

Basis and Purpose, all of which were published in the **Federal Register** of July 31, 1978, 43 FR 33451, and became effective on September 5, 1978.

The rules are divided into three parts which appear at 16 CFR parts 801, 802, and 803. Part 801 defines a number of the terms used in the act and rules, and explains which acquisitions are subject to the reporting and waiting period requirements. Part 802 contains a number of exemptions from these requirements. Part 803 explains the procedures for complying with the act. The Form, which is completed by persons required to file notification, is an appendix to part 803 of the rules.

Changes of a substantive nature have been made in the premerger notification rules or Form on ten occasions since they were first promulgated: 44 FR 66781 (November 21, 1979); 45 FR 14205 (March 5, 1980); 46 FR 38710 (July 29, 1981); 48 FR 34427 (July 29, 1983); 50 FR 38742 (September 24, 1985); 51 FR 10368 (March 28, 1986); 52 FR 7066 (March 6, 1987); 52 FR 20058 (May 29, 1987); 54 FR 21425 (May 18, 1989) and 55 FR 31371 (August 2, 1990).

The current set of proposed changes to the rules interprets the act and expands the current policies of the Commission's Premerger Notification Office regarding transactions in the ordinary course of business that are exempt from the notification and waiting requirements of the act. The proposals also include several new exemptions for acquisitions of certain types of real property assets and carbon-based mineral reserves. The Commission, as part of its ongoing review of the rules, invites interested persons to submit comments on these proposed rules and the Statement of Basis and Purpose.

Statement of Basis and Purpose for the Commission's Proposed Revisions to the Premerger Notification Rules

Proposed §§ 802.1, 802.2, 802.3, 802.4, and 802.5 describe certain types of acquisitions that would be exempt from the notification requirements of the act. They would replace and expand existing § 802.1, which describes certain applications of the exemption granted by section 7A(c)(1) of the act for acquisitions of goods or realty in the ordinary course of business. Proposed revisions to § 801.15 would define when the aggregation rules apply to acquisitions covered by these newly proposed rules.

In 1985, the Commission proposed three new provisions under part 802. Previously proposed § 802.1 would have addressed the statutory "ordinary course of business" exemption;

previously proposed § 802.2 would have exempted certain acquisitions of unimproved land, office buildings and residential properties; and previously proposed § 802.3 would have exempted certain acquisitions of carbon-based mineral reserves.

In response to the 1985 notice of proposed rulemaking, the Commission received twenty comments that focused wholly or in part on the then proposed §§ 802.1, 802.2, and 802.3. The persons who commented are listed in the **Federal Register** of March 6, 1987, 52 FR 7066. The comments are available for public inspection in the Federal Trade Commission's Public Reference Room, Reference number 223.2.1-1-E and F.

On March 23, 1995, the Chairman of the Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice jointly announced eight initiatives for review of transactions under the act. One of the initiatives is a reduction in the number of filings received pursuant to the act. A draft of several revisions to the Hart-Scott-Rodino rules under consideration by the staff of the Commission's Premerger Notification Office (PNO) was made available to the public. Those revisions would eliminate the necessity to file premerger notification for certain transactions that are not likely to violate the antitrust laws. The draft reflected careful consideration by the staff of the comments received in response to the 1985 proposals, the experience of the PNO during the intervening years in its determinations of the reportability of a large number of transactions not specifically exempted by the act or the rules and the experience of the enforcement agencies in conducting their antitrust review of premerger filings.

Included in the March 23 draft was a series of questions to be considered in determining whether the revisions under consideration by the PNO effectively exempted transactions that were unlikely to violate the antitrust laws and facilitated uncomplicated application of the rules. In response to an invitation for comment, the staff of the Commission received extensive input from the private antitrust bar and worked closely with the Department of Justice to address the questions raised in the draft. As a result, the draft revisions were reformulated significantly to enhance their effectiveness in exempting classes of transactions that are unlikely to create competitive problems, while ensuring that the enforcement agencies continue to receive notification of classes of

acquisitions that are more likely to present potential antitrust concerns. The Commission now formally proposes the following amendments to the premerger notification rules.

Criteria for the Rules. Section 7A(c)(1) of the act exempts "acquisitions of goods or realty transferred in the ordinary course of business." Existing § 802.1(a) interprets this statutory language to apply the exemption to acquisitions of voting securities of entities holding only realty. Existing § 802.1(b) denies the exemption to the sale of goods or real property if they constitute "all or substantially all of the assets of that entity or an operating division thereof" unless the entity qualifies for the exemption under existing § 802.1(a) because its assets consist solely of real property and assets incidental to the ownership of real property.

The reportability of transfers in the ordinary course of business has long been a frequent source of questions from the public. Proposed § 802.1 represents interpretations of section 7A(c)(1) made by the PNO over the years, and it also broadens these interpretations to exempt additional classes of acquisitions that are unlikely to violate the antitrust laws.

Proposed § 802.1(a) preserves the concept of existing § 802.1(b) and makes the exemption unavailable for acquisitions of all or substantially all of the assets of an operating unit. Operating unit is defined as assets operated by the acquired person as a business undertaking in a particular area or for particular products or services. The sale of all or substantially all of the assets of a business is generally equivalent to the sale of a business enterprise. Although it is possible that the effects of selling capacity might be to enhance competition, it can also diminish competition, and each acquisition must be judged individually. The current and proposed rules therefore require generally that acquisitions that transfer the equivalent of a business remain subject to the prior notification obligations of the act.

Proposed § 802.1 also defines categories of acquisitions of goods that are deemed to be in the ordinary course of business and are therefore exempt from the notification requirements. Individual review of such transactions is typically unnecessary because selling goods is the essence of manufacturing, wholesaling, and retailing businesses. Sales in the ordinary course of business should not in any way diminish the capacity of the selling firm to compete.