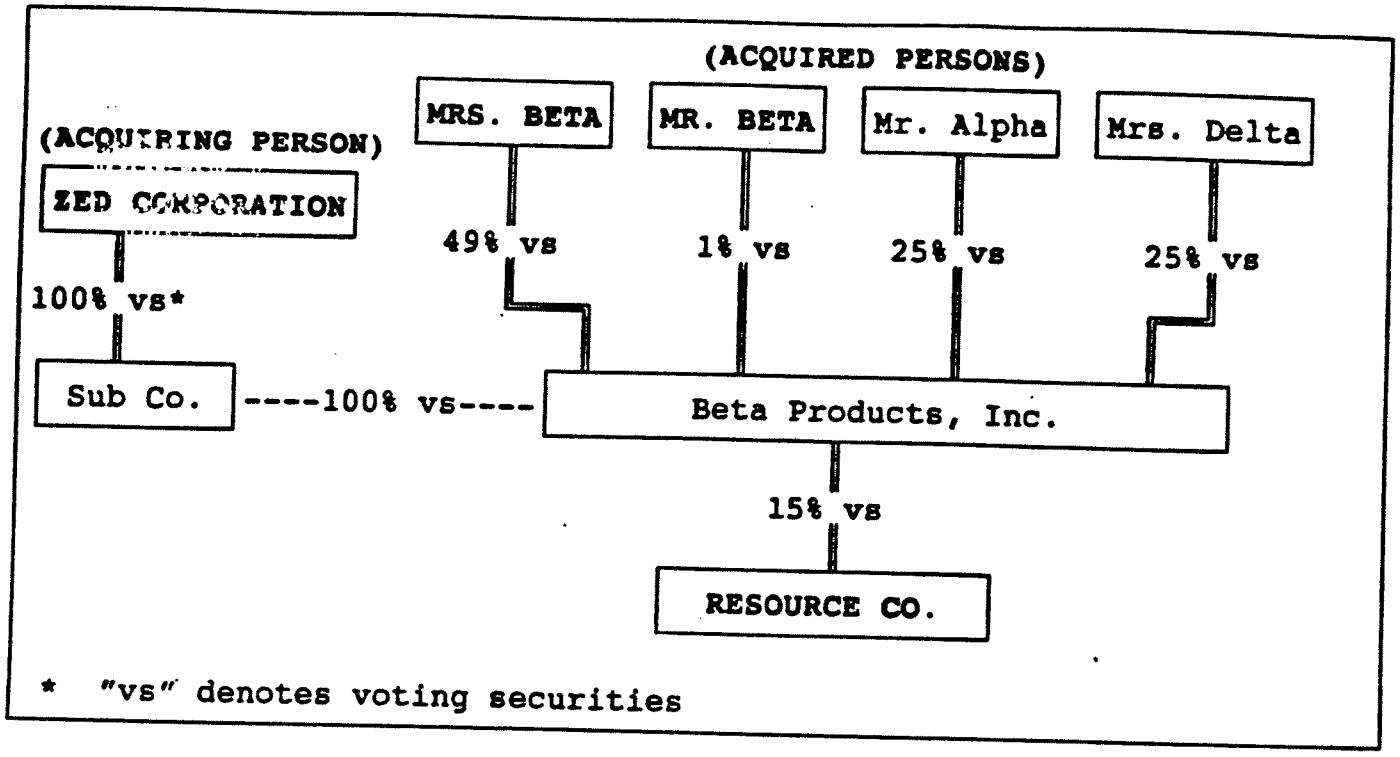
B. Check List of Steps to Determine if a Transaction Must be Reported

In determining whether a particular transaction must be reported, you should begin by answering several preliminary questions:

* Who are the parties involved in the deal?
* What is being acquired?
* What are the amount and the nature of the consideration?
* When and under what conditions will the transaction take place?

In exploring these preliminary questions about the hypothetical transaction, you have learned that when Mrs. Beta said Beta Products was "selling out" to Zed Corporation, she meant that Zed Corporation had entered into agreements with the shareholders of Beta Products to buy all of Beta Products' outstanding voting securities for $22 million. Further investigation reveals, however, that Zed Corporation does not plan to purchase the stock directly; rather, Zed Corporation's wholly-owned subsidiary Sub Co. will buy the stock from Beta Products' shareholders. You already know who those shareholders are: Mrs. Beta holds 49 percent of the outstanding voting securities and her husband owns 1 percent, while Mrs. Delta, her sister-in-law, and Mr. Alpha, a private investor, each own 25 percent. You also know from your previous work that Beta Products, Inc., holds 4500 shares of common stock which constitute 15 percent of the voting securities of Resource Co., but holds no stock in any other company. Beta Products is the largest holder of Resource voting securities. To clarify the relationships among the parties and the structure of the transaction, it is often helpful to draw a diagram of the transaction such as the one in Figure 1 below.

FIGURE 1



Once you have outlined the basic transaction, you are ready to analyze it to determine whether it must be reported. The important steps in this process, each of which is discussed in greater detail in Section III, include:

1. Identifying the "ultimate parent entity" of each party;

2. Determining the size of each "person" involved in the transaction; and

3. Determining the size of the transaction and the relevant reporting threshold.

As you will see, the premerger notification rules treat this transaction as two separate acquisitions, both of which may be reportable. In both, the acquiring person is Zed Corporation, which is highlighted in Figure 1 in bold, capital letters. Mrs. and Mr. Beta will be identified as the acquired person in the acquisition of Beta Products, Inc., and are also highlighted in the figure. In addition, because the acquisition of Beta Products will result in Zed Corporation holding voting securities of Resource Co., the rules treat this aspect of the transaction as a separate acquisition in which Resource Co.

(also highlighted in bold, capital letters) is the acquired person.

III. THE COVERAGE RULES

The premerger notification rules are divided into three parts:

Coverage: The first part, 16 C.F.R. Part 801, contains the coverage rules. These include definitions of various terms, methods for determining dollar values and percentages, and other procedures for determining whether notification is required.

Exemptions: The second part, 16 C.F.R. Part 802, contains various exemptions for transactions which would otherwise have to be reported. You should consult these exemption rules, as well as the exemptions set out in the statute itself, before filing, to determine whether any of them apply. See Clayton Act § 7A(c), 15 U.S.C. § 18a(c).

Filing Procedures: The third part, 16 C.F.R. Part 803, sets out the procedures for filing a notification and report form.

The coverage rules of 16 C.F.R. Part 801 are the main focus of this Guide.

You should note that both direct and indirect acquisitions are potentially subject to the premerger notification requirements. Thus, if you acquire a company that holds voting securities of other corporations, you must separately analyze the acquisition of those securities to determine whether those indirect acquisitions must be reported. Rule 801.4, 16 C.F.R. § 801.4, describes the manner in which one kind of indirect, or "secondary," acquisition is to be reported.

In addition, you should be aware that the formation of a joint venture or other corporation may be subject to the premerger notification requirements. In such transactions, the parties forming the new corporation are acquiring the voting securities of the new issuer. Rule 801.40, 16 C.F.R. § 801.40, describes the circumstances in which the formation of a joint venture or other corporation is reportable.

A. The Ultimate Parent Entity

The first step in determining your reporting obligation is to identify the ultimate parent entity of each party to the transaction. Under the act, the obligation to report depends on the size of the "persons" involved; Rule 801.1(a)(1), 16 C.F.R. § 801.1(a)(1), defines "person" as "an ultimate parent entity and all entities which it controls."

1. Definition

An ultimate parent entity is the company, individual or other entity that controls a party to the transaction and is not itself controlled by anyone else. For example, the ultimate parent entity may be a corporate parent of a subsidiary company that is planning to acquire a plant, or it could be a partnership or individual that owns a majority of the stock of the acquiring company. The ultimate parent entity may be separated from the firm whose name appears on the sale agreement by many layers of controlled subsidiaries, or the ultimate parent entity may actually be entering into the transaction in its own name.

2. The chain of control

Identifying the ultimate parent entity involves tracing the chain of "control," a term defined in Rule 801.1(b), 16 C.F.R. § 801.1(b). Control exists if a person "holds" 50 percent or more of the outstanding voting securities of an issuer. In the case of an entity that has no outstanding voting securities, control exists if a person has the right to 50 percent or more of the profits, or the right, in the event of dissolution, to 50 percent or more of the assets of the entity. Control also exists if a person has the contractual power presently to designate 50 percent or more of the board of directors of a corporation, or 50 percent or more of the individuals exercising similar functions in an unincorporated entity.

3. "Hold" and "Beneficial Ownership"

To determine control of a corporation, then, you will first need to identify the individuals or entities that "hold" its voting securities. The holder of voting securities, according to Rule 801.1(c), 16 C.F.R. § 801.1(c), is the individual or entity that has beneficial ownership. Although the term "beneficial ownership" is not defined in the rules, the statement of basis and purpose to the rule gives examples of some indicators of beneficial ownership. These include the right to receive an increase in the value of the stock, the

right to receive dividends, the obligation to bear the risk of loss, and the right to vote the stock. Thus, a person would be the "holder" of voting securities even though the shares were physically held by the person's stock broker and listed under the broker's street name. When more than one person have rights associated with a voting security or asset, beneficial ownership is determined on an individual basis, based on the particular circumstances involved. (Please refer to the discussion of beneficial ownership in the Statement of Basis and Purpose published by the Commission at the time the rules were promulgated, 43 Fed. Reg. 33458. In addition, you may need to review subparts 2 through 8 of Rule 801.1(c), 16 C.F.R. § 801.1(c); they identify the holder of voting securities in specific situations.)

4. Other control tests

In addition to identifying who holds the voting securities of a corporation, you will also have to determine whether any entity has the contractual power to appoint 50 percent or more of the board of directors. Where a person has such power, that person controls the corporation for premerger notification purposes. (This second test for determining control is discussed further in the statements of basis and purpose accompanying the rule at 43 Fed. Reg. 33457-58 and 53 Fed. Reg. 20060-63.)

As a consequence of the several criteria of the rule defining control, more than one person may be deemed to control an entity. Each controlling person may have a separate obligation to report the transaction. As many as four entities can control a corporation, two because they each hold 50 percent of the voting securities, and two because they each have the contractual power to appoint 50 percent or more of the board of directors. In the case of a noncorporate entity, it is conceivable, although unlikely, that there could be as many as six controlling entities: two who have the contractual power to designate 50 percent or more of the people exercising functions similar to those of a board of directors; two who are each entitled to 50 percent of the profits of the entity and another two who are each entitled to 50 percent of the assets of the entity upon its dissolution.

In the hypothetical, Sub Co. is not an ultimate parent entity because 50 percent of its outstanding voting securities are held by Zed Corporation. Assume that no one person holds as much as 50 percent of Zed Corporation's voting securities, nor does anyone have the contractual power to appoint 50 percent or more of its board of directors. Under the rules, therefore, Zed Corporation is not controlled by anyone else, and it is the ultimate parent entity of a "person" consisting of Zed

Corporation and any other entities that it controls: in this situation, Sub Co.

Beta Products, Inc., does not have a 50 percent shareholder, nor does any person have the contractual power to appoint 50 percent or more of its board of directors. In this situation, however, our analysis cannot end there. Under Rule 801.1(c)(2), 16 C.F.R. § 801.1(c)(2), the holdings of spouses and their minor children must be aggregated. Even if Mr. and Mrs. Beta reside apart and have not spoken to each other in years, Rule 801.1(c)(2) nevertheless requires that their holdings be aggregated. Thus, Mrs. Beta and Mr. Beta hold 50 percent of Beta Products, Inc., and together are its ultimate parent entity. (Because they are individuals, they cannot be controlled by any other entity.)

B. The Size-of-Person Test

1. The basic test

The next step in the analysis is to determine the size of the persons you have defined by identifying the ultimate parent entities of the parties. The basic "size-of-person-test" established by Section 7A(a)(2) of the act, 15 U.S.C. § 18a(a)(2), is that filing is required only where at least one of the persons involved in the transaction has $100 million or more in annual net sales or total assets, and the other has $10 million or more. If these size thresholds are not met, the transaction need not be reported. Thus, for example, no filings would be required for a merger between two $99 million companies.

There is one exception to the basic size-of-person test. Where an entity that is not engaged in manufacturing is being acquired by an entity with sales or assets of $100 million, annual net sales are disregarded and the entity being acquired must have assets of at least $10 million.[3]

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[3] One reason Congress may have had for creating this separate rule is that for some non-manufacturing businesses such as wholesale and retail operations, high sales revenues reflect mostly the cost of their inventory rather than the value added by the non-manufacturing firm. Consequently, including sales of non-manufacturing firms as a criteria might have extended burdensome reporting obligations to small businesses.

2. Calculating annual net sales and total assets

The procedures for calculating the annual net sales and total assets of a person are set out in Rule 801.11, 16 C.F.R. § 801.11. If you are certain without any calculation that a particular person meets the size-of-person test, then you need not consult Rule 801.11. If you are not sure, you should follow the procedures outlined in the rule to calculate the person's size.

Generally, a person's annual net sales and total assets are as stated on its last regularly prepared income statement and balance sheet. These financial statements must have been prepared in accordance with procedures normally used by the filing person and must have been prepared within 15 months of the date of filing or consummation.

As used in the rule, "net sales" means gross revenues less returns, discounts, excise taxes, and the like. "Net sales" is not the equivalent of profits or "net income," however, and therefore the cost of raw materials, wages, interest, and other expenses may not be deducted. The statement of basis and purpose at 43 Fed. Reg. 33472-73 describes the concept of "net sales" in greater detail.

a. Including controlled entities

The size of the person includes the sales and assets of all entities (domestic and foreign) included within the person. If there are entities controlled by the ultimate parent entity whose sales and assets are not consolidated in the ultimate parent entity's financial statements, those figures must be added to determine the total size of the person. Unconsolidated sales and assets should be added, however, only to the extent that such additions are "nonduplicative." If the ultimate parent entity's interest in the subsidiary is already reflected on the parent's balance sheet as an asset, then adding together the total assets of the subsidiary and the total assets of the ultimate parent entity would result in double counting of at least part of the value of the subsidiary's assets. Accordingly, you should only add the value of a subsidiary's assets after subtracting the value of the interest in the subsidiary as it is carried on the parent's balance sheet. See the statement of basis and purpose at 43 Fed. Reg. 33473 for further discussion of consolidating a person's sales or assets.

b. Natural persons

If the ultimate parent entity is an individual, Rule 801.11(d), 16 C.F.R. § 801.11(d), provides that the individual's

total assets consist of his or her investment assets, voting securities, and other income-producing property, together with the assets of any entity he or she controls. The relevant factor in determining whether property is income-producing is not whether the property actually produces income, but whether it is held either for investment or for the production of income. You will have to refer to the definitions of "hold" and "control" to determine whether the individual (together with spouse and minor children) "holds" such property and to determine what entities he or she may "control." You may omit from the calculation the value of residences, cars, and personal property not held for the purpose of producing income. The annual net sales of an individual are the sum of the net sales of the entities he or she controls, including proprietorships.

c. Financial statements

If a person has no regularly prepared financial statements and you are not sure whether it meets the size-of-person test, you may need to prepare a special statement of the person's sales and assets in order to calculate its size. If you do prepare such a statement and subsequently file a Notification and Report Form, you may have to submit it in response to item 4(b) of the form. If you can determine whether the person's size meets the size-of-person test without such a statement, you do not have to prepare one just so you will have one to file.

If a person has regularly prepared financial statements, you should continue to use the information in the most recent statements until the next regularly prepared statements are issued, even if subsequent changes in income or assets have occurred. For example, the most recently prepared statements may show $9 million in annual net sales and $8 million in total assets; yet, you may know that the person has had an increase in sales which will put its annual revenue over $10 million for the current fiscal year. For premerger notification purposes, however, the person will not be considered a $10 million person until the annual income statement reflecting the increased revenue is prepared.

3. Hypothetical Transaction

a. The size of Zed

In the hypothetical, you have already identified Zed Corporation as its own ultimate parent entity and have concluded that Mr. and Mrs. Beta together are the ultimate parent entity of Beta Products, Inc. Assume that you also know that Zed Corporation is a large diversified company and probably has several hundred million dollars in annual sales. To be certain,

you can consult Zed Corporation's annual report and refer to the 10-K and 10-Q reports that the company has filed with the Securities and Exchange Commission. In this instance, assume that Zed Corporation's annual report confirms that last year the company had annual revenues of $545 million. Since the current year is not yet ended and Zed Corporation used the calendar year for accounting purposes, there is no more recent annual income figure. Thus, Zed Corporation is clearly a $100 million person. There is no need to check total assets since the corporation meets the size-of-person requirement based on annual net sales. If it were necessary to consider total assets, you would want to look for the company's most recent regularly prepared balance sheet showing total assets. Note, however, that the balance sheets included in the firm's annual report or SEC filing may not be the company's most recent regularly prepared statements, since many corporations prepare quarterly or monthly statements of assets.

b. The size of the Betas

Applying the size-of-person test to Mr. and Mrs. Beta is a bit more involved since neither regularly prepares a financial statement. A good starting point, though, would be to add together the sales and assets of all the companies they control. You, therefore, would not include the sales and assets of Resource Co. because the Betas do not control that company but hold only a minority interest with no contractual power to appoint 50 percent or more of the board of directors. Assume here that Beta Products, Inc., is the only company which Mr. and Mrs. Beta control. Accordingly, you are spared the task of consolidating on one balance sheet the sales and assets of several independent entities. The minimum annual net sales for Mr. and Mrs. Beta can thus be found in the annual revenue figure from Beta Products' yearly statement of income. Assume that statement shows sales to be $9 million. It also shows total assets to be $9 million. If either figure had been $10 million, you could have stopped there and concluded that the size of person in the case of Mr. and Mrs. Beta was at least $10 million.

In the absence of such a simple solution, however, you must next consider the value of any additional investments owned by Mr. and Mrs. Beta, and any additional revenues these may generate. As provided by Rule 801.11(d), 16 C.F.R. § 801.11(d), you should not consider Mr. Beta's country residence or the sports car he drives in computing his total assets; similarly, the value of Mrs. Beta's luxury condominium should be omitted from the calculation of her total assets. You should also exclude the value of the Resource Co. voting securities because, although they are investment assets, their value is already reflected on Beta Products' balance sheet.

However, Mr. and Mrs. Beta also hold in their own names voting securities in other corporations, a vacation cottage that is rented out during the summer months, and a racehorse. Since these assets are all held to produce income or as investments, you will have to determine their value and include them in your calculation of the value of Mr. and Mrs. Beta's total assets.

Assume that, even without precise figures, you are able to determine that these additional voting securities and income-producing properties are worth at least $1 million. Adding this to the total assets of Beta Products, Inc., puts Mr. and Mrs. Beta's total investment assets over $10 million. You conclude, therefore, that Mr. and Mrs. Beta together satisfy the size-of-person requirement. Because you have now determined that the acquiring person is a $100 million person and the acquired person is a $10 million person, you know that the parties to the proposed transaction meet the size-of-person test.

The calculations you performed to determine Mr. and Mrs. Beta's size of person were rough estimates and did not require the preparation of a balance sheet. If Mr. Beta or you had prepared or directed someone else to prepare a balance sheet to check your conclusion, then, as noted above, that balance sheet would have to be submitted in response to item 4 of the Notification and Report Form.

c. The secondary acquisition

In addition to these calculations, you must also determine if Resource Co. meets the size of person test. This is required because Zed Corporation will hold voting securities of Resource Co. as a result of its acquisition of control of Beta Products. Pursuant to Rule 801.4, 16 C.F.R. § 801.4, an acquiring person is subject to the obligations imposed by the act and rules if it will "obtain control of an issuer which holds voting securities of another issuer which it does not control. . . " and the direct acquisition of the other issuer's securities would be reportable.

The obligation to report a "secondary acquisition" of voting securities held by a to-be-acquired issuer (here the voting securities of Resource Co. held by Beta Products) is analyzed separately from the obligation to report the "primary acquisition" of Beta Products. Even if the acquisition of Beta Products were not reportable because the Betas did not meet the size of person test, the secondary acquisition of Resources Co. voting securities might be subject to the act's notification and waiting requirements.

d. The size of Resource Co.

For purposes of this hypothetical transaction, assume that Resource Co. is a publicly traded corporation and no person holds more than 15 percent of its voting securities. Resource Co.'s most recent financial statements report total assets of $20 million and annual net sales of $40 million. Accordingly, an acquisition of voting securities or assets of Resource Co. by Zed Corporation meets the size of person test.

C. The Size-of-Transaction Test

1. The Notification Thresholds

If both parties to a transaction meet the size-of-person test, you must then determine whether the size-of-transaction test is met. Only if both of these tests are satisfied is notification required.

The statute and rules establish two types of size-of-transaction tests. The first is the basic minimum size requirement: only transactions of significant size must be reported. The second test is a series of thresholds that require notification for subsequent acquisitions of an issuer's voting securities.

a. Minimum Size-of-Transaction Test

Under the basic minimum size-of-transaction test established by the statute, § 7A(a)(3), read in conjunction with Rule 802.20, 16 C.F.R. § 802.20, notification is required if, as a result of the acquisition, the acquiring person would hold either:

1. Voting securities, assets, or a combination of voting securities and assets of the acquired person valued at more than $15 million;

or

2. 50 percent of the voting securities of a firm which, together with all the entities it controls, has annual net sales or total assets of $25 million or more, regardless of the value of the voting securities.

The first of these tests, which is the one more commonly met, establishes the basic rule that a filing is required, assuming that all other requirements are met, whenever a transaction results in a person holding more than $15 million

in assets or stock. The second of the tests supplements this basic rule by requiring reporting for acquisitions of control of certain business entities that have a low purchase price.[4]

b. Additional notification thresholds for acquisitions of voting securities

Rule 801.1(h), 16 C.F.R. § 801.1(h), establishes four notification thresholds for acquisitions of voting securities:

a. $15 million or 15%;
b. 15%, if more than $15 million;
c. 25%, if more than $15 million; and
d. 50%.

An acquiring person is required to indicate on the Notification and Report Form which threshold it intends to cross. The acquiring person then has one year from the expiration of the waiting period to consummate the reported transaction. See Rule 803.7, 16 C.F.R. § 803.7. In other words, the acquiring person can acquire any of that issuer's voting securities during that one-year period without reporting again as long as the acquiring person does not accumulate enough voting securities to cross a higher threshold than the one indicated on the Form. It can, of course, cross any lower threshold during that one-year period; however, if it intends to cross a higher threshold than the one indicated on the Form, then it will have to report again.

Once the acquiring person has acquired enough voting securities to cross the threshold for which it has filed, or a lower threshold, that acquiring person can continue to buy and sell that issuer's voting securities without refiling for a period of five years from the expiration of the waiting period as long as it does not cross a higher threshold than the one it crossed within that initial one year period. See Rule 802.21, 16 C.F.R. § 802.21. The acquiring person must file again, however, before it can cross a higher threshold.

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[4] Some firms may have a low net worth because of debt or potential liabilities, yet have operations that are competitively important in a market. To preserve the opportunity to examine such transactions, the rules make the acquisition of control of firms valued at $15 million or less reportable if they have annual net sales or total assets of $25 million or more.

c. Avoiding multiple notifications

A person acquiring voting securities of one issuer can avoid any requirement for multiple filings for acquisitions of voting securities made within a year of the expiration of its waiting period. If the acquiring person declares in its notification an intention to acquire 50 percent or more of the issuer's voting securities, then it will have no further obligation for acquisitions during that year regardless of the percentage acquired, because the antitrust agencies are on notice that the person may acquire all the issuer's voting securities. If, however, the acquiring person were to file for the 15 percent threshold, it could acquire up to but not including the voting security that would increase its holdings to 25 percent of the issuer's outstanding voting securities. To make an acquisition that resulted in it holding 25 percent or more of the voting securities, the acquiror would have to file an additional notification declaring its intention to cross the 25 or 50 percent threshold.

d. Affidavit required

In order to file, a person must submit an affidavit that it has a good faith intent to acquire a reportable amount of voting securities. Sometimes an acquiring person will choose to make an initial filing for a lower threshold even though it anticipates acquiring additional voting securities at a later time. These acquirors may be motivated by a belief that antitrust review of their proposed transaction will be quicker or easier at a lower threshold, or by a belief that the acquired person -- to whom it must reveal its acquisition intention (see Rule 803.5) -- will be less likely to oppose the acquisition of a smaller percentage. Of course, such an acquiring person will be required to refile before exceeding the limits of that lower notification threshold.

Thus, suppose that A files a notification to acquire 25 percent of the voting securities of B for a price exceeding $15 million, but acquires only 20 percent of B's securities within one year of the expiration of the waiting period. During the five years after the expiration of the waiting period, A is free to purchase or sell voting securities of B as long as it does not hold more than 24.99 percent of B's outstanding securities. A will have to make a new filing before it may cross the next threshold of 25 percent, though, because its accumulation of B's securities met only the 15 percent threshold. After the expiration of the five years, it must file again before buying a single share if its holdings of B's voting securities are then valued at $15 million or more.

2. Value of voting securities and assets to be held as a result of the acquisition

In order to determine whether a transaction will meet the $15 million threshold, you must compute the value of the voting securities and assets which you will hold as a result of the acquisition. The phrase "held as a result of the acquisition" has a technical meaning under the premerger notification rules. It includes not only those securities and assets which are currently being acquired, but also, in some circumstances, voting securities and assets previously acquired from the same person. Rule 801.13, 16 C.F.R. § 801.13, determines what is held as a result of the acquisition, and Rules 801.13 and 801.14, 16 C.F.R. §§ 801.13, 801.14, specify how such voting securities and assets should be valued.

a. "Held as a result of the acquisition."

All voting securities and assets currently being acquired are held as a result of the acquisition. In addition, Rule 801.13, 16 C.F.R. § 801.13, explains when you must aggregate previously-acquired voting securities or assets with those that you plan to acquire in order to determine what is held as a result of the acquisition. Voting securities and assets are treated separately under the rule.

(1) Aggregating previously-acquired voting securities

Rule 801.13(a)(1), 16 C.F.R. § 801.13(a)(1), requires that you add any previously-acquired voting securities of the same issuer that you still hold to any voting securities that you plan to acquire to determine what voting securities of that issuer will be held as a result of the planned acquisition. There are some special circumstances, however, described in Rule 801.15, 16 C.F.R. § 801.15, in which the prior, simultaneous, or subsequent acquisition is exempt from notification and need not be included in the calculation.

To determine the value of the voting securities you will hold, Rule 801.14, 16 C.F.R. § 801.14, requires that you aggregate the value of all of the voting securities of all of the issuers included within the acquired person that you will hold as a result of the acquisition. Thus, if you hold voting securities of one subsidiary company and plan to acquire voting securities of the parent or a different subsidiary of the same parent, you would aggregate these holdings to determine the value of the securities held.

(2) Aggregating assets and voting securities

In some circumstances, the $15 million size-of-transaction test requires acquiring persons to add the value of an issuer's voting securities that it holds and will hold and the value of assets that have been acquired or will be acquired from that issuer or the person controlling that issuer. Whether the acquisitions of assets and voting securities are both to be considered "held as a result of the transaction" depends on the order of the asset and the voting securities transactions. If voting securities have been acquired and will be held at the time assets are to be acquired, then both the voting securities and assets are held as a result of the transaction and their combined value is included to determine if the $15 million size-of-transaction test is satisfied. If, however, the asset transaction precedes the voting securities transaction, then the assets are not considered to be held as a result of the later acquisition of voting securities and the value of the assets is not included. The Commission explained the reason for not including assets in the second instance when it promulgated Rule 801.13, 16 C.F.R. § 801.13: "once assets are sold, they confer no continuing ability to participate in the affairs of the acquired person, and so prior acquisitions of assets need not be considered for purposes of subsequent acquisitions of stock." 43 Fed. Reg. 33478-9.

(3) Aggregating previously-acquired assets

If you have previously acquired assets and plan to acquire additional assets from the same person, you may have to include the value of the previously-acquired assets in order to determine whether the transaction meets the $15 million threshold. Rules 801.13(b)(1) and (2), 16 C.F.R. §§ 801.13(b)(1) and (b)(2), set out the "180 day rule" for aggregating assets. They provide that the values of previously-acquired and to-be-acquired assets are to be aggregated where three conditions are met:

1. The prior transaction must have been an acquisition of assets from the same entity or another entity controlled by the same person;

2. The previous acquisition must have been consummated within 180 calendar days of the execution of the contract, agreement in principle, or letter of intent to make the subsequent acquisition; and

3. The acquiring person must still hold the assets previously acquired.

If your transaction meets all three of these conditions, you will have to include the value of the previously-acquired assets in computing the value of the current acquisition. However, if the previous asset acquisition (or aggregated asset acquisitions) was reported properly to the enforcement agencies, then it (or they) need not be aggregated with any subsequent acquisitions.

Transactions that are separated for the purpose of avoiding premerger notification or waiting obligations may be reportable pursuant to Rule 801.90, 16 C.F.R. § 801.90, even if they do not meet the three criteria, if the substance of the transaction is reportable.

b. Valuation

Now that you have determined what is held as a result of the acquisition, you must value those securities and assets. Different methods of valuation are required for voting securities and for assets held as a result of an acquisition.

(1) Acquisitions of voting securities

For securities that are to be acquired, Rule 801.10(a), 16 C.F.R § 801.10(a), separates voting securities into two groups -- those that are publicly traded and those that are not -- and provides slightly different rules for computing the value of each. The value of publicly-traded securities is the acquisition price or the market price, whichever is greater. Thus, if the voting securities are trading at $50 a share, and you have a contract to buy a block for $60 a share, the $60 value will be used. If the acquisition price of publicly-traded shares has not been determined, the value is the market price. If the voting securities are not publicly traded, the value is the acquisition price. Where the acquisition price of non-publicly traded stock has not been determined, the value is the fair market value. Previously acquired securities are valued in similar ways pursuant to Rule 801.13, 16 C.F.R. § 801.13.

(2) Acquisitions of assets

For an acquisition of assets, Rule 801.10(b), 16 C.F.R. § 801.10(b), provides that the value of the assets to be acquired shall be their fair market value. However, if the acquisition price is determined, and it is greater than the fair market value, the assets shall be valued at the acquisition price.

(3) Definitions

The terms "market price," "acquisition price," and "fair market value" are defined for premerger notification purposes in Rule 801.10(c), 16 C.F.R. § 801.10(c). The "market price" for publicly-traded voting securities is the lowest closing price for the stock during a specified 45-day period. See Rule 801.10(c)(1), 16 C.F.R § 801.10(c)(1). The "45-day rule" will frequently enable you to determine whether a particular transaction will meet the size-of-transaction test even though the price of the voting securities may be fluctuating significantly on the open market.

(4) Stock market valuation period

The particular 45-day valuation period applicable to a specific transaction depends upon the nature of the transaction. For acquisitions of stock on the open market, or other acquisitions of voting securities from holders other than the issuer (all of the kinds of transactions that are subject to Rule 801.30, 16 C.F.R. § 801.30), the valuation period begins 45 days before the target company receives from the person planning to buy the stock the notice required by Rule 803.5(a), 16 C.F.R. § 803.5(a). For other acquisitions of voting securities -- those in which one party is buying stock directly from the issuer -- the valuation period is the 45 days before the transaction is consummated. In these circumstances, the parties may not know any of the values during the 45-day period and should estimate what they believe the value will be. This 45-day period may not begin more than one day before the parties execute a contract, letter of intent, or agreement in principle for the proposed transaction. If they believed wrongly the value of the shares would fall, thereby making the transaction not reportable, but the value remained high, then the parties could not consummate until a filing is made and the waiting period expired. Thus, when consummation is set for 45 days or less from the time of the agreement, the valuation period may be less than 45 days.

(5) Acquisition price

Rule 801.10(c)(2), 16 C.F.R. § 801.10(c)(2), states that the "acquisition price" of voting securities or assets includes the value of all consideration to be given for them. This consideration includes any cash, voting securities, tangible assets, and intangible assets that the acquiring person is exchanging. It also includes the value of any liabilities that the acquiring person will assume. Thus, if you will pay $10 million in cash for a factory and, in addition, will assume $6 million in liabilities, the acquisition price is $16 million

and, if other requirements are met, you will have to file notification.

(6) Fair market value

"Fair market value" must be determined in good faith by the board of directors of the ultimate parent entity of the acquiring person. See Rule 801.10(c)(3), 16 C.F.R. § 801.10(c)(3). The board of directors may delegate this task, but the board remains responsible for the determination and for the ultimate decision about whether to report the transaction. Such a determination must be made within 60 days of filing or, if no filing is made, within 60 days of consummation. If the parties do not file and do not consummate the transaction within that time, the acquiring firm's board of directors will have to make a new determination of the fair market value before deciding whether or not a filing is required. If the parties actually file, however, they need not make a new determination of fair market value, even if they delay consummation for more than 60 days.

(7) Previously acquired voting securities and assets

Voting securities that were acquired in an earlier transaction are valued on the basis of their current worth, not their historical purchase price. See Rule 801.13(a), 16 C.F.R. § 801.13(a). If the securities are publicly traded, you should use their current market price, as determined by the 45-day rule under Rule 801.10(c)(1), 16 C.F.R. § 801.10(c)(1). Otherwise, they are valued at their current fair market value, as determined by Rule 801.10(c)(3), 16 C.F.R. § 801.10(c)(3).

Previously acquired assets should be valued according to Rule 801.10(b), 16 C.F.R. § 801.10(b), as of the time they were acquired.

3. Percentage of voting securities to be acquired

As discussed above, the acquiring person in a voting securities transaction must specify which of the four notification thresholds it intends to cross. Rule 801.12, 16 C.F.R. § 801.12, describes the procedures for calculating the percentage of voting securities the acquiring person will hold for purposes of determining whether a transaction will cross the 15 percent, 25 percent, or 50 percent notification threshold. Rule 801.12(a), 16 C.F.R. § 801.12(a), defines "percentage of voting securities" as the percentage of the outstanding voting securities of the entity which issued the voting securities. You should therefore not include in the threshold calculation

any voting securities of other issuers controlled by the ultimate parent entity. If you will hold voting securities of more than one issuer, each percentage must be calculated separately. Under Rule 801.12(b), 16 C.F.R. § 801.12(b), you should generally also omit authorized but unissued voting securities or treasury securities, as well as convertible voting securities that have not yet been converted and do not have a present right to vote. You should include unissued or treasury stock in the formula only when filing notification for their acquisition, and you should consider convertible voting securities only when filing notification for their conversion. The treatment of convertible voting securities is explained further in the statement of basis and purpose for Rule 801.12, at 43 Fed. Reg. 33476.

The method for calculating the percentage of outstanding voting securities that will be held is described in Rule 801.12(b) 16 C.F.R. § 801.12(b) and its examples. The rule is designed to recognize weighted voting rights and different classes of voting securities.

The percentage is derived from the ratio of two numbers. To determine the first number of the ratio, the shares to be held, you may have to consult the definition of "hold" in Rule 801.1(c), 16 C.F.R. § 801.1(c), the meaning of voting securities "to be held as a result of the acquisition" in Rule 801.13(a), 16 C.F.R. § 801.13(a), and the special exceptions to Rule 801.13 which are set out in Rule 801.15, 16 C.F.R. § 801.15. Usually, this number will include all the voting securities of the acquired issuer that the acquiring person holds before the transaction plus all the additional shares it plans to acquire as a result of the transaction.

The second number of the ratio, the total number of votes that holders of all outstanding voting securities will be entitled to cast for directors after the transaction is completed, will usually be the same before and after the transaction. However, if the transaction under consideration will increase the total number of votes outstanding, for example, through the conversion of convertible voting securities or the acquisition of treasury stock, the second number in the ratio must reflect this increase in the total number of votes outstanding.

4. Hypothetical Transaction

To determine whether Zed Corporation and Mr. and Mrs. Beta will have to report their transaction, you will have to determine the value of the Beta Products' voting securities to be acquired. Since Beta Products, Inc., is a closely-held company and the stock is not publicly traded, the applicable

rule is 16 C.F.R. § 801.10(a)(2). This rule provides that the value of the voting securities will be the acquisition price, if determined, or, if the acquisition price has not been determined, the fair market value of the voting securities as set by the board of directors of the acquiring person. Assume Sub Co. and Beta Products' shareholders have agreed on a total purchase price of $22 million for 100 percent of the voting securities of Beta Products, Inc; therefore, you will not have to get the board of directors of Zed Corporation to determine the fair market value of Beta Products' stock. Rather, you can rely on the acquisition price of $22 million to conclude that the acquisition meets the $15 million size-of-transaction test.

Your analysis of the size of the Sub Co./Beta Products transaction does not end here, however, even though you have concluded that the deal meets the minimum size-of-transaction test. You still need to determine the percentage of voting securities to be acquired so that you can identify the appropriate threshold on the Notification and Report Form.

In the case of Mr. and Mrs. Beta, you do not really have to do any calculations. You know that however many shares of Beta Products' voting securities are outstanding, the Betas own 50 percent of them and Zed Co. is buying them all. On the Notification and Report Form, you can identify the 50 percent threshold as the highest threshold that will be crossed by the proposed transaction.

To determine whether Zed Corporation and Resource Co. must report, you will have to calculate the value of the voting securities of Resource Co. that will be held by Zed as a result of acquiring Beta Products. Because the acquisition price of the Resource securities is not separately identified, the rules require that the value be determined by the market price. See Rule 801.10(a)(1)(ii), 16 C.F.R. § 801.10(a)(1)(ii). In this transaction, the market price can be determined because the voting securities are publicly traded. Resource shares sell, at the time of your research, for $100 a share; thus, the value of the 4500 Resource shares that Zed will obtain is likely to be about $4.5 million. See Rule 801.10(c)(1), 16 C.F.R. § 801.10(c)(1). If Zed already owned other Resource voting securities, you would add the current market value of those shares to determine if the total value of the acquisition met the size of transaction test. After checking with Zed, you determine that it does not hold any other Resource securities. Accordingly, the secondary acquisition does not meet the size of transaction test and is not reportable.

Note the exemption for Zed's acquisition of Resource shares was created by Rule 802.20, 16 C.F.R. § 802.20. Absent that rule, an acquisition of 15 percent or more of an issuer's voting

securities could be reportable because it meets the act's size of transaction criteria. See § 7A(a)(3)(A), 15 U.S.C. § 18a(a)(3)(A). However, Rule 802.20 exempts all acquisitions valued at $15 million or less unless the acquiring person obtains 50 percent or more of the voting securities of an issuer that has certain specified attributes. Here Zed will neither obtain 50 percent of Resource's voting securities, nor will hold more than $15 million of its shares. Accordingly, the secondary acquisition of Resource shares is exempt.

IV. ADDITIONAL CONSIDERATIONS

Although the premerger notification rules tend to be complex and technical, the discussion in this Guide should help you determine whether a particular transaction must be reported. In addition, Figure 2, on the last page, presents an overview of premerger notification analysis. It includes citations to the relevant rules, and you may find that it is a useful aid as you conduct your analysis of a particular transaction. We note again, however, that you should not rely on this Guide to determine your filing obligation. As indicated earlier, you should refer to the act, the relevant rules (and in some cases, to the statement of basis and purpose) and the formal interpretations of the rules to understand points that are not discussed in this general introduction. This Guide is an introduction to the two basic criteria that determine when you have to file a premerger notification: the size of person test and the size of transaction test. It is not designed to be a full explanation of either of these; rather it is intended to give you an overview of them to make it easier to understand the rules when you read them.

The Guide also does not cover all reporting obligations. Two of the premerger rules that were referred to earlier in this Guide warrant additional reference. The formation of a corporate joint venture is reportable if the parties and the venture meet the criteria of Rule 801.40, 16 C.F.R. § 801.40. Second, Rule 801.90, 16 C.F.R. § 801.90, declares that: "Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction."

Finally, it is important to be aware of the many exemptions provided in the act and the rules. The premerger notification program is designed to facilitate antitrust review. It therefore does not require notifications for transactions that have been determined to be unlikely to violate the antitrust laws. For example:

* Stock splits that do not change the percentages owned by any person are exempt. See § 7A(c)(10), 15 U.S.C. § 18a(c)(10), and Rule 802.10, 16 C.F.R. § 802.10.

* Acquisitions of small percentages of an issuer's voting securities solely for the purpose of investment are exempt. See § 7A(c)(9), 15 U.S.C. § 18a(c)(9), and Rule 802.9, 16 C.F.R. § 802.9.

* Acquisitions of voting securities by persons who already own 50 percent of the voting shares are also not reportable. See § 7A(c)(3), 15 U.S.C. § 18a(c)(3), and Rule 802.30, 16 C.F.R § 802.30.

* Acquisitions in the ordinary course of business, such as purchases of current supplies, are also exempt. See § 7A(c)(1), 15 U.S.C. § 18a(c)(1), and Rule 802.1, 16 C.F.R. § 802.1.

In addition, transactions in regulated industries, whose competitive effects are reviewed by other agencies, may be exempt or subject to modified reporting requirements. See § 7A(c)(6), 15 U.S.C. § 18a(c)(6), and Rule 802.6, 16 C.F.R. § 802.6. Also, transactions involving foreign businesses are subject to distinct treatment under the rules. See Rules 802.50 - 802.53, 16 C.F.R. §§ 802.50 - 802.53.

If you have concluded that you must file a report, it may be helpful to consult Guides III and IV for suggestions on how to complete the Form. In addition, take the time to read the instructions to the Notification and Report Form carefully. They have been written with special attention to helping you avoid the most common mistakes.

Finally, if you still have questions, the Premerger Notification Office at the Federal Trade Commission (telephone: (202) 326-3100) will be happy to help you.

FIGURE 2: Determining the Notification Obligation

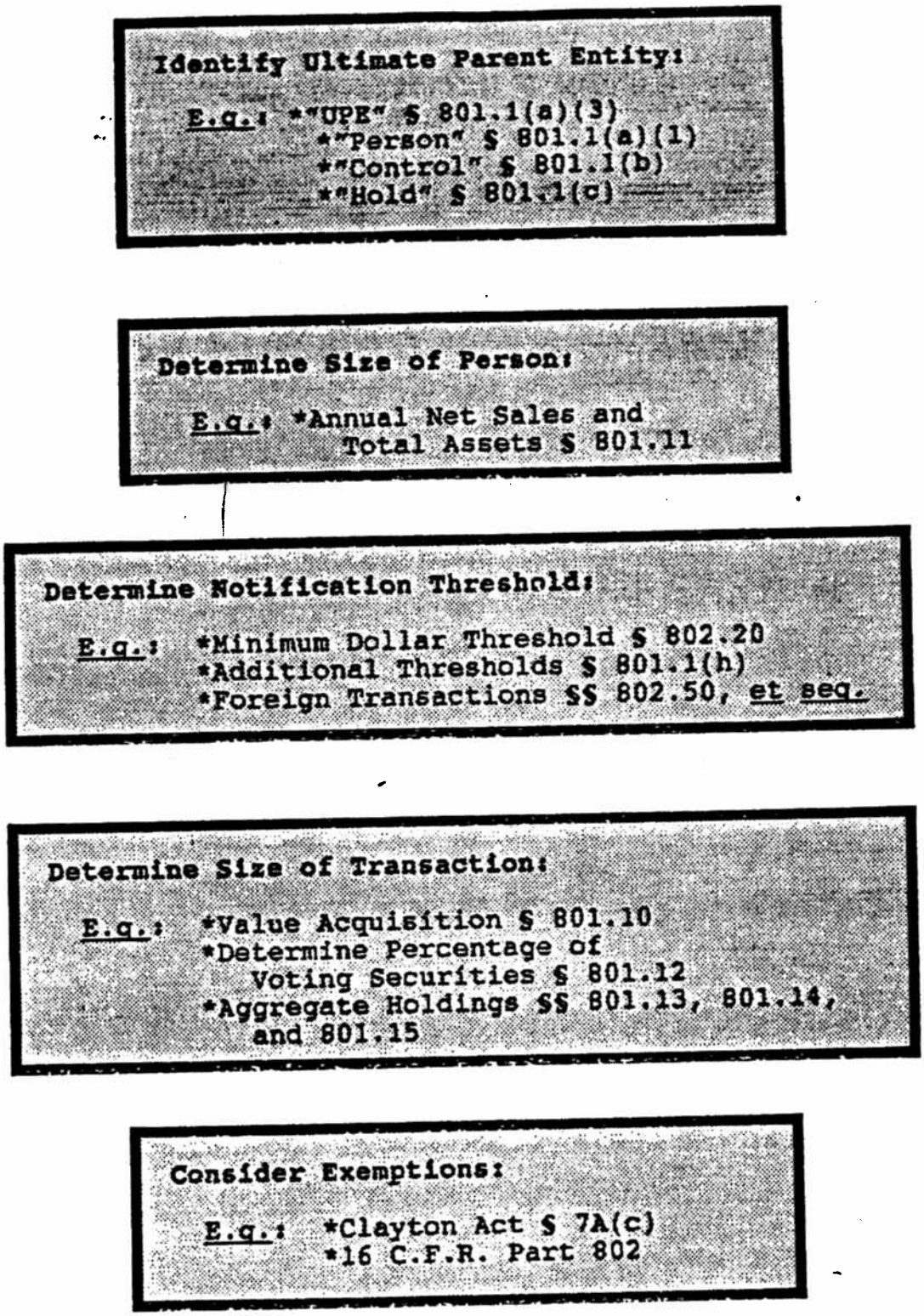

Exhibit C

Memorandum of Agreement with respect to the handling of civil penalty suits enforcing the premerger notification provisions of the Hart-Scott-Rodino Act.

MEMORANDUM OF AGREEMENT
BETWEEN
THE DEPARTMENT OF JUSTICE
AND
THE FEDERAL TRADE COMMISSION

WHEREAS, the Federal Trade Commission ("Commission") conducts investigations into potential violations of Section 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 ("H-S-R Act"), and the regulations promulgated thereunder, 16 C.F.R. Parts 801, 802 and 803 ("Rules");

WHEREAS, the Department of Justice, ("Department"), acting at the request of the Commission or upon its own initiative, may commence actions pursuant to Section 7A (g) (1) of the Clayton Act for violations of the H-S-R Act and/or Rules;

WHEREAS, the conduct of that litigation requires a close and cooperative relationship between the attorneys of the Department and of the Commission in order to achieve the most effective deployment of the Government's resources and assure consistent approaches to enforcement of the provisions of the H-S-R Act and Rules; and

WHEREAS, the Department may appoint the Commission's attorneys as Special Attorneys or Special Assistant United States Attorneys and thereby authorize them to commence a particular action on behalf of the United States pursuant to 28 U.S.C. §§ 515, 543;

NOW, THEREFORE, the following Memorandum of Agreement is entered into by the Department, represented by the Attorney General of the United States ("Attorney General") and the Assistant Attorney General in charge of the Antitrust Division of the Department ("Assistant Attorney General"), and the Commission, represented by the Chairman of the Commission ("Chairman"), for the purpose of promoting the efficient and effective handling of actions for violations of the H-S-R Act and/or Rules:

1. The Attorney General will have control over all actions brought pursuant to Section 7A(g) (1) of the H-S-R Act.

2. In cases where the Commission deems an action to be appropriate, it will request that the Department initiate such action by transmitting a case proposal to the Attorney General in the following manner:

(a) all such requests by the Commission to the Department will be transmitted by the Commission to the Attorney General, and a copy will be concurrently delivered to the Assistant Attorney General;

(b) all such requests will be accompanied by a memorandum that contains such information as may be necessary to assist in evaluating and/or prosecuting the requested action and that describes the relief proposed by the Commission to be sought in the action;

(c) at the request of the Assistant Attorney General, the Commission will make available any files relevant to the case that is the subject of the requested action.

3. The Assistant Attorney General will, within 45 days after receipt of a request and supporting papers as described in 2 (b) above from the Commission, evaluate the case proposal for purposes of determining whether the Department will initiate an action for the violations alleged; during such time, the Commission's attorneys will be available to consult with the Assistant Attorney General with respect to such action, and will provide such additional information and support as may be necessary to assist the Assistant Attorney General in such deliberations.

4. Prior to the expiration of this 45-day period, the Assistant Attorney General will inform the Chairman by letter that:

(a) no action is authorized, providing the reasons supporting said conclusion;

(b) additional information is required before a determination can be made, describing the nature of the information needed; or

(c) the Assistant Attorney General will initiate an action by filing a complaint within a time certain.

5. If none of the determinations described in Paragraph 4 has been communicated to the Chairman by the end of the 45-day period, the Chairman or the Chairman's delegate may designate specific Commission attorney(s) and forward the name(s) of such attorney(s) in writing to the Attorney General for purposes of their prompt appointment as Special Attorneys or Special Assistant United States Attorneys ("Commission Special Attorneys") to prosecute the action; PROVIDED, however, that the Attorney General will retain full discretion to make, decline to make, or revoke any such appointment at any time.

6. Commission attorneys appointed as Commission Special Attorneys for purposes of prosecuting such actions will be subject to the supervision and control of the Attorney General, and will take the required oath prior to conducting any kind of court proceedings.

7. In all actions prosecuted by the Commission Special Attorneys pursuant to this Agreement, the Commission shall be responsible for any costs and attorneys fees incurred.

8. It is understood that, pursuant to this Agreement, Commission Special Attorneys in the course of prosecuting actions may appear in court, conduct discovery and trials, present oral argument, prepare briefs, memoranda and pleadings, participate in discussions with opposing counsel, including settlement negotiations, and undertake all other aspects of case preparation and trial normally associated with the

responsibilities of an attorney in the conduct of litigation; PROVIDED, however, that the Attorney General will retain control over the conduct of all such litigation.

9. It is understood that the settlement of any action subject to this Agreement and the negotiation of any such settlement to be filed in court will require the authorization of the Attorney General or the appropriate delegate within the Department in a manner that conforms to the Department's regulations governing the settlement of actions as set forth in 28 C.F.R. §0.160 et seq.

10. Nothing in this Agreement will affect any authority of the Solicitor General to authorize or decline to authorize appeals by the Government from any district court to any appellate court or petitions to such courts for the issuance of extraordinary writs, such as the authority conferred by 28 C.F.R. §0.20, or to carry out the traditional functions of the Solicitor General with regard to appeals to or petitions for review by the Supreme Court.

11. Nothing in this Agreement will affect any authority of the Commission to commence any action pursuant to Section 7A(g) (2) of the Clayton Act.

12. In order to implement the terms of this Agreement effectively, the Attorney General, the Assistant Attorney General and the Chairman will transmit copies of this

Agreement to all personnel affected by its provisions. This Agreement will not preclude the Department and the Commission from entering into mutually satisfactory arrangements concerning the handling of a particular case.

13. This Agreement will apply to all cases for which requests are submitted after the date of approval of this Agreement. The Department and the Commission will endeavor to resolve all matters relating to cases arising before the effective date of this Agreement in a manner consistent with the spirit of this Agreement. This Agreement may be terminated at any time by written notice from the Attorney General to the Chairman or from the Chairman to the Attorney General but, in the event of such termination, the Agreement will remain in force with respect to litigation commenced under the Agreement prior to its termination.

Dick Thornburgh
Attorney General

Date: May 29, 1991

James F. Rill
Assistant Attorney General
Antitrust Division
Department of Justice
Date:

Janet D. Steiger
Chairman
Federal Trade Commission
Date: July 31, 91

By Direction of the Commission

Exhibit D

International agreement

to cooperate in enforcement

of competition laws.

AGREEMENT
BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND
THE COMMISSION OF THE EUROPEAN COMMUNITIES
REGARDING THE APPLICATION OF THEIR COMPETITION LAWS

The Government of the United States of America and the Commission of the European Communities:

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the United States of America and the European Communities;

Noting that the Government of the United States of America and the Commission of the European Communities share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on June 5, 1986; and

Having regard to the Declaration on US-EC Relations adopted on November 23, 1990;

Have agreed as follows:

Article I

PURPOSE AND DEFINITIONS

1. The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

a) "Competition law(s)" shall mean

(i) for the European Communities, Articles 85, 86, 89 and 90 of the Treaty establishing the European Economic Community, Regulation (EEC) no. 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations including High Authority Decision no. 24-54, and

(ii) for the United States of America, the Sherman Act (15 U.S.C. §§1-7), the Clayton Act (15 U.S.C. §§12-27), the Wilson Tariff Act (15 U.S.C. §§8-11), and the Federal Trade Commission Act (15

U.S.C. §§41-68, except as these sections relate to consumer protection functions),

as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for purposes of this Agreement;

b) "Competition authorities" shall mean (i) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and (ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;

c) "Enforcement activities" shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party; and

d) "Anticompetitive activities" shall mean any conduct or transaction that is impermissible under the competition laws of a Party.

Article II

NOTIFICATION

1. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.

2. Enforcement activities as to which notification ordinarily will be appropriate include those that:

a) Are relevant to enforcement activities of the other Party;

b) Involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;

c) Involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its states or member states;

d) Involve conduct believed to have been required, encouraged or approved by the other Party; or

e) Involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

3. With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:

a) In the case of the Government of the United States of America,

(i) not later than the time its competition authorities request, pursuant to 15 U.S.C. §18a(e), additional information or documentary material concerning the proposed transaction,

(ii) when its competition authorities decide to file a complaint challenging the transaction, and

(iii) where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and

b) In the case of the Commission of the European Communities,

(i) when notice of the transaction is published in the Official Journal, pursuant to Article 4(3) of Council Regulation no. 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,

(ii) when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6(1)(c) of Council Regulation no. 4064/89, and

(iii) far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.

4. With respect to other matters, notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of

a) the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America, and

b) the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America,

to enable the other Party's views to be taken into account.

5. Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to

a) regulatory or judicial proceedings that are public,

b) intervention or participation that is public and pursuant to formal procedures, and

c) in the case of regulatory proceedings in the United States, only proceedings before federal agencies.

Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. Notifications under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

Article III

EXCHANGE OF INFORMATION

1. The Parties agree that it is in their common interest to share information that will (a) facilitate effective

application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation of the kind described in Article II, paragraph 5.

2. In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

3. Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Upon receiving a request from the other Party, and within the limits of Articles VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.

Article IV

COOPERATION AND COORDINATION IN ENFORCEMENT ACTIVITIES

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

2. In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:

a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;

b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

c) the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and

d) the possibility of reducing costs incurred by persons subject to the enforcement activities.

3. In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar

as possible, consistently with the enforcement objectives of the other Party.

4. Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

Article V

COOPERATION REGARDING ANTICOMPETITIVE ACTIVITIES IN THE TERRITORY OF ONE PARTY THAT ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.

2. If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.

3. Upon receipt of a notification under paragraph 2, and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authorities of the notified Party will consider whether or not to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party will advise the notifying Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI

AVOIDANCE OF CONFLICTS OVER ENFORCEMENT ACTIVITIES

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or

proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles:

1. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.

2. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize, however, that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.

3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:

a) the relative significance to the anticompetitive activities involved of conduct within the enforcing

Party's territory as compared to conduct within the other Party's territory;

b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;

c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;

d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and

f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

Article VII

CONSULTATION

1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a

view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefor and shall state whether procedural time limits or other considerations require the consultations to be expedited.

These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.

2. In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.

Article VIII

CONFIDENTIALITY OF INFORMATION

1. Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.

2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

Article IX

EXISTING LAW

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or member states.

Article X

COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement, including notifications under Articles II and V, may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authority to the other Party's authority. Notifications under Articles II, V and XI, and requests under Article VII, shall be confirmed promptly in writing through diplomatic channels.

Article XI

ENTRY INTO FORCE, TERMINATION AND REVIEW

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

3. The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could

usefully cooperate and identifying any other ways in which the Agreement could be improved. The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Agreement.

DONE at Washington, in duplicate, this twenty-third day of September, 1991, in the English language.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE COMMISSION OF THE EUROPEAN COMMUNITIES: