

of its waiting period—five years to acquire up to the next notification threshold, without another filing obligation. Thus, under § 802.21, an acquiring person could file, indicate the 25 percent threshold, and as long as it crossed that threshold no more than a year after the end of its waiting period, take up to five years to acquire up to 49.9 percent¹ of the same issuer's voting stock without refiling, possibly crossing another post-February 1, 2001 filing fee threshold in the process.

The HSR Act, as amended, requires that an acquiring person pay a certain fee based on the value of the assets and voting securities it holds as a result of an acquisition. This means that, if the prior thresholds were retained, the acquiring person who filed to acquire 25 percent of an issuer's voting securities and paid the fee that corresponds to the value of 25 percent of those securities, could acquire the 25 percent, and acquire up to an additional 24.9 percent within five years, without filing or paying any additional fee. In this example, when acquiring person A plans to acquire 25 percent in year one, but may acquire up to 49 percent, what fee should it pay? Similarly, if, as several comments suggest, the notification thresholds were \$50 million, 25 percent, and 50 percent, what fee should A pay if filing for the \$50 million threshold where that filing would enable it to buy 24.9 percent, worth well over \$500 million? Should the determination turn on A's intent? How would that intent be ascertained? What if its intent later changes?

The following scenario illustrates how retaining the percentage thresholds would lead to inequitable treatment for similarly situated filers. If a person filed notification at the 25 percent notification threshold to make open market purchases but did not know precisely how many shares above that threshold it intended to acquire, its fee would be based on the value of 25 percent of the issuer's voting stock. If that percentage were valued at \$90 million, the fee paid would be \$45,000, even if ultimately 30 percent, valued at \$108 million, were acquired. On the other hand, if a person filed notification based on an agreement to acquire 30 percent of the same issuer's voting stock, valued at \$108 million, a filing fee of \$125,000 would be required. The substance of the acquisitions is exactly the same, but the structure penalizes the filer that is able to report with greater

specificity the amount of voting securities it will hold.

The approach the Commission is adopting in these Final Rules retains § 802.21 and the concept of allowing subsequent acquisitions without repeated filings up to the next threshold. It adopts thresholds that provide for additional review from time to time as the acquirer obtains a substantially larger investment in the acquired company, while exempting smaller additional acquisitions. It assures that notification of all reportable acquisitions and the Congressionally-mandated fee are simultaneously received, without requiring the firms or the agency to examine fine or elusive distinctions in the intent of the acquiring person. A number of informal comments received from affected parties during preparation of the Interim Rules suggested that the approach adopted here would be the most practical and sensible means of providing for intermediate thresholds. While a number of formal comments criticized the dollar thresholds, it is of note that none of them suggested an alternative approach that would also solve the administrative/filing fee questions raised in the SBP to the Interim Rules.

Several of the comments noted that if voting securities already held increase in value to an amount greater than the next dollar notification threshold, even a very small (and presumably insignificant from an antitrust perspective) acquisition of additional shares would trigger a new filing. The Commission carefully considered these comments and it believes, based on its own experience with filings received over the last several fiscal years as well as extensive input from the private bar prior to implementing the new thresholds, that occurrence of such filing scenarios will be rare. Multiple filings would not be required for mergers and consolidations (where 100 percent of the issuer's voting securities are acquired at once), nor for asset acquisitions (where notification thresholds are inapplicable). The only situation in which multiple filings potentially may be required is where an acquiring person makes multiple acquisitions of voting stock of a large issuer and that acquiring person is unable accurately to estimate what the value of its holdings in that issuer ultimately will be. Some filers may prefer in such circumstances to indicate a higher threshold than that which will be exceeded with the initial acquisition and thereby avoid the trouble and expense of preparing another filing. For example, a party making an \$80 million acquisition of a small percentage of an

issuer's stock but contemplating a subsequent acquisition may opt to file for the \$100 million or \$500 million threshold and avoid multiple filings. Another party contemplating an \$80 million acquisition of a small percentage of an issuer's stock but not expecting to make additional acquisitions would likely opt to file for the \$50 million threshold and pay the lowest filing fee.

Comment 16 asserted in addition that the complexity of valuing a transaction to determine which threshold will be crossed creates a significant burden on the parties to the transactions. The acquiring person has always been confronted with accurately determining the value of assets and/or voting securities to be held as a result of an acquisition. This requirement has not changed, although its significance has increased with the creation of a tiered filing fee system based on size of transaction. The comment also noted that while some administrative problems have been solved by using the fee thresholds as filing thresholds, other problems have been created. However, the comment did not outline specific problems other than the multiple filing problem concerning an increase in value of voting securities followed by a small additional purchase—a situation that the agencies believe is both rare and avoidable.

As to the initial reportable transaction itself, where a transaction is determined to be reportable, the acquiring person can make a valuation at the time of filing, using the appropriate methodology specified in the rules, and "lock in" the value of assets or voting securities that will be held as a result of the acquisition. This value, as long as it has been determined in good faith, may be relied on for purposes of determining the appropriate filing fee and notification threshold for this acquisition, even if events such as a sharp increase in market price or post-closing adjustments subsequently cause the final acquisition price to exceed a threshold higher than that indicated in the filing. Accordingly, the retention of the multiple dollar thresholds should not impose a substantial additional burden on a significant number of persons filing notification.

Comment 9 asserted that multiple dollar thresholds for asset acquisitions are unnecessary. Notification thresholds are inapplicable to asset acquisitions, and, in order to make that clear, one change is being made to § 801.1(h) of the Interim Rules. The change removes the reference to assets in connection with notification thresholds. The § 801.1(h) notification thresholds, unlike the

¹ For simplicity, decimal percentages are expressed herein in tenths. In reality, by indicating the 25 percent notification threshold, any number of shares representing up to, but not meeting or exceeding 50 percent, could be acquired.