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March 19, 1979

To Our Clients

Tender Offers under Hart-Scott-Rodino
Pre-Acquisition Notification Requirements

Henry Lesser prepared the enclosed to be published for the new edition of the Georgeson Tender Offer Handbook. It is an excellent short outline of the Hart-Scott Act's impact on tender offers and acquisitions.

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Enclosure

TENDER OFFERS UNDER HART-SCOTT-RODINO PRE-ACQUISITION NOTIFICATION REQUIREMENTS*

Henry Lesser**

1. INTRODUCTION.

1.1 The Act. Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 added Section 7A to the Clayton Act ("Section 7A").[1] Section 7A became effective on September 5, 1978, which was the effective date of the final rules (the "Rules") promulgated thereunder by the Federal Trade Commission (the "FTC").[2] Section 7A prevents substantial acquisitions from being consummated until the FTC and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (the "Assistant Attorney General") have had the opportunity to screen them under applicable federal antitrust laws, in particular Section 7 of the Clayton Act. Section 7A's pre-acquisition notification ("file-and-wait") provisions have a significant practical impact on acquisition timing and strategy.

1.2. Sources of law. Section 7A, the Rules, the FTC's Statement of Basis and Purpose[3] and FTC interpretations[4] together comprise a highly technical body of law, which will likely grow more complex with additional interpretations, judicial decisions and Rule amendments.

 The law is stated as of March 15, 1979.

** Associated with the firm of Wachtell, Lipton, Rosen & Katz. For convenience of presentation, all footnotes are printed sequentially at the end of the text.

1.3. Scope of discussion. This discussion summarizes the key elements of the file-and-wait requirements, with particular reference to tender offers. The impact of Section 7A on specific transactions can be determined only from a close study of the above-mentioned primary sources and the developing analytical literature.[5]

2. OUTLINE OF REQUIREMENTS.

2.1. Basic effect. Section 7A provides that, in general, any acquisition which meets certain tests (a "reportable acquisition") may not be consummated until (a) prior notification thereof, on a prescribed form ("Form"), has been filed with the FTC and the Assistant Attorney General (the "Agencies"), and (b) a waiting period has either expired or been prematurely terminated by the Agencies, which have the power to extend the minimum period by requesting, prior to the expiration thereof, additional information or documentary material relevant to the reported acquisition ("additional data") once from either party.

2.2. Applicability to tender offers. Although Section 7A's file-and-wait provisions are frequently referred to as a "pre-merger" notification program, they apply to any reportable acquisition of voting securities or asset, regardless of legal structure, and are expressly applicable to tender offers.

2.3. General tests. The general tests for a reportable acquisition are:

2.3.1. The commerce test. One or other of the acquiring and the acquired persons (these are terms of art -- see 4.2) must be engaged in, or in any activity affecting, commerce, as that concept is used in the federal antitrust laws.[6]

2.3.2. The size tests. The acquisition must meet two cumulative tests: (i) under the size-of-person test, it must involve an acquiring and acquired person, one of which is a $100 million person and the other of which is a $10 million person, the size of each being measured by sales and/or assets (see 4); and (ii) under the size-of-acquisition test, it must result in the acquiring person holding voting securities or assets of a minimum aggregate amount, measured by dollar value or percentage - although this is frequently described as the "15% or $15 million" test, modifications to Section 7A in the Rules render this a misleading simplification (see 5).

2.4. Special treatment of tender offers. The length of the waiting period and the timing of its commencement and expiration depend on the structure of the reportable acquisition. In that regard, although the Rules treat all non-target-negotiated acquisitions ("801.30 acquisitions") alike in several respects, for certain purposes tender offers, in particular cash tender offers (i.e., offers in which tendering stockholders receive only cash),[7] receive special treatment, e.g., (a) whereas the minimum waiting period for an 801.30 acquisition is generally 30 days following the filing of a Form by the acquiring person (sometimes referred to as the "offeror"), in a cash tender offer the minimum period is 15 days, and (b)

whereas the failure of the acquired person (sometimes referred to as the "target") to respond to an Agency request for additional data generally extends the waiting period, it does not have this effect in a tender offer. The tender offer waiting periods and related timing considerations are further discussed in 2.5.2 and 3.

2.4.1. Definition of tender offer. The Rules define a tender offer as any acquisition of voting securities which is a tender offer for purposes of Section 14 of the Securities Exchange Act of 1934, as amended (the "Exchange Act").[8] This definition was intended to give effect to the SEC's view that acquisitions not structured as a conventional tender offer, i.e., a formal offer to all target shareholders to purchase some or all of their shares at a specified price, may constitute a tender offer.[9] However, recent court decisions adopting a narrower definition[10] heighten the importance of the special treatment of tender offers under Section 7A, although a pre-tender offer "beachhead" acquisition of target stock which does not constitute an integrated part of the offer may nevertheless be independently reportable.

2.4.1.1. Friendly and hostile offer. Section 7A, unlike many state takeover statutes, draws no distinction between negotiated ("friendly") and contested ("hostile") tender offers.

2.4.1.2. Exchange offers. Although cash tender offers receive special treatment, an exchange or cash-and-stock offer is a "tender offer" under Section 7A, since it is treated as such by the Exchange Act.

2.5. Nature of Section 7A. Notwithstanding its significant practical impact, Section 7A has a limited scope.

2.5.1. No change in antitrust law.

(a) Substantive law. Section 7A is a notice statute. It does not alter the criteria for determining whether an acquisition violates substantive antitrust law. In particular, although its file-and-wait requirements are keyed to the size of the acquisition and the parties involved, rather than anti-competitive effect in any relevant market, a reportable acquisition is not, through size per se, made violative of substantive law.[11]

(b) Remedies. Although Section 7A entitles the Agencies to expedited hearings of preliminary injunction motions filed in government suits alleging antitrust violations,[12] it does not change the judicial standards to be applied in ruling on such motions and it confers no additional remedies for such violations. In particular, it does not enable the Agencies unilaterally to delay a reportable acquisition once the waiting period has ended. Although an additional data request (except one made to a tender offer target) extends the initial waiting until a specified period after the response thereto (see 3.2.1 and 3.2), any further extension may be ordered only by a federal district court on the basis of lack of substantial compliance with Section 7A.[13] However, the FTC's view is that any failure to furnish required data is a potential failure of substantial compliance and that the burdensomeness and cost involved in obtaining such data cannot per se excuse a failure to supply it.[14] If this view, which the legislative history of Section 7A does not support,[15] prevails, the making of an additional data request can have a substantial delaying effect.

(c) Pre-clearance. Section 7A is not a pre-clearance statute and expiration of the waiting period confers no automatic antitrust immunity. Although the Agencies have the power prematurely to terminate a waiting period and a favorable business review (see next sentence) may be the basis of an early termination (see 3.1.3), Section 7A provides that the taking or omitting to take of any action thereunder by the Agencies does not preclude their subsequent antitrust enforcement action against a reported acquisition.[16] FTC advisory opinions[17] and Department of Justice business review letters[18] remain available forms of antitrust pre-clearance in appropriate cases but they do not bar future enforcement action by the issuing Agency[19] nor constitute an exception to, or preclude immediate enforcement action by the non-issuing Agency against an acquisition reported under, Section 7A.[20]

2.5.2. Only consummation prohibited. It is the consummation of a reportable acquisition that is conditioned on compliance with the file-and-wait requirements, and "consummation" is defined as closing or transfer of title.[21] This permits all steps in an acquisition, other than its completion, to be taken even before the waiting period starts to run. In particular:

(a) Section 7A, unlike many state takeover statutes, does not delay the commencement of a tender offer. Although the offeror must have notified the target of, and publicly announced, its intention to make the offer before its Form can be filed,[22] there is no prescribed mini-

mum period between fulfillment of these requirements and the filing, and the announcement requirement may be met by a state takeover statute filing which is deemed public under applicable law, a press release or the actual publication and commencement of the offer.[23] Accordingly, Section 7A does not prevent a tender offer from being commenced on the same day that the offeror gives its notice, makes its announcement and files its Form.

(b) Section 7A does not require the finalization of arrangements for the tendering of shares (e.g., execution of the dealer-manager, depositary and forwarding agent agreements) to be deferred nor prevent the tendering of shares during the waiting period.

(c) Unlike the Exchange Act, many state takeover statutes and stock exchange rules, Section 7A does not require the offer to be kept open for any minimum period, nor does it give tendering shareholders withdrawal rights if the offer expires before the waiting period ends. Accordingly, subject to appropriate securities laws disclosure, (i) tendered shares, up to that number which in percentage or dollar value do not meet the size-of-acquisition test (see 5), may be accepted and paid for during the waiting period, and (ii) the offeror may end the offer on its scheduled acquisition date, although the waiting period has not ended, without having to return tendered shares (although Exchange Act withdrawal rights become exercisable if tendered shares not purchased within 60 days of commencement of the offer).

2.5.3. Filing not public information. Section 7A is not a public disclosure statute. It expressly exempts filings from disclosure by the Agencies under the Freedom of Information Act.[24] It also prohibits the Agencies from disclosing the filed information except in connection with judicial or administrative proceedings, although the FTC views this exception as granting each Agency a disclosure discretion is any proceeding in which it is plaintiff or defendant, whether or not the person who filed the information is also a party thereto.[25]

2.6. Certain exceptions. The significant exceptions to Section 7A's file-and-wait requirements include the following (as well as those noted in 5). The FTC interprets 7A to preclude the Agencies from issuing ad hoc exemptions.[26]

2.6.1. Non-voting securities. The definition of "voting security" excludes any security which, neither presently nor on conversion, entitles the holder to vote for directors of the issuer or any other entity included in the same person (the test of inclusion being control - see 4.2).[27]

2.6.2. Convertible voting securities. Although a security which, on conversion, would entitle the holder to vote for directors (a "convertible voting security")[28] is a voting security, its acquisition is exempt.[29] However, conversion may result in a reportable acquisition of the underlying voting securities.[30]

2.6.3. Acquisition by 50% owner. Section 7A exempts an acquisition of voting securities by an acquiring person already owning 50%

of the same issuer's voting securities.[31] Thus, if 50% of a target is acquired in a tender offer, a second step merger (see 3.4) to the remaining public interest is not reportable.

2.6.4. Self-tenders. Whenever the acquiring and acquired persons (see 4.2) are the same, the acquisition is exempt as an intra-person transaction.[32] Since such transactions include a corporation's repurchase of its own shares,[33] a tender offer by an issuer for its own voting securities is exempt.

2.6.5. Investment exemptions.

(a) 10% exemption. An acquisition of voting securities made solely for the purpose of investment (see 2.6.5(c)) is exempt provided the securities held "as a result of" the acquisition (this is a term of art - see 5.2) do not exceed 10% of the issuer's outstanding voting securities,[34] even if such securities meet the $15 million size-of-acquisition test (see 5.1.1).[35]

(b) Institutional investor exemption. Various types of financial institution (e.g., banks, insurance companies and broker-dealers) are "institutional investors" generally exempted from reporting acquisitions of voting securities (i) made directly by them in the ordinary course of their business and solely for investment (see 2.6.5(c)), and (ii) not resulting in the institution or any other entity included in the same person (see 4.2) either controlling the issuer (see 4.2.4) or holding both (see 2.6.5(d)) more than 15% of the issuer's outstanding voting securities

and more than $25 million thereof in value.[36] However, the exemption is inapplicable if either (i) the issuer of the acquired securities is an institution of the same type as the acquiring institution or any entity included in the same person as the latter, or (ii) any other such entity which is not itself an institutional investor holds voting securities, other than convertible voting securities (see 2.6.2), of the same issuer.[37]

(c) Solely for Investment. Investment intention requires an absence of intention of participating in the formulation, determination or direction of the issuer's basic business decisions.[38] The Agencies will not consider the voting of the acquired securities per se as evidence of a non-investment purpose but will so consider certain types of conduct, including (i) nominating a candidate for election to the issuer's board of directors, (ii) proposing corporate action requiring shareholder approval, (iii) soliciting proxies, (iv) having a controlling shareholder, director, officer or employee simultaneously serving as an offeror or director of the issuer, or (v) being a competitor of the issuer.[39]

(d) No arbitrage exemption. Arbitrageurs play a key role in the outcome of tender offers through their accumulation of substantial blocks of target stock for the express purpose of tendering. However, the FTC has denied them any special exemption and requires them to qualify for the institutional investor exemption.[40] Generally, they will so qualify, as broker-dealers buying solely to liquidate their position at a premium: while a single arbitrageur might acquire target stock valued at more than $25 million, an arbitrage position is unlikely to exceed 15% of a target's outstanding voting securities.

3. TENDER OFFER WAITING PERIOD.

3.1. Initial Waiting Period.

3.1.1. Commencement. The minimum waiting period for a reportable tender offer is either (a) cash offer - 15 days following the date the offeror's Form is filed, or (b) non-cash offer - 30 days following such date.[41] All Section 7A waiting periods, initial and extended, are measured in calendar days, start to run on the date of a triggering filing and expire at 11:59 P.M., Eastern Time, on the last day of the period, which is measured from the day following the filing date.[42] In effect, therefore, a reportable offer cannot be consummated until the 17th (cash offer) or 32nd (non-cash offer) day from the date of filing.

3.1.2. Target's failure to file. The target is required to file its own Form within 15 days, or 10 days in a cash tender offer, following (i.e., excluding) the date the offeror's Form was filed (the acquiring person's pre-filing notice, see 2.5.2, must advise the target of its anticipated filing date).[43] However, breach of this obligation will not delay the consummation of the offer, since the initial waiting period for all 801.30 acquisitions is triggered by the acquiring person's filing (cf. 3.2.4).

3.1.3. Early termination. The Agencies may prematurely terminate any waiting period after the acquiring person's Form has been filed, provided (a) the acquired person has also filed its Form (even in an 801.30 acquisition), (b) no additional data request is outstanding, and

(c) the Agencies have decided to make no (or no further) such request or take any other action within the waiting period.[44] Neither Section 7A nor the Rules contain any substantive criteria for early terminations and the several termination notices which the Agencies have to date published in the Federal Register have set forth no reasons for their issuance. However, a Special Assistant to the Assistant Attorney General has stated that factors found persuasive in granting early termination requests have included "constraints on available financing and the peculiar cyclical nature of the acquired business," that a favorable business review (see 2.5.1(c)) will make early termination possible but that the Agencies will be reluctant to lose their neutrality by granting requests where there are competing offers.[45]

3.2. Requests for additional data.

3.2.1 Extension of waiting period. A request for additional data made during the initial waiting period generally extends that period for a specified number of days following the date the data is filed with the requesting Agency: (a) cash tender offer - 10 days; (b) any other case - 20 days.[46] The cash or non-cash nature of the offer is determined on the date the data is filed.[47] Since the request may be made by telephone provided written confirmation is mailed before the initial period expires,[48] it can be made on the last day of the waiting period. Generally, requests to both parties on different dates will have a cumulative extension effect. However, a tender offer cannot be delayed by the target's failure to respond to a request made to it - see 3.2.4.

3.2.2. To whom made. The Agencies may request additional data from (a) any person required to file a Form, including a tender offer target, (b) any entity included in the same person (see 4.2) and (c) any

officer, director, partner, agent or employee thereof.[49] However, both Agencies cannot make a request to the same entity or individual[50] and each Agency may make only one request to each side.[51]

3.2.3. Time for responding. Additional data must be supplied within a reasonable time.[52] The Agencies' stated intention is to test compliance with this requirement on a case-by-case basis.[53]

3.2.4. Target's failure to respond. The failure of a tender offer target or any of its officers, directors, partners, agents or employees to comply with a request for additional data does not delay the running of the waiting period, although it exposes them to independent enforcement proceedings.[54] This protection is not afforded to the acquiring person in any other kind of 801.30 acquisition (cf. 3.1.2).

3.3 Amended and extended offers. Only in two cases does an amendment or extension of a reportable tender offer extend the waiting period:[55] (a) increase in number of shares sought -- if the acquisition of the increased number will result in the offeror crossing a higher notification threshold than it would have crossed under the original offer (see 5.3), e.g. if a offer for 49% is amended to an any-and-all offer, it must file a new Form and observe a new waiting period (the target need not re-file if its Form was filed before the increase); and (b) conversion from non-cash to cash offer or vice versa -- the offeror must file the amended offering documents (but not a new Form) with the Agencies and the waiting period is extended until either (i) the earlier (conversion to cash offer) or (ii) the later (conversion to non-cash offer) of the 30th day following the date its Form

was filed or the 15th day following the date the amended documents are filed.

3.4 Two-step acquisitions. For tax or other reasons, friendly acquisitions are frequently structured as a partial cash tender offer followed by a "second-step" merger. Whereas the minimum waiting period for a cash tender offer is 15 days and is triggered by the filing of the offeror's Form, the waiting period for a merger is 30 days and starts to run only after both parties have filed their separate Forms, which cannot be filed until an agreement or letter of intent has been signed.[56] The Agencies have raised no objection where parties have minimized these timing differences by treating the two steps as discrete transactions and filing separate tender offer and merger Forms more or less concurrently; although this entitles the Agencies to make additional data requests for each step, it ensures that the merger waiting period will not expire substantially later than the tender offer waiting period and that any request made as to the merger will not delay the expiration of the shorter waiting period for the offer itself.

4. SIZE-OF-PERSON TEST.

4.1 Statement of test.[57] One or other of the acquiring or the acquired person must have total assets or annual net sales of at least $100 million. If the acquiring person satisfies the $100 million criterion, the acquired person need have only $10 million in total assets or, if it is engaged in manufacturing,[58] annual net sales. If the acquired person satis-

fies the $100 million criterion (whether or not engaged in manufacturing), the acquiring person (whether or not so engaged) need have only $10 million in total assets or annual net sales. Thus, total assets are always a relevant measure of size and annual net sales are a relevant measure in all cases except in determining whether a non-manufacturing acquired person with less than $100 million in assets or sales satisfies the $10 million criterion, for which determination such person's sales are not relevant.

4.2. Acquiring and Acquired persons.

4.2.1. General. The term "acquiring person" does not necessarily mean the entity which will directly own the acquired voting securities or assets and the term "acquired person" does not (except in determining the percentage of the issuer's outstanding voting securities - see 5.4.2) necessarily mean the issuer of those securities or the seller of those assets. In each case, the term refers to the person in which that entity is included, the test of inclusion being is "control," and such controlling person is the "ultimate parent entity."[59] See, further, 4.2.4 through 4.2.6.

4.2.2. Stock not an "asset". A stock purchase is never a reportable acquisition as between the acquiring person and the seller because securities are not considered assets of the person from whom they are acquired[60] and the transaction constitutes a voting securities acquisition only as between the acquiring person and the person in which the issuer is included.

4.2.3. "Entity". In general, every natural or juristic

person is an entity.[61]

4.2.4. "Control". One entity, A, controls another, B, when A either (i) holds at least 50% of B's outstanding voting securities or (ii) has a presently exercisable right to designate a majority of B's board of directors.[62] If A controls B, B controls C and no entity controls A, then B and C are both included in A, which is the ultimate parent entity for B and C. If B and C are affiliates under A's common control, rather than in a parent-subsidiary relationship between themselves, A is nevertheless the ultimate parent entity in which both B and C are included.

4.2.5. "Hold". An entity "holds" those voting securities or assets it beneficially owns; record ownership, e.g., a broker's legal title to stock held for a client, is irrelevant.[63] The FTC's concept of beneficial ownership is not co-extensive with the SEC's latest Exchange Act rules thereon, e.g., the Rules treat the holdings of spouses and their minor children as holdings of each of them whether or not voting or dispositive power is shared for SEC purposes.[64]

4.2.6. Consolidation required. Since the ultimate parent entity and all entities included in it together constitute a composite acquiring or acquired person, that person's total assets and annual net sales must be computed on a consolidated world-wide basis, even if the various included entities are not consolidated for financial reporting purposes.[65] Thus, in a tender offer by B, a wholly owned subsidiary of A formed solely for the offer, for C, the holding company parent of D, A is

the acquiring person, C is the acquired person and the size-of-person test may therefore be met regardless of the assets or sales of B and C provided A, B's ultimate parent entity, and D, an entity included in C, satisfy the $100 million/$10 million test.

4.3. Financial statements determinative. Subject to the foregoing consolidation requirements, total assets and annual net sales must be calculated from most recently prepared financial statements no older than 15 months.[66]

5. SIZE-OF-ACQUISITION TEST.

The following summary relates primarily to acquisitions of voting securities, including tender offers (which receive no special treatment in this regard). Certain additional considerations apply to asset acquisitions.

5.1. Basic tests.

5.1.1. Dollar value test. An acquisition meets this test if it will result in (see 5.2) the acquired person holding an aggregate total amount of an acquired person's voting securities and assets exceeding $15 million in value.[67] The rules for determining value are discussed in 5.5. Note that the definition of "acquired person" (see 4.2) requires acquisitions of voting securities issued by two or more entities included in the same person to be aggregated in applying this test (cf. the rule for determining percentages - see 5.4.2).

5.1.2. Percentage test. The FTC's minimum dollar value exemption significantly modifies the Section 7A 15% test: if an acquisition

will not meet the dollar value criterion, it will not satisfy the test, even if it will result in an aggregate holding of 15% or more of an issuer's outstanding voting securities, unless it will result in (see 5.2) either (a) a holding of voting securities which confer control (this will generally mean 50% - see 4.2.4) of an issuer that, together with the entities it controls (id.), has total assets or annual net sales (see 4.2 and 4.3) of at least $10 million, or (b) a holding of assets of the acquired person valued at more than $10 million.[68] Since previously held assets are never taken into account in applying the size-of-acquisition test to a subsequent voting securities acquisition (see 5.2.2), criterion (b) will not be met in such an acquisition and the statutory $15 million/15% test, as it applies to tender offers and other voting securities acquisitions, has thus effectively been amended to a "$15 or 50%" test. The rules for calculating percentage are discussed in 5.4.

5.2. Aggregation of pre-acquisition holdings. The criterion for determining whether an acquisition will meet the size-of-acquisition test is the percentage or dollar value of the voting securities to be held "as a result of" that acquisition.

5.2.1. Previously held voting securities. In general, all voting securities of the same issuer which the acquiring person will hold after the acquisition is consummated, including those it (including its controlled entities - see 4.2) already owns are considered securities it will hold "as a result of" the acquisition.[69] Whether, e.g., the $15 million level is to be crossed in one tender offer by A for B's voting

securities or a series of fifteen $1 million private purchases of such securities by 15 separate entities included in A, is not relevant: in either case, the transaction which results in an aggregate $15 million holding will meet the test. Previously held voting securities are not so aggregated only if (i) held as a result of a prior acquisition which qualified for any exemption, and (ii) that exemption was not itself one (such as those discussed in 2.6.5) which depended on the amount of securities acquired.[70]

5.2.2. Previously held assets. The size-of-acquisition test will be met where the acquired person will hold voting securities and assets of the acquired person having an aggregate value in excess of $15 million, even if the voting securities themselves do not have such a value. However, previously held assets are never taken into account in determining whether a subsequent acquisition of voting securities will meet this test.[71]

5.3. Notification threshold exemption. By reason of the aggregation requirement, once the $15 million level has been exceeded a subsequent acquisition of even a single voting security of any issuer included in the same person may (depending on the market value of the prior holding at the time of the subsequent acquisition - see 5.5.2) be reportable, because it will "result in" that same dollar level being crossed, regardless of the aggregate percentage held.[72] To avoid the potential burdensomeness of this requirement, the Rules provide that, if certain condi-

tions have been met with respect to an acquisition (the "first acquisition") which met or exceeded ("crossed") any of four "notification thresholds," the acquiring person may, within five years from the expiration (or early termination) of the waiting period applicable to that acquisition, make further acquisitions (collectively, the "second acquisition") of the same issuer's voting securities without having to file a new Form and observe a new waiting period provided its aggregate holdings after consummation of the second acquisition does not cross any higher threshold.

5.3.1. Notification thresholds. These are:[73] (a) 15% of an issuer's outstanding voting securities or an aggregate total amount of an acquired person's voting securities and assets exceeding $15 million in value (this threshold is the same as the statutory size-of-acquisition test - see 5.1) ; (b) 15% of an issuer's outstanding voting securities, if valued in excess of $15 million (i.e., if the second acquisition increases the aggregate holding from 15% worth $12 million to 20% worth $16 million it crosses threshold (b)); (c) 25%; and (d) 50% (once 50% has been exceeded, subsequent acquisitions are exempt - see 2.6.3). Note, however, that the minimum dollar value exemption (see 5.1.2) exempts a second acquisition which (i) crosses thresholds (a), (b) or (c) but does not result in an aggregate holding valued at more than $15 million, or (ii) crosses threshold (d) with respect to an issuer which, together with its controlled entities, has assets with a value of less than $10 million. Also note, however, that the rule for determining the percentage of an issuer's voting securities

(see 5.4) renders the exemption inapplicable to a second acquisition of voting securities of a different issuer included in the same person.

5.3.2. Conditions to the exemption.[74] These are:

(a) The first acquisition must have been reported under Section 7A. If, e.g., the first acquisition crossed the 25% threshold but was not reported because it did not result in a holding with a value in excess of $15 million (i.e., was within the minimum dollar value exemption), any second acquisition which results in such a holding will be outside the exemption, even if it does not cross the 50% threshold. Thus, a second acquisition increasing a holding resulting from a first acquisition consummated before the September 5, 1978 effective date of Section 7A can never qualify for the exemption, even if it was reported under the FTC's pre-Section 7A notification program.[75]

(b) Forms must have been filed for the first acquisition both by the acquiring and the acquired persons. Even if, although the latter did not file, the acquisition was a tender offer or other 801.30 acquisition consummated after the acquiring person had filed, as is permitted (see 3.1.2), the second acquisition is not exempt.

(c) If, within one year of the expiration (or early termination) of the waiting period applicable to its first acquisition, the acquiring person did not cross the highest threshold its Form permitted it to cross, the only exempt second acquisition is one which does

not cross the highest threshold actually exceeded within that period. If, e.g., A's first acquisition was a partial tender offer for 49% of B's voting securities, A's Form relating thereto is treated as a filing at the 25% threshold; if only 20% was tendered but, within the one-year period, A made additional purchases resulting in an aggregate holding of 25% of B's voting securities at the end of that period, the first acquisition will be treated as having crossed the 25% threshold and A may, during the next 4 years, make a second acquisition increasing its holding to any percentage less than 50% (the next threshold) in reliance on the exemption; but if, at the end of the one-year period, A's aggregate holding, although it had a value in excess of $15 million, comprised only 22%, the first acquisition will only be treated as having crossed the thresholds below 25% and a second acquisition which increases its aggregate holding to 25% will not be exempt.

5.4. Calculating percentages.

5.4.1. Criterion is voting power. The percentage of an issuer's voting securities to be held as a result of an acquisition is based not on the ratio between the aggregate number of securities to be held as a result thereof and the total number outstanding, but on the ratio between the aggregate number of votes for directors which the securities to be so held entitle the holder(s) to cast to the aggregate number of such votes which the total outstanding securities entitle the holder(s) to cast. If the acquisition will increase the number of exercisable votes, the

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computation must give effect to this prospective increase.[77] Due to the effects of weighted voting of different classes of voting security, cumulative voting or other charter provisions, the percentage of exercisable votes may be greater or less than the number of outstanding securities. Note that, since the grant of a proxy does not increase the voting power of the subject share, it does not impact the percentage calculation;[78] thus, proxy contests are not covered by Section 7A.

5.4.2. Relationship to "acquired person" definition. The percentage calculation with respect to an issuer's voting securities is based only on the voting power of the outstanding voting securities of that issuer; even though it may not be an ultimate parent entity for other purposes, the issuer is the only "acquired person" for the purpose of the calculation.[79] Note that in computing value, rather than percentage, with respect to the acquired securities, the general definition of "acquired person" applies (see 5.1.1).

5.5. Calculating value.

5.5.1. Voting securities to be acquired. The value of exchange- or NASDAQ-listed voting securities acquired in an 801.30 acquisition is either the market price or, if known and greater, the acquisition price.[80] The "acquisition price" of such securities is the aggregate consideration to be paid[81] (thus, in an exchange offer the acquisition price comprises the aggregate value of the number of securities offered to tendering shareholders - if these are not publicly traded, their value is fair market

value, as determined by the acquiring person's board of directors [82]). The "market price" of such securities is the lowest closing price within the 45 calendar days preceding the date notice is given to the target (see 2.5.2(a)) or the acqisition is consummated. Since tender offers are priced to give the target's shareholders a premium over market price, the acquisition price, i.e., the offer price, will be determinative. If, on the determination date, the lowest market price is such that the acquisition, if then consummated, would not meet the size-of-acquisition test, subsequent increases in market price (e.g., reflecting the market's reaction to the announcement of a tender offer) do not make the acquisition reportable provided it is consummated within the next 45 days; after that time, value must be re-computed and will therefore reflect the increased market price.

5.5.2. Voting securities already held. The value of previously acquired voting securities which must be aggregated with those to be subsequently acquired (see 5.2) is not the price for which they were originally acquired but their value on the determination date for the subsequent acquisition, [85] so that if those securities are exchange- or NASDAQ-listed, they must be re-valued on the basis of the lowest closing price within the 45 days preceding such date. [86]

FOOTNOTES

1. 15 U.S.C. § 18a.

2. 16 C.F.R. Parts 801-03, 43 Fed. Reg. 33450 (July 31, 1978), corrected in 43 Fed. Reg. 34443 (August 4, 1978).

3. 43 Fed. Reg. 33450 et seq. (July 31, 1978). The Statement is hereinafter cited by reference to the relevant page in 43 Fed. Reg.

4. Rule 803.30 provides for formal and informal (including telephonic) staff interpretations and for staff references of interpretation requests to the FTC Commissioners. Staff, unlike the Commissioners', formal interpretations are not required to be summarized in the Federal Register but are currently being filed in the FTC's public reference section.

5. See, e.g.: Lipton and Steinberger, Takeovers and Freezeouts, Law Journal-Seminars Press, 1978, ¶ 7.2; Law Journal-Seminars Press, Mergers and Acquisitions under Hart-Scott-Rodino (Axinn and Fogg, Co-Chairmen), 1978.

6. Section 7A(a)(1); Rule 801.1(1).

7. Rules 801.1(g)(2) and (3).

8. Rule 801.1(g)(1).

9. Statement at 33464.

10. See, e.g., Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195 (2d Cir. 1978). Cf. S-G Securities, Inc. v. The Fuqua Investment Company, et. al., Fed. Sec. L. Rep. (CCH) ¶ 96,750 (D. Mass. Dec. 19, 1978). The SEC's revised proposed tender offer rules, Release No. 34-15548, Feb. 5, 1979, reflect its continued view that the term "tender offer" should not be limited to conventional-type formal offers.

11. On March 8, 1979, Senator Kennedy introduced a Senate bill (S600) to prohibit mergers and acquisitions of control where each party has assets and sales exceeding $2 billion or $350 billion or one party has assets or sales exceeding $350 million and the other has at least 20% of the net sales in any line of commerce in any section of the U.S. with annual net sales of more than $100 million. Affirmative defenses of substantial pro-competitive effect, promotion of "efficiencies" and divestiture of "viable business units" would be available except for acquisitions between two $2 billion persons.

12. Section 7A(f).

13. Sections 7A(e)(2) and (g)(2).

14. Statement at 33508-33509.

15. See 122 Cong. Rec. H10,293 (daily ed. Sept. 16, 1976) (per Representative Rodino).

16. Section 7A(a)(i)(1).

17. 16 C.F.R. §§ 1.1-1.4.

18. 28 C.F.R. § 50.6.

19. 16 C.F.R. §1.3(b); 28 C.F.R. §50.6.

20. Statement at 33505; 28 C.F.R. §50.6.

21. Statement at 33453.

22. Rule 803.5(a).

23. Statement at 33510.

24. Section 7A(h), modifying 5 U.S.C. § 552.

25. Statement at 33519.

26. Statement at 33518.

27. Rule 801.1(f)(1).

28. Rule 801.1(f)(2).

29. Rule 802.31.

30. FTC note to Rule 802.31. The Statement, at 33476, makes it clear that the 15% and $25 million tests are cumulative. Conversion means exchange without the payment of additional consideration (excluding transfer costs and payments made to complete fractional shares). Rule 801.1(f)(3). Convertible securities constitute assets for purposes of the size-of-person test (see 4 in text). Statement at 33462.

31. Section 7A(c)(3).

32. Rule 802.30.

33. Example 4 in FTC note to Rule 802.30.

34. Section 7A(c)(9); Rule 802.9.

35. Statement at 33489.

36. Rule 802.64; Statement at 33503.

37. Rule 802.64(c).

38. Rule 801.1(i)(1)

39. Statement at 33465.

40. Statement at 33519.

41. Section 7A(b)(1).

42. Id.; Rules 803.10(a) and (b).

43. Rule 801.30(b)(2).

44. Section 7A(b)(2); Rule 803.11.

45. Roger J. Dennis, The Premerger Notification Program — A First Look, remarks before a New York Law Journal/ Law Journal Seminars-Press seminar, Oct. 16, 1978.

46. Section 7a(e)(2); Rule 803.20(c).

47. Statement at 33494.

48. Rule 803.20(b)(2)(ii).

49. Section 7A(e)(1); Rule 803.20(a)(1).

50. Rule 803.20(b)(1).

51. See Statement at 33514.

52. Rule 803.21.

53. Statement at 33516.

54. Section 7A(e)(2); Rule 803.20(c); Statement at 33515 and 33516.

55. Rule 802.23. However, an amendment to the offer price may extend the required length of the offer under state takeover statutes or trigger new withdrawal rights under the Exchange Act.

56. Section 7A(b)(1), as modified, with respect to non-tender offer 801.30 acquisitions, by Rules 801.30(b)(1) and 803.10(a)(1); Rule 803.5(b).

57. The text restates the test as set forth in Section 7A(a)(2).

58. A person is engaged in manufacturing if it produces in, and derives annual revenues of more than $1 million from, industries classified as manufacturing in the Census Bureau's standard industrial classification ("SIC") system. Rule 801.1(j). The furnishing of revenue data by SIC product code is a central requirement of the Form.

59. Rules 801.1(a) and 801.2.

60. Rule 801.21(b).

61. Rule 801.1(a)(2).

62. Rule 801.1(b).

63. Rule 801.1(c). See, also, Statement at 33458.

64. Rule 801.1(c)(2). See, also, Statement at 33458. The SEC's rules are set forth in Rule 13d-3 under the Exchange Act; see also, Exchange Act Release No. 14692 (April 21, 1978).

65. Rules 801.11(a) and (b)(1).

66. Rules 801.11((b)(2) and (c).

67. Section 7A(a)(3)(B).

68. Rule 802.20(b), modifying Section 7A(a)(3)(A).

69. Rules 801.14.

70. Rule 801.15.

71. Rule 801.13(b)(2).

72. See Statement at 33477 and 33492.

73. Rule 801.1(h).

74. Rule 802.21.

75. 39 Fed. Reg. 35717 (Oct. 3, 1974). Persons required to file Forms under Section 7A, or exempt from so doing, are also exempt from the former program. 43 Fed. Reg. 28045 (June 28, 1978). However, special reports filed under the former program with respect to an acquisition to be consummated on or after September 5, 1978 do not fulfill Section 7A's filing requirement. Statement at 33518.

76. Rule 801.12(b). The information regarding the issuer's outstanding securities contained in its most recent SEC filings may generally be relied on. Rule 801.12(b)(3).

77. Id. See, also, Statement at 33475.

78. Example 1 in FTC note to Rule 801.12(b); Statement at 33475.

79. Rules 801.2(b) and 801.12(a).

80. Rule 801.10(a)(1).

81. Rule 801.10(c)(2).

82. Rules 801.10(a)(2)(ii) and 801.10(c)(3).

83. Rule 801.10(c)(1).

84. Statement at 33471.

85. Rule 801.13(a)(2).

86. Rules 801.13(a)(2)(i) and 801.10(c)(1).