

## Federal Trade Commission

## § 803.9

the person filing notification to complete the transaction.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34439, July 29, 1983; 52 FR 7082, Mar. 6, 1987; 66 FR 8695, Feb. 1, 2001]

### § 803.6 Certification.

(a) The notification required by the act shall be certified:

(1) In the case of a partnership, by any general partner thereof;

(2) In the case of a corporation, by any officer or director thereof;

(3) In the case of a person lacking officers, directors, or partners, by any individual exercising similar functions;

(4) In the case of a natural person, by such natural person or his or her legal representative;

(5) In the case of the estate of a deceased natural person, by any duly authorized legal representative of such estate.

(b) Additional information or documentary material submitted in response to a request pursuant to section 7A(e) and § 803.20 shall be accompanied by a certification in the format appearing at the end of the Notification and Report Form, completed in accordance with paragraph (a) of this section by the person or individual to whom it was directed.

(c) In all cases, the certifying individual must possess actual authority to make the certification on behalf of the person filing notification.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34429, July 29, 1983]

### § 803.7 Expiration of notification.

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

*Example:* A files notification that \$125 million of the voting securities of corporation B are to be acquired. One year after the expiration of the waiting period, A has acquired only \$95 million of B's voting securities. Although § 802.21 will permit "A" to purchase any amount of B's voting securities short of

\$100 million within 5 years from the expiration of the waiting period, A's holdings may not meet or exceed the \$100 million notification threshold without "A" and "B" again filing notification and observing a waiting period.

[43 FR 33548, July 31, 1978, as amended at 66 FR 8695, Feb. 1, 2001]

### § 803.8 Foreign language documents.

(a) Whenever at the time of filing a Notification and Report Form there is an English language outline, summary, extract or verbatim translation of any information or of all or portions of any documentary materials in a foreign language required to be submitted by the act or these rules, all such English language versions shall be filed along with the foreign language information or materials.

(b) Documentary materials or information in a foreign language required to be submitted in responses to a request for additional information or documentary material shall be submitted with verbatim English language translations, or all existing English language versions, or both, as specified in such request.

[48 FR 34440, July 29, 1983]

### § 803.9 Filing fee.

(a) Each acquiring person shall pay the filing fee required by the act to the Federal Trade Commission, except as provided in paragraphs (b) and (c) of this section. No additional fee is to be submitted to the Antitrust Division of the Department of Justice.

*Examples:* 1. "A" wishes to acquire voting securities issued by B, where the greater of the acquisition price and the market price is \$64 million, pursuant to § 801.10. When "A" files notification for the transaction, it must indicate the \$50 million threshold and pay a filing fee of \$45,000 because the aggregate total amount of the acquisition is less than \$100 million, but greater than \$50 million.

2. "A" acquires \$40 million of assets from "B." The parties meet the size of person criteria of Section 7A(a)(2)(B), but the transaction is not reportable because it does not exceed the \$50 million size of transaction threshold of that provision. Two months later "A" acquires additional assets from "B" valued at \$90 million. Pursuant to the aggregation requirements of § 801.13(b)(2)(ii), the aggregate total amount of "B's" assets that "A" will hold as a result of the second acquisition is \$130 million. Accordingly,

when "A" files notification for the second transaction, "A" must indicate the \$100 million threshold and pay a filing fee of \$125,000 because the aggregate total amount of the acquisition is less than \$500 million, but not less than \$100 million.

3. "A" acquires \$60 million of voting securities issued by B after submitting its notification and \$45,000 filing fee and indicates the \$50 million threshold. Two years later, "A" files to acquire additional voting securities issued by B valued at \$50 million because it will exceed the next higher reporting threshold (see § 801.1(h)). Assuming the second transaction is reportable and the value of its initial holdings is unchanged (see § 801.13(a)(2) and 801.10(c)), the provisions of § 801.13(a)(1) require that "A" report that the value of the second transaction is \$110 million because "A" must aggregate previously acquired securities in calculating the value of B's voting securities that it will hold as a result of the second acquisition. "A" should pay a filing fee of \$125,000.

4. "A" signs a contract with a stated purchase price of \$110 million, subject to adjustments, to acquire all of the assets of "B." If the amount of adjustments can be reasonably estimated, the acquisition price—as adjusted to reflect that estimate—is determined. If the amount of adjustments cannot be reasonably estimated, the acquisition price is undetermined. In either case the board or its delegee must also determine in good faith the fair market value. (§ 801.10(b) states that the value of an asset acquisition is to be the fair market value or the acquisition price, if determined and greater than fair market value.) "A" files notification and submits a \$45,000 filing fee. "A"'s decision to pay that fee may be justified on either of two bases, and "A" should submit an attachment to the Notification and Report Form explaining the valuation. First, "A" may have concluded that the acquisition price can be reasonably estimated to be \$98 million, because of anticipated adjustments—e.g., based on due diligence by "A"'s accounting firm indicating that one third of the inventory is not saleable. If fair market value is also determined in good faith to be less than \$100 million, the \$45,000 fee is appropriate. Alternatively, "A" may conclude that because the adjustments cannot reasonably be estimated, acquisition price is undetermined. If so, "A" would base the valuation on the good faith determination of fair market value. The acquiring party's execution of the Certification also attests to the good faith valuation of the value of the transaction.

5. "A" contracts to acquire all of the assets of "B" for \$1 billion. The assets include hotels, office buildings, and rental retail property with a total value of \$850 million, all of which are exempted by § 802.2. Section 802.2 directs that these assets are exempt from the

requirements of the act and that reporting requirements for the transaction should be determined by analyzing the remainder of the acquisition as if it were a separate transaction. Furthermore, § 801.15(a)(2) states that those exempt assets are never held as a result of the acquisition. Accordingly, the aggregate amount of the transaction is \$150 million. "A" will be liable for a filing fee of \$125,000, rather than \$280,000, because the value of the transaction is not less than \$100 million but less than \$500 million. Note, however, that "A" must include an attachment in its Notification and Report Form setting out both the \$1 billion total purchase price and the basis for its determination that the aggregate total amount of the acquisition under the rules is \$150 million rather than \$1 billion, in accordance with the Instructions to the Form.

6. "A" acquires coal reserves from "B" valued at \$150 million. No notification or filing fee is required because the acquisition is exempted by § 802.3(b). Three months later, A proposes to acquire additional coal reserves from "B" valued at \$450 million. This transaction is subject to the notification requirements of the act because the value of the acquisition exceeds the \$200 million limitation on the exemption in § 802.3(b). As a result of § 801.13(b)(2)(ii), the prior \$150 million acquisition must be added because the additional \$450 million of coal reserves were acquired from the same person within 180 days of the initial acquisition. Because aggregating the two acquisitions exceeds the \$200 million exemption threshold, § 801.15(b) directs that "A" will also hold the previously exempt \$150 million acquisition; thus, the aggregate amount held as a result of the \$450 million acquisition is \$600 million. Accordingly, "A" must file notification to acquire the coal reserves valued at \$600 million and pay a filing fee of \$280,000.

7. "A" intends to acquire 20 percent of the voting securities of B, a non-publicly traded issuer. The agreed upon acquisition price is \$99 million subject to post-closing adjustments of up to plus or minus \$2 million. "A" estimates that the adjustments will be minus \$1 million. In this example, since "A" is able in good faith to reasonably estimate the adjustments to the agreed-on price, the acquisition price is deemed to be determined and the appropriate filing fee threshold is \$50 million. Even if the post-closing adjustments cause the final price actually paid to exceed \$100 million, "A" would be deemed to hold \$98 million in B voting securities as a result of this acquisition. Note, however, since the potential acquisition price subject to adjustments could have exceeded the \$100 million threshold (e.g., "straddles two filing fee thresholds"), an explanation of why the lower threshold was indicated should be attached. Also note that any additional acquisition by "A" of B voting stock (if the value

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of the stock currently held by "A" is \$100 million or more) will cause "A" to cross the \$100 million threshold and another filing and the appropriate fee will be required.

8. "A" intends to make a cash tender offer for a minimum of 50 percent plus one share of the voting securities of B, a non-publicly traded issuer, but will accept up to 100 percent of the shares if they are tendered. There are 12 million shares of B voting stock outstanding and the tender offer price is \$10 per share. In this instance, since there is no cap on the number of shares that can be tendered, the value of the transaction will be the value of 100 percent of B's voting securities, and "A" must pay the \$125,000 fee for the \$100 million filing fee threshold. Note that if the tender offer had been for a maximum of 50 percent plus one share the value of the transaction would be \$60 million, and the appropriate fee would be \$45,000, based on the \$50 million filing fee threshold. This would be true even if the tender offer were to be followed by a merger which would be exempt under Section 7A(c)(3),

(b) For a transaction described by §801.2(d)(2)(iii), the parties shall pay only one filing fee. In accordance with §801.2(d)(2)(iii), both parties to a consolidation are acquiring and acquired persons and must submit a Notification and Report Form where the transaction meets the reporting requirements of that act; however, only one filing fee is required in connection with such a transaction, and is payable by either party to the transaction. The filing fee is based on the greater of the two sizes of transaction in the consolidation.

(c) For a reportable transaction in which the acquiring entity has two ultimate parent entities, both ultimate parent entities are acquiring persons; however, if the responses for both ultimate parent entities would be the same for item 5 of the Notification and Report Form, only one filing fee is required in connection with the transaction.

(d) *Manner of payment.* Fees may be paid by United States postal money order, bank money order, bank cashier's check, certified check or by electronic wire transfer (EWT). The fee must be paid in U.S. currency.

(1) Fees paid by money order or check shall be made payable to the "Federal Trade Commission," omitting the name or title of any official of the Commission, and shall be submitted to the Premerger Notification Office of

the Federal Trade Commission along with the Notification and Report Form.

(2) Fees paid by EWT shall be deposited to the Treasury's account at the New York Federal Reserve Bank. Specific instructions for making EWT payments are contained in the Instructions to the Notification and Report Form.

(e) *Refunds.* Except as provided in this paragraph, no filing fee received by the Commission will be returned to the payer and no part of the filing fee shall be refunded. The filing fee shall be refunded only if the Commission's staff determines, based on the information and representations contained in the filing person's notification, that premerger notification was not required by the act. Once the Commission's staff has determined that the notification was required, the filing fee shall not be refunded even if it appears at the time of consummation that the transaction does not meet the reporting requirements established in the act.

[66 FR 8695, Feb. 1, 2001, as amended at 68 FR 2431, Jan. 17, 2003]

### § 803.10 Running of time.

(a) *Beginning of waiting period.* The waiting period required by the act shall begin on the date of receipt of the notification required by the act, in the manner provided by these rules (or, if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance in accordance with §803.3) from:

(1) In the case of acquisitions to which §801.30 applies, the acquiring person;

(2) In the case of the formation of a joint venture or other corporation covered by §801.40, all persons contributing to the formation of the joint venture or other corporation that are required by the act and these rules to file notification;

(3) In the case of all other acquisitions, all persons required by the act and these rules to file notification.

(b) *Expiration of waiting period.* (1) Subject to paragraph (b)(3) of this section, for purposes of Section