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**Non-Vessel Operating Common Carrier
and Ocean Freight Forwarder
Transportation Intermediary
Applicants**

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**Ocean Freight Forwarders—Ocean
Transportation Intermediary
Applicants**

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CEO (Qualifying Individual)

Dated: March 31, 2000.

Bryant L. VanBrakle,
Secretary.

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BILLING CODE 6730-01-P

FEDERAL TRADE COMMISSION

**Premerger Notification: Reporting and
Waiting Period Requirements**

AGENCY: Federal Trade Commission.

ACTION: Notice of issuance of Formal
Interpretation 17.

SUMMARY: The Premerger Notification
Office ("PNO") of the Federal Trade
Commission ("FTC"), with the
concurrence of the Assistant Attorney
General in charge of the Antitrust
Division of the Department of Justice
("DOJ"), is adopting a Formal
Interpretation of the Hart-Scott-Rodino
Act, ("the HSR Act," "the Act"), which
requires persons planning certain
mergers, consolidations, or other
acquisitions to report information about
the proposed transactions to the FTC
and DOJ in order to allow for effective
premerger antitrust review. The Act
exempts from Hart-Scott-Rodino
premerger review certain classes of
acquisitions that require premerger
competitive review by a specialized
regulatory agency. This Interpretation

describes the PNO's position regarding
transactions that may occur under the
recently enacted Gramm-Leach-Bliley
Act that have some portions subject to
advance competitive review by a
banking agency and other, non-bank
portions that are not subject to such
review. Under the Interpretation, the
non-bank portion of such a transaction
is subject to the reporting requirements
of the HSR Act regardless of whether the
non-bank business is housed in an
affiliate of a financial holding company
or a financial subsidiary of a bank. The
Interpretation also addresses HSR
treatment of certain transactions in
which portions of the transaction
require approval under different
sections (section 3 and section 4) of the
Bank Holding Company Act. This
Interpretation does not address
questions concerning how to apply the
HSR rules to the portion of a mixed
transaction that is subject to the HSR
Act. These issues will be addressed by
the PNO on a case-by-case basis.¹

DATES: Formal Interpretation 17 is
effective on April 3, 2000.

FOR FURTHER INFORMATION CONTACT:
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326-2946; Premerger Notification
Office, Bureau of Competition, Room
301, Federal Trade Commission,
Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The text of
Formal Interpretation Number 17 is set
out below:

FORMAL INTERPRETATION 17,
PURSUANT TO § 803.30 OF THE
PREMERGER NOTIFICATION RULES,
16 CFR § 803.30, REGARDING FILING
OBLIGATIONS FOR CERTAIN
ACQUISITIONS INVOLVING BANKING
AND NON-BANKING BUSINESSES
UNDER THE (c)(7) AND (c)(8)
EXEMPTIONS OF THE HART-SCOTT-
RODINO ACT AS AMENDED BY THE
GRAMM-LEACH-BLILEY ACT

Pursuant to § 803.30 of the Hart-Scott-
Rodino premerger notification rules
("the rules"), the Premerger Notification
Office ("PNO") of the Federal Trade
Commission ("FTC"), with the
concurrence of the Assistant Attorney
General in charge of the Antitrust
Division of the Department of Justice
("DOJ"), collectively, "the enforcement
agencies", issues this formal
interpretation of the Hart-Scott-Rodino
Act, as amended.

¹ Parties wishing to determine the application of
the HSR Act and the Rules to a particular set of facts
will find source materials on the FTC Web site at
www.ftc.gov. Parties may also call the PNO for
advice at (202) 326-3100.

The Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act, Public
Law 106-102, was signed into law by
President Clinton on November 12,
1999. Title I of Gramm-Leach-Bliley,
Facilitating Affiliation Among Banks,
Securities Firms and Insurance
Companies, generally became effective
March 11, 2000. Under the new law,
bank holding companies and banks are
allowed to affiliate with companies that
participate in financial services markets
that were previously off limits to such
entities. In particular, Gramm-Leach-
Bliley repeals the restrictions on banks
affiliating with securities firms
contained in sections 20 and 32 of the
Glass-Steagall Act. The statute creates a
new "financial holding company"
category under section 4(k) of the Bank
Holding Company Act ("BHCA"). Such
holding companies can engage in a
statutorily provided list of financial
activities, including insurance and
securities underwriting and agency
activities, merchant banking and
insurance company portfolio investment
activities. Other financial activities and
activities incidental to financial
activities may be approved if the
Federal Reserve Board and the Treasury
Department agree. Activities that are
"complementary" to financial activities
are also authorized and such activities
may be specified by the Federal Reserve
Board at a later date. A bank holding
company that does not become a
financial holding company can continue
to engage in activities closely related to
banking, such as trust services, data
processing services, investment advising
and ATM network ownership, under
section 4(c)(8) of the BHCA.

Gramm-Leach-Bliley also allows a
national bank that meets certain
standards to engage in the same new
financial activities in "financial
subsidiaries," except for insurance
underwriting, merchant banking (which
may be approved as a permissible
activity beginning five years after
enactment), insurance company
portfolio investments, and, unless
permitted by other law, real estate
development and real estate investment.
Other financial activities and activities
incidental to financial activities may be
approved if the Federal Reserve Board
and the Treasury Department agree. The
aggregate assets of all financial
subsidiaries must not exceed 45% of the
parent bank's assets or \$50 billion,
whichever is less. National banks may
continue to have traditional operating
subsidiaries. Gramm-Leach-Bliley
prohibits operating subsidiaries of

national banks from doing anything that a bank cannot do directly.²

Amendments to the HSR Act Made by Gramm-Leach-Bliley

The HSR Act exempts from HSR premerger antitrust review several classes of acquisitions that are "already subject to advance antitrust review" by other agencies, thus avoiding duplicative reporting. See H.R. Rep. No. 1373, 94th Cong., 2d Sess. 6 (1976).

Section 133(c) of Gramm-Leach-Bliley amended the HSR Act's (c)(7) exemption, pertaining to transactions which require agency approval under section 3 of the BHCA, section 18(c) of the Federal Deposit Insurance Act ("FDI Act"), or section 10(e) of the Home Owners' Loan Act, and the HSR Act's (c)(8) exemption, pertaining to transactions which require agency approval under section 4 of the BHCA or section 5 of the Home Owners' Loan Act. Specifically, the HSR Act's (c)(7) exemption, 15 USC § 18a(c)(7), as amended by section 133(c)(1) of Gramm-Leach-Bliley, provides an exemption from HSR requirements for "transactions which require agency approval under * * * section 1828(c) of title 12 [section 18(c) of the FDI Act], or section 1842 of title 12 [Section 3 of BHCA], except that a portion of a transaction is not exempt under this paragraph if such portion of the transaction (A) is subject to section 4(k) of the Bank Holding Company Act of 1956; and (B) does not require agency approval under section 3 of the Bank Holding Company Act of 1956." (Language added by section 133(c)(1) is italicized.)

The HSR Act's (c)(8) exemption, 15 USC § 18a(c)(8), pertaining to transactions which require agency approval under section 4 of the BHCA, is amended in a parallel fashion by section 133(c)(2) of Gramm-Leach-Bliley. Section (c)(8) of the HSR Act exempts such transactions provided that the materials filed with the agency are contemporaneously submitted to the enforcement agencies at least thirty days prior to consummation.

Treatment of Mixed Bank and Non-Bank Transactions

It has always been the case that some transactions are "mixed," that is, have some aspects or portions subject to

regulatory agency premerger competitive review and approval and other aspects or portions not. Such mixed transactions can and have occurred involving all regulated industries, including banking, as discussed below. The PNO's longstanding position has been to treat the portion of a mixed transaction not subject to advance competitive review and approval by a regulatory agency as being subject to the HSR Act.³ Moreover, when the Commission (with the concurrence of the Department of Justice) promulgated § 802.6(b) of the rules in 1983 to exempt from the HSR Act "any transaction which requires approval by the [CAB] prior to consummation," the agencies made clear in the rule that the non-aeronautic part of a transaction—which did not require such approval—was essentially to be treated as a separate transaction potentially reportable under the HSR Act.

The PNO views the amendments of the HSR Act made by section 133(c) of the Gramm-Leach-Bliley Act as confirming that the PNO's longstanding treatment of mixed transactions is to be applied to transactions involving the banking industry. As described below, the non-bank portion of a transaction is subject to the reporting requirements of the HSR Act, regardless of whether the non-bank business is housed in an affiliate of a financial holding company or a financial subsidiary of a bank.⁴

The Joint Explanatory Statement of the Committee of Conference contained in the Conference Report demonstrates that Congress considered section 133(c) of Gramm-Leach-Bliley to be a clarification and affirmation of the existing treatment of mixed transactions under HSR:

This clarification for the new [financial holding company] structure is consistent with, and does not disturb, existing law and precedents under which mergers involving complex corporate entities, some parts of which are in industries subject to merger review by specialized regulatory agencies and other parts of which are not, are considered according to agency jurisdiction over their respective parts, so that normal H-S-R Act requirements apply to those parts that do not fall

within the specialized agency's specific authority. See 16 C.F.R. § 802.6.

Cong. Rec. H11296 (Nov. 2, 1999).

The PNO's interpretation of the HSR exemptions amended by Gramm-Leach-Bliley is further guided by the explanatory Floor Remarks of House Judiciary Committee Chairman Hyde:

Under current law, bank mergers are reviewed under special bank merger statutes, and they do not go through the Hart-Scott-Rodino merger review process that covers most other mergers. Now banks will be able to get into other businesses which they have not been able to do before.

The principle that we have followed is that when mergers occur, the bank part of that merger will be judged under the current bank merger statutes, and we do not intend any change in that process or in any of the agencies' respective jurisdictions. The non-bank part of that merger will be subject to the normal Hart-Scott-Rodino merger review by either the Justice Department or the Federal Trade Commission.

This is, in all likelihood, the result that would have been obtained anyway. Hybrid transactions involving complex corporate entities—some parts of which are in industries subject to merger review by specialized regulatory agencies and other parts of which are not—have occurred in the past. In those cases, the various parts of the consolidation were considered according to agency jurisdiction over the respective parts, so that normal Hart-Scott-Rodino Act requirements applied to those parts that did not fall within the specialized agency's specific authority. See, e.g., 16 CFR § 802.6. I think the precedents would have already dictated the desired result here.

In short, under this bill and the precedents, no bank is treated differently than it otherwise would be because it has some other business within its corporate family. Likewise, no other business is treated differently than it otherwise would be because it has a bank within its corporate family.

Cong. Rec. H11549 (Nov. 4, 1999).

The HSR Act (c)(7) exemption, as amended, expressly addresses acquisitions in which a bank and its financial affiliate are being acquired by a financial holding company (the affiliate structure). The financial affiliate portion of that transaction is not exempt from the HSR Act, because it is subject to section 4(k) and does not require Federal Reserve Board approval under section 3 of the BHCA. Gramm-Leach-Bliley does not expressly address acquisitions of a bank with a financial subsidiary by another bank or holding

² Gramm-Leach-Bliley also recognizes that state banks may have subsidiaries that engage in the same activities as financial subsidiaries, subject to certain restrictions. It does not eliminate existing authority for subsidiaries of state banks to engage in state-authorized activities not permissible for national banks or their subsidiaries, subject to approval by the Federal Deposit Insurance Corporation.

³ This PNO position has been noted by HSR practitioners and commentators. See, e.g., American Bar Association Section of Antitrust Law, Premerger Notification Practice Manual (1991 ed.) Interpretations 33, 36; S. Axinn, Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act (1996) § 6.06[3][b].

⁴ Of course, a comparable approach to mixed transactions also applies to transactions involving thrifts or thrift holding companies.

company (the subsidiary structure). Chairman Hyde explained the absence of an express clarification regarding the subsidiary structure similar to the clarification that expressly addresses the affiliate structure:

As the shape of the new activities in which banks were going to be permitted to engage through operating subsidiaries became clear in conference, the conferees ideally would have further revised the House language to make a similar clarification, regarding consolidations of non-banking entities that are operating subsidiaries of merging banks. But the operating subsidiary situations so closely parallels the precedents I have mentioned that a clarification for that situation was probably unnecessary.

Of course, whatever aspect of a banking merger is not subject to normal Hart-Scott-Rodino premerger review will be subject to the alternative procedures set forth in the Bank Merger Act and the Bank Holding Company Act, including the automatic stay. So one way or another, there will be some avenue for effective premerger review by the antitrust agencies. These alternative procedures would be in some ways more potentially disruptive to the merging banking entities, particularly when the antitrust concern involves non-banking entities. But it is our intent that the precedents will be followed.

Cong. Rec. H11549, Floor Statement of Chairman Hyde (Nov. 4, 1999).

Accordingly, consistent with the intent of Congress, the PNO interprets the HSR Act, as amended by section 133(c) of Gramm-Leach-Bliley, as reaching the non-bank portion of a transaction when housed in a financial subsidiary of a bank as well as when housed in an affiliate of a financial holding company. Thus, in acquisitions of a bank with a financial subsidiary (or of a holding company in which a bank has a financial subsidiary) by another bank or holding company, the acquisition of the financial subsidiary will be reportable under the HSR Act if the applicable size-of-person and size-of-transaction tests are met and no other exemption applies.

A Related Point

As noted above, the HSR Act (c)(7) exemption covers transactions which require agency approval under section 3 of the BHCA. The HSR Act (c)(8) exemption applies to transactions which require agency approval under section 4 of the BHCA if copies of materials filed with such agency are contemporaneously filed with the enforcement agencies at least 30 days

prior to consummation. If a bank holding company acquired another bank holding company that has one or more so-called "4(c)(8) affiliates,"⁵ approvals would be required under both section 3 and section 4 of the BHCA.⁶ The question has arisen—and may continue to arise with Gramm-Leach-Bliley in effect—whether parties to such a transaction need comply with the copies/waiting conditions of the (c)(8) exemption for the section 4 part of the transaction or may instead regard (c)(7) as covering the entire transaction. Based on discussions with Federal Reserve Board staff, we believe that in this type of transaction, the Federal Reserve Board review and approval under section 3 of the BHCA does not entail competitive review and approval of the section 4 portion of the transaction. Accordingly, parties to a transaction that involves approvals under section 3 and section 4 of the BHCA should comply with the copies/waiting conditions of the HSR Act (c)(8) exemption for the section 4 part of the transaction.⁷

The following Examples illustrate the application of this Formal Interpretation. In these Examples, "subject to HSR" means that the parties will have to comply with HSR notification and waiting requirements if applicable size criteria and thresholds are met and no other exemption applies.

1. Financial Holding Company A acquires Bank B. B does not own any financial subsidiaries. This is a transaction which requires Federal Reserve Board approval under section 3 of the BHCA and there is no non-bank part of this merger. The transaction is exempt from the HSR Act under (c)(7).

2. Financial Holding Company A acquires Securities Company B. This transaction does not require banking agency approval under any of the relevant banking statutes, and is thus not covered by the HSR Act (c)(7) or (c)(8) exemptions. The acquisition is subject to the HSR Act.

3. Financial Holding Company A acquires Financial Holding Company B. B owns banks and financial affiliates,

including insurance companies and securities companies. While A's acquisition of B's banks is exempt under HSR section (c)(7), the acquisition of the financial affiliates is subject to HSR. This situation is expressly addressed by the language of section (c)(7) as amended by Gramm-Leach-Bliley. The acquisition of the financial affiliates is a portion of a transaction that is subject to section 4(k) of the BHCA and does not require agency approval under section 3 of the BHCA. If in this Example B owned 4(c)(8) affiliates such as thrifts in addition to banks and financial affiliates, A's acquisition of B's 4(c)(8) affiliates would require Federal Reserve Board approval under section 4 of the BHCA. HSR Act section (c)(8) as amended by Gramm-Leach-Bliley would exempt A's acquisition of B's 4(c)(8) affiliates (provided that A complied with the requirements of that section—see Example 7), but the acquisition of the financial affiliates would still be subject to HSR. Under HSR Act sections (c)(7) and (c)(8) as amended, the acquisition of the financial affiliates would be a portion of a transaction that is subject to section 4(k) of the BHCA and does not require agency approval under section 3 or section 4 of the BHCA.

4. Securities company A will acquire Bank B. B does not own any financial subsidiaries. In order to make the acquisition, A must apply to become a financial holding company. Because the acquisition of B requires Federal Reserve Board approval under section 3 of the BHCA and there is no non-bank business being acquired, this transaction is exempt under HSR Act section (c)(7). See Example 1.

5. Bank A acquires Securities Company B as a financial subsidiary under Gramm-Leach-Bliley. This transaction does not require banking agency approval under any of the banking statutes referenced in the HSR Act, and is thus not exempted by HSR Act sections (c)(7) or (c)(8). The acquisition is subject to HSR. See Example 2. Note that if Bank A, instead of acquiring a financial subsidiary, had acquired Mortgage Company B as a traditional operating subsidiary, either before or after the Gramm-Leach-Bliley Act takes effect, that transaction also would not require banking agency approval under any of the relevant banking statutes specified in the HSR Act (c)(7) and (c)(8) exemptions, and thus would be subject to HSR.

6. Bank A from Example 5, which now holds Financial Subsidiary B, is acquired by Bank C. While C's acquisition of A requires agency approval (by the Office of the

⁵ A bank holding company can acquire a company engaged in activities closely related to banking if it gets approval under section 4 of the BHCA.

⁶ By way of contrast, when a financial holding company acquires another financial holding company that has section 4(k) financial affiliates, the acquisition of the financial affiliates does not require Federal Reserve Board approval.

⁷ In the past, the PNO informally advised that the (c)(7) exemption could be relied on exclusively in such a transaction. This advice was based on the belief that all portions of the transaction were reviewed by the Federal Reserve Board under section 3. This view is no longer held by the PNO.

Comptroller of the Currency, Federal Reserve Board or Federal Deposit Insurance Corporation, depending on whether C is a national bank, state member bank, or state non-member bank) under section 18(c) of the FDI Act and is exempt under HSR section (c)(7), the acquisition of financial subsidiary B is subject to HSR. If in this example C is not a Bank but rather a financial holding company, bank holding company or a securities firm, the result is the same. The non-bank portion of a merger is subject to HSR regardless of whether the non-bank business is housed in an affiliate of a financial holding company or a financial subsidiary of a bank.

7. A and B are bank holding companies that have not become financial holding companies under Gramm-Leach-Bliley. They may engage in activities closely related to banking under section 4(c)(8) of the BHCA, but not in the broader array of activities allowed under section 4(k). A acquires B, including the banks owned by B and non-bank section 4(c)(8) affiliates. The acquisition of the banks requires Federal Reserve Board approval under section 3 of the BHCA and is exempt under HSR Act section (c)(7). The acquisition of the non-bank affiliates requires Federal Reserve Board approval under section 4 of the BHCA and is exempt under HSR Act section (c)(8) if copies of all information and documents filed with the Federal Reserve Board are filed contemporaneously with the FTC and DOJ at least 30 days prior to consummation. Although the parties need not make HSR filings, (c)(7) does not exempt the entire transaction, and the copies/30-day requirements of the (c)(8) exemption must be observed for the non-banking affiliates.

8. A is a national bank that has one or more operating subsidiaries but does not have any financial subsidiaries. Under Gramm-Leach-Bliley, A's operating subsidiaries cannot engage in any activities that A cannot engage in directly. If A is to be acquired by another entity, the PNO will view this for purposes of HSR as a purely banking transaction that requires agency approval under section 3 of the Bank Holding Company Act or section 18(c) of the FDI Act and not as a mixed transaction. The entire transaction will be exempt under HSR Act section (c)(7).

9. Ten entities plan to form and each have a 10% interest in a new corporation, A, which will own and operate an ATM network. Formation of joint venture corporations is generally analyzed under § 801.40 of the rules, which may require one or more of the contributors to the joint venture to file

under the HSR Act for the acquisition of voting securities of the joint venture. For HSR purposes, the formation of A involves ten potentially reportable acquisitions. Each contributor that is a bank holding company will require Federal Reserve Board approval for its acquisition under section 4 of the BHCA, and accordingly, each such acquisition is exempt under HSR Act section (c)(8). In addition, a special rule, § 802.42, applies, if at least one of the ten entities forming A is a bank holding company whose acquisition of A is exempt pursuant to the (c)(8) exemption. In that case, under § 802.42, the contributors that are not bank holding companies and whose acquisitions of A are not exempted by HSR Act section (c)(8) receive a partial exemption. These entities can file the affidavits described in Rule 802.42(a) in lieu of filing HSR Forms, but otherwise remain subject to the Act and Rules (e.g., waiting period; second requests).

10. Corporation A from Example 9, an ATM network owned by ten entities, now plans to acquire another ATM network, B. For HSR purposes, there will be one acquisition with A as the acquiring person. If any of the ten entities that own A is a bank holding company, it will need Federal Reserve Board approval under section 4 of the BHCA. The PNO will apply the rationale of the HSR Act section (c)(8) and § 802.42 in such an instance. Accordingly, the PNO will treat A's acquisition of B as exempt under HSR Act section (c)(8) if: (i) At least one of the entities owning A must get Federal Reserve Board approval under section 4 of the BHCA; and (ii) each such entity that must get such Federal Reserve Board approval complies with the requirements of HSR section (c)(8) by filing copies of all information and documentary material filed with the Federal Reserve Board with the FTC and DOJ contemporaneously and at least 30 days prior to consummation of the proposed transaction. If A's acquisition of B does not require any approval under section 4 of the BHCA (because none of the owners of A is a bank holding company), then A's acquisition of B will be subject to HSR. The PNO believes that this treatment of mergers of ATM networks assures effective premerger competitive review while avoiding duplicative review and minimizing burdens and costs for the parties.

Donald S. Clark,
Secretary.

[FR Doc. 00-8426 Filed 4-4-00; 8:45 am]

BILLING CODE 6750-01-P

GENERAL ACCOUNTING OFFICE

[Documents No. JFMIP-SR-00-02]

Joint Financial Management Improvement Program (JFMIP)—Federal Financial Management System Requirements (FFMSR)

AGENCY: Joint Financial Management Improvement Program (JFMIP).

ACTION: Notice of document availability.

SUMMARY: The JFMIP is seeking public comment on an exposure draft entitled "Property Management Systems Requirements," dated April 2000. The draft is the first FFMSR document to address standard requirements for federal agency property management systems. The document is intended to assist agencies when developing new property management systems and when improving or evaluating existing property management systems. It provides the baseline functionality that property management systems must have a support agency missions and comply with laws and regulations. The final issuance of this JFMIP Property Management Systems Requirements document will provide the functional requirements definition necessary for agencies to comply with mandates of the Chief Financial Officers Act and the Federal financial Management Improvement Act.

DATES: Comments are due by May 31, 2000.

ADDRESSES: Copies of the exposure draft have been mailed to agency senior financial officials, together with a cover memo listing the questions on which JFMIP is soliciting feedback. The exposure draft and cover memo are available on the JFMIP website: <http://www.financenet.gov/financenet/fed/jfmip/jfmipexp.htm>. Comment should be addressed to JFMIP, 1990 K Street, NW, Suite 430, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Dorothy Sugiyama, (202) 219-0536 or via Internet: dorothy.sugiyama@gsa.gov

SUPPLEMENTARY INFORMATION: The Federal Financial Management Improvement Act (FFMIA) of 1996 mandated that agencies implement and maintain systems that comply substantially with Federal Financial management systems requirements, applicable Federal accounting standards, and the U.S. Government Standard General Ledger at the transaction level. The FFMIA statute codified the JFMIP financial systems requirements documents as a key benchmark that agency systems must meet to be substantially in compliance with systems requirements provisions