

statutory filing fee thresholds, exist solely for the purpose of exempting subsequent acquisitions of voting securities that do not result in the acquiring person holding voting securities meeting or exceeding a higher notification threshold than that met or exceeded in a previous acquisition of voting securities, as provided in Rule 802.21.

The mention of "assets" in Interim Rule 801.1(h) could cause some confusion in the application of § 802.21 to acquisitions of voting securities when a previous acquisition of both assets and voting securities has been made and reported. Consider the following example: A acquires voting securities of B valued at \$60 million and assets of B valued at \$60 million. A would file indicating the \$50 million notification threshold since it would hold less than \$100 million in B voting securities, but would pay a \$125,000 filing fee because it would hold in excess of \$100 million in voting securities and assets of B as a result of the acquisition. A now wishes to make an additional acquisition of B voting securities. The § 802.21 exemption, which applies only to voting securities, exempts a subsequent acquisition of voting securities only when a prior notification threshold has been exceeded by an earlier acquisition of voting securities and the subsequent acquisition will not cause the acquiring person to meet or exceed a greater notification threshold. Thus, it is incorrect to conclude that A earlier crossed the \$100 million notification threshold; rather, it only crossed the \$50 million notification threshold, and whether it must file a new notification depends on whether the additional acquisition results in A holding \$100 million or more of B's voting securities. The removal of the reference to assets in § 801.1(h) should clarify this point.

The Notification and Report Form is also being amended to note that Item 2(c), requiring the acquiring person to report the notification threshold which is being filed for, is applicable only to acquisitions of voting securities. Filing persons should be aware that the determination of the appropriate filing fee remains unchanged. The filing fee is still calculated based on the total aggregate value of voting securities and assets that will be held as a result of the acquisition. Additionally, the reference to § 801.1(h)(1) in § 801.21 (securities and cash not considered assets when acquired) is removed as it is no longer applicable.

After careful consideration of the options and of the comments regarding notification thresholds, the Commission has determined that the notification

thresholds promulgated by the Interim Rules are appropriate and the Final Rule will be implemented with those thresholds.

Part 803—Transmittal Rules

Section 803.9 Filing Fee

The Commission received three comments concerning § 803.9. Comment 1 objected to the fact that the filing fee for an acquisition of voting securities of a foreign issuer is based on the entire value of the transaction and may reach \$280,000, despite the fact that the U.S. portion of the transaction may be relatively small and the issuer's U.S. presence may measure only slightly over \$50 million. The comment proposed an amendment to the rule that would limit filing fees for all acquisitions of foreign assets or voting securities to \$45,000 unless more than 50 percent of the transaction's value is attributable to either assets located in the U.S. or to sales in or into the U.S.

Amending § 803.9 in this fashion would be in direct conflict with the language of the 2000 Amendments, which clearly specifies that the filing fee is based on the aggregate total value of voting securities and assets held as a result of the acquisition.

Comment 13 suggested that examples 4 and 5 to the rule would be more appropriately paired with other rules; however, the Commission believes that the examples explain how the appropriate filing fee is determined and sees no need to remove them from this rule.

Comment 8 claimed that the language of the rule is unclear. It contended that nowhere does the rule state that filing persons must pay a filing fee each time a threshold is crossed. It further stated that only by extremely careful reading and parsing of sentences can one conclude that the agencies apparently want the full fees for crossing each threshold. As the comment does not specify what language is confusing or unclear, it is difficult for the Commission to determine what portion of the rule might need clarification. The language of the rule in its current form unambiguously lays out the filing fee requirements, and since no other comment indicated that the rule is unclear, the Final Rule will be implemented without change except as noted in the following paragraph. Two additional examples are added to further illustrate the application of the rule.

Section 803.9 is amended in the following way: 803.9(c) provides that 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 Items 5 through 8 of the Notification and Report Form, only one filing fee is required in connection with the transaction. The intent of this paragraph was to require only one filing fee for those transactions where the two acquiring persons would have no significant business activities outside of the jointly-controlled acquisition vehicle. Although no comments were received on this point, we have discovered that in some instances such persons may respond differently to Item 6, *i.e.*, the two ultimate parent entities may have different shareholders. To ensure that the intent of this section is implemented, § 803.9(c) is amended to require only that the response to Item 5 be the same for both acquiring persons in order for the transaction to qualify for one filing fee.

It should also be noted that the SBP accompanying the Interim Rules contained a typographical error which omitted the word "not" in the last sentence discussing § 803.9. The sentence should have read: "It is currently Commission practice to refund filing fees only in such instances, but paragraph (e) is added to codify that practice and give notice that acquiring persons will *not* receive partial reimbursement of their fee in the event they overvalue a transaction."

Section 803.20 Requests for Additional Information or Documentary Material

Comments 12 and 13 correctly pointed out a discrepancy between the SBP and the Interim Rule. The intent was to amend this section to reflect the fact that a second request to an acquired person in a bankruptcy transaction covered by 11 U.S.C. 363(b) does not extend the waiting period. That section of the Bankruptcy Code provides that subsection (e)(2) of Section 7A of the Clayton Act, which deals with how second requests affect the waiting period, shall apply to such bankruptcy transactions in the same manner as subsection (e)(2) applies to a cash tender offer. This was correctly described in the SBP; however, a drafting error in the Interim Rule effected a different result. The Final Rule has been revised to correspond to the intent stated in the SBP. In addition, the example has been revised to more clearly illustrate the application of the rule in the case of a tender offer.