

**Part 803—Appendix: Premerger Notification and Report Form***Transactions Subject to Foreign Antitrust Reporting Requirements*

The Form was amended by the Interim Rules to include a space for reporting persons to indicate whether the filing is subject to foreign antitrust reporting requirements and requests the voluntary submission of the name(s) of any foreign antitrust or competition authority that, based upon the knowledge or belief of the filing person at the time of the filing, has been or will be notified of the proposed transaction and the date or anticipated date of such notification.

Three comments were received regarding this change. Comment 3 stated that the determination of the countries requiring a premerger report is a substantial burden, frequently completed after HSR filings are made. It further argued that the list would be unnecessary in the great majority of filings, which do not receive more substantive review. Comment 8 argued that the listing is unnecessary, and will likely be incomplete, since the exact identity of countries to be notified is not always known at the time of filing.

Comment 13 also indicated that the burden associated with responding to this item may outweigh the probative value to the agencies. It recommended that the voluntary nature of the item be disclosed on the Form so infrequent filers will know without reference to the Instructions that their response is not mandatory. The comment further remarked that despite the fact that a response to the item is voluntary, the risk is raised that the parties may inadvertently err in their reporting, and that the Commission has given no explanation of the steps that a party must undertake to ensure that the voluntary answer is accurate.

The Commission, as it stated in the SBP accompanying the Interim Rules, believes that early notice of multiple jurisdiction filings will allow the agencies to communicate with foreign counterparts only to the extent that statutorily protected information is not disclosed and, where appropriate, to seek consent of the parties to allow more extensive cooperation between or among antitrust authorities in conducting their investigations. This approach could in many instances reduce the burden that would be placed on the parties in providing duplicative responses to multiple jurisdictions.

The Commission recognizes that numerous foreign jurisdictions may be involved, some of which may not have been identified at the time the parties to

a transaction are otherwise prepared to file their notification, and accordingly requests that the filing person voluntarily respond to this item based on its knowledge or belief “at the time of the filing.” If a filing person chooses to respond, the obligation to provide accurate information is the same as that for any other item on the Form. If the parties answer to the best of their knowledge at the time of filing, it is highly unlikely that any penalty would result if the response later proves to be inaccurate.

Given the voluntary nature of the item, and the instruction that the person filing respond only based on its knowledge at the time of filing, the Commission believes that the potential benefit to the agencies outweighs what would be a very limited burden to the parties. This item will remain on the Form; however, the word “voluntary” in parentheses will be added to the item on the Form itself to ensure that the voluntary nature of the response to this item is clear without reference to the Instructions.

*Explanation of Amount Paid/Name of Person Responsible for Fair Market Valuation*

The Interim Rules introduced a new item on the Form in which the acquiring person indicates the amount of the fee paid. The acquiring person is further advised that should the fee be based on an amount that differs from the acquisition price, or if the acquisition price is undetermined and may fall within a range that straddles two filing fee thresholds, an explanation of the value reported is required to be submitted with the Form. The explanation should include discussion of adjustments to the acquisition price, a description of any exempt assets and their value, and the valuation method(s) used. In connection with the valuation of the transaction, Item 2(e) was also added, requiring that if the value of the transaction is based in whole or in part on a fair market valuation, the name of the person responsible for that valuation should be provided. The Commission received three comments regarding the attachment of the valuation explanation and the identification of the person responsible for any fair market valuation.

Comment 3 stated that the addition of these items adds additional burden for the parties and asserted that if the agencies have questions about the valuation method, they can always raise them with the reporting person. The comment suggested that there is no need to name the person performing the valuation since an officer of the filing

party certifies the accuracy of all of the information in the filing. Comment 8 also noted that the information regarding the method of valuation can be obtained by calling the contact person listed in Item 1(g) of the Form.

Comment 13 asserted that although the agencies might reasonably request an explanation of the valuation to ensure that the proper filing fees are being paid, it is not clear when such disclosure must be provided and how its requirements can be satisfied. It also noted that it is unclear under what circumstances a transaction value might straddle two filing fee thresholds. For example, the comment noted that it is uncertain whether a person filing for a cash tender offer for a minimum condition (*i.e.*, 66⅔ percent) should be able to file based upon a valuation for the minimum condition being satisfied, or based on the assumption that 100 percent of the shares will be tendered (presumably valued at a higher filing fee threshold). The comment also observed that if the agencies are looking for a responsible person to hold accountable for any errors in the valuation, they can look to the officer who signed the certification and do not need an additional person to be identified as accountable on the Form itself.

The Commission recognizes that with the new fee schedule the valuation of transactions must be more precise than was required in the past. It does not, however, believe that the new items on the Form impose any significant burden beyond that already required to calculate the value of the transaction. When it is not apparent from the purchase agreement why a lower filing fee threshold is being indicated, the required explanation need not be lengthy or highly detailed, but merely a concise description of how the acquiring person arrived at the value it is reporting on the Form. In most cases, this explanation will quickly resolve any valuation issues staff may have identified and will eliminate the need to contact the parties for any further discussion.

The issues surrounding valuation are, and have always been, complex. How the rules governing valuation should be applied to determine the appropriate filing fee has been the subject of individual informal interpretations and widely attended public question and answer sessions. Additionally, several examples were included in § 803.9 to illustrate commonly encountered scenarios. More examples are added to the final version of this rule to address other situations which have been identified as problematic.