[redacted]

[redacted]

[redacted]

September 5, 1991

This material may be subject to the confidentiality provision of Section 7A (h) of the Clayton Act which restricts release under the Freedom of Information Act

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Pre-Merger Notification Office
Bureau of Competition
Federal Trade Commissions
Sixth Street and Pennsylvania Avenue, N.W.
Room 303
Washington, D.C. 20580
FAX: (202) 326-2050

Attention: Hy David Rubenstein
Staff Attorney

Re: Identification No. [redacted]

Acquisition of [redacted]

Dear Mr. Rubenstein:

Reference is hereby made to the Hart-Scott-Rodino Pre-Merger Notification Form (with documentary attachments thereto (the "H-S-R Notice") relating to the above-referenced

[redacted]

proposed acquisitions (the "Proposed Acquisitions") filed with your office on August 16, 1991 by [redacted], the ultimate parent of [redacted]. As described in the H-S-R Notice, [redacted] (the "Seller") has entered into (i) an Agreement and Plan of Merger dated [redacted] (the "Merger Agreement") with the Buyer, whose ultimate parent is [redacted] pursuant to which [redacted] will merge with [redacted] a wholly-owned subsidiary of the Buyer, becoming a wholly owned subsidiary of the Buyer and (ii) a Purchase Agreement dated [redacted] (the "Purchase Agreement") with the Buyer pursuant to which the Seller will sell to the Buyer 100% of the capital stock of [redacted]. The purchase price for the sale of [redacted] to the Buyer is [redacted]. The purchase price for the sale of [redacted] to the Buyer is [redacted]. The Buyer has the option under each of the Merger Agreement and Purchase Agreement to pay the purchase price to the Seller in either cash or Class A Common Stock of the Buyer. The Seller will not accept Class A Common Stock of the Buyer to the extent that the amount of such stock delivered, when combined with shares of Class A Common Stock beneficially owned by the beneficial owners of the Sellers within the meaning of Section 16 with the Security Exchange Act of 1934 has amended, will equal or exceed 10% of the issued and outstanding Class A Common Stock of the Buyer. In the event that the Buyer elects to pay the purchase price in Class A Common Stock of the Buyer, it is the Seller's intention to sell most of the securities so acquired shortly after the acquisition and distribute the remaining shares to various investors in the Seller.

Prior to submitting the H-S-R Notice, this office had communications with the Federal Trade Commission describing the transaction. At that time, the Federal Trade Commission (Staff) initially indicated that the acquisition of stock by the Seller would be exempt from the filing requirements under the Act due to the fact that such acquisition was solely for investment purposes. Subsequent to filing the H-S-R Notice with the Federal Trade Commission, the Federal Trade Commission (Staff) indicated that the acquisition of stock of the Buyer by the Seller would not be considered "solely for investment purposes" because the Buyer and [redacted] are allegedly competitors.

This letter, submitted at the request of the Federal Trade Commission, demonstrates that (i) [redacted] and the Buyer are not competitors and (ii) the Seller's receipt of stock in the Buyer fits squarely within the "solely for investment purposes" exception Section 7A(c)(9) of the Act.

A. [redacted] and the Buyer are not competitors

Based upon discussions with [redacted] sole involvement in the commercial consumer cellular telephone industry is through the Seller. Although the Seller and the Buyer are in the same product market, they do not compete in the same geographic market. The geographic markets of cellular telephone companies were determined by the Federal Communications Commission (the "FCC") pursuant to regulation, utilizing Metropolitan Statistical Areas ("MSAs") and Rural Statistical Areas ("RSAs"). See 47 CFR §22.903 (a copy of which is attached hereto as Exhibit A). For a cellular telephone company to operate in any given cellular market, the FCC's prior authorization is required.

In any cellular market, the FCC authorizes only two competing systems, one operating on the B frequency block and the other operating on the A frequency block. 47 CFR §22.902(b) (a copy of which is attached hereto as Exhibit A). The license on the B frequency block is initially granted to the local wireline telephone company operating in that cellular market and the license on the B frequency block is initially granted to a non-wireline operator.

Within its assigned [redacted] and [redacted] the authorized cellular telephone company identifies in its initial license application to the FCC its Cellular Geographic Service Area ("CGSA"), the size of which may not exceed the applicable MSA or RSA boundary.[1/] The CGSA is the market in which the license holder for that [redacted] or [redacted] sells its product - cellular telephone service. Outside of its CGSA,

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1/ A de minimis overlap of cellular markets is permissible under FCC regulations due to the inherent nature and contours of the radio signal. 47 CFR §22.903(a). This overlap, however, is irrelevant to the determination of the geographic market because it is insignificant and because it is not essential to competitive effectiveness. See United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

cellular telephone service would be provided by a carrier licensed to operate in the next adjacent CGSA (assuming a licensed operator existed therein).[2/] The two licensed cellular operators compete within their MSA or RSA by expanding geographic coverage (their CGSA), devising service plans, adding special features and cutting telephone prices. Each cellular geographic market is discreet with only two competitors to each market and a competitor gains access to that market solely by obtaining FCC authorization to provide service on one of the two frequency blocks in that cellular market.

[redacted] Following the consummation of the proposed acquisitions, will operate only in the following MSAs or RSAs and compete only with the following persons:

2/ Although many CGSAs are coterminous with the MSA or RSA boundaries, the FCC's regulations contemplate that cellular licensees may have CGSAs that comprise only a portion of an RSA or MSA. For example, in an MSA or RSA, there may be several B Block licensees, each with a different non overlapping CGSA. This has occurred in some RSAs where the RSA had more than one wireline operator, all seeking to provide cellular services in that RSA. Competition within any cellular market, however, is still between only two cellular companies due to the fact the licensees authorized on the same frequency block operate in different CGSAs or cellular markets. Thus, a cellular consumer seeking to obtain cellular services in any particular cellular market only has two companies from which to choose - a Block B licensee and a Block A licensee.

TABLE I

Competitors of the Seller in Each Cellular Market[3/]

MSA or RSA	Block A Competitor
[redacted]	

The FCC's definition of geographic cellular markets fully comports with case law. The United States Supreme Court reviewed an analogous, but less compelling set of facts, in United States v. Philadelphia National Bank. In Philadelphia National Bank, the Court held that, even though two banks proposing to merge did business outside of the four-county Philadelphia metropolitan area, because state law authorized such banks to branch only in such four-county area and because convenience of location is essential to competitive effectiveness in banking, the geographic market of the merging banks was limited to the four-county Philadelphia metropolitan area. Id., 374 U.S. 321, 361 (1963). See also Town of Concord, Mass. v. Boston Edison Co., 721 F.Supp 1456, 1459-60 (D. Mass 1989); United States v. Waste Management, Inc., 743 F.2d 976, 980 (2d Cir. 1984) (Dallas and Fort Worth areas constitute separate waste collection markets despite their close proximity (45 to 50 minute drive) due to existing competitors exclusivity to either city).

Unlike a bank, which can take deposits and originate loans beyond its immediate service area, a cellular telephone company is unable to provide services beyond its CGSA. C.f. Metro Mobile CTS, Inc. v. New Vector Communications, Inc., 661 F.Supp. 1504 (D. Ariz. 1987) (court relied on the FCC geographic market definition in its decision). Due to the need for FCC authorization to operate in any cellular market, the Seller and the Buyer can only effectively provide services to persons within their respective MSAs or RSAs. Clearly, under the holdings of Town of Concord, Waste Management and

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3/ Based upon review of The Status of MSA Cellular Markets and The Status of RSA Cellular Markets, each prepared by FCC, as of May 15, 1991 and July 11, 1991, respectively.

Philadelphia National Bank, the geographic market of a cellular telephone company is the MSA or RSA in which it is licensed to operate. Therefore, the Seller and the Buyer, operating in different MSAs and RSAs, are not competitors.

B. The facts and circumstances regarding the Seller's acquisition of stock in the Buyer clearly indicates the Seller's investment intent.

So long as a person acquiring stock in another does not intend to participate in the formulation of basic business decisions of an issuer, the acquisition of such stock is solely for investment purposes and therefore exempt from the filing requirements under the Act. 43 Fed. Reg. 33465 (a copy of which is attached hereto as Exhibit B). All extrinsic evidence in the present acquisition indicates the investment intent of the Seller's acquisition of the stock.

1. The decision as to the form of payment - stock or cash - rests with the Buyer, not the Seller.

2. The amount of stock to be received by the Seller constitutes a small portion of the outstanding stock of the Buyer, clearly an amount insufficient to influence management where the ultimate parent of the Buyer, [redacted] is an individual.

3. It is the intention of the Seller to sell most of the stock shortly acquired as part of the purchase price after consummation of the acquisitions contemplated by the Purchase Agreement and the Merger Agreement, and to distribute the rest among its investors, an intent that is wholly in line with the "solely for investment purposes" exemption.

4. As is demonstrated above, neither the Seller nor [redacted] competes with the Buyer.

5. The Agreements not to Compete to be entered into between the Seller's subsidiaries and the Buyer cover only the [redacted] and [redacted] areas.

CONCLUSION

As demonstrated above, any acquisition of stock of the Buyer by the Seller is merely a form of payment of the purchase price for the Proposed Acquisition and made solely

for investment purposes. For the reasons stated above, [redacted] should not be required to file a pre-merger notification in connection with its acquisition of stock in the Seller.

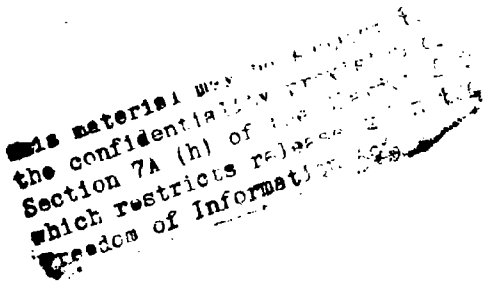
Since this transaction is on a short timetable, I respectfully request expedited review of this letter. If you have any questions, please don't hesitate to call me.

Very truly yours,

[redacted]

cc: [redacted]

EXHIBIT A


This material may be withheld
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Section 7A (h) of the
which restricts release
Freedom of Information

est, convenience and necessity would be served by a grant thereof.

(b) Neither Ameritech Information Technologies Corp., Bell Atlantic Corp., BellSouth Corp., NYNEX Corp., Pacific Telesis Group, Southwestern Bell Corp., or US West, Inc., their successors in interest, nor any affiliated entity, may engage in the provision of cellular service except as provided for in paragraphs (c) and (d), or as otherwise authorized by the Commission.

(c) A carrier subject to the restriction in paragraph (b) of this section, may, subject to other provisions of law, have a controlling or lesser interest in, or be under common control with a separate corporate entity that furnishes cellular service provided the following conditions are met:

(1) Each such separate corporation shall obtain access to landline exchange and transmission facilities necessary for the provision of cellular service on the same basis as those facilities are available to other entities, and may not own any facilities for the provision of landline telephone service;

(2) Each such separate corporation shall operate independently in the furnishing of cellular service. It may include, as part of its operations, the furnishing of other mobile services offered pursuant to Part 22 of the Commission's Rules. Each such separate corporation shall maintain its own books of account, have separate officers, utilize separate operating, marketing, installation, and maintenance personnel, and utilize separate computer and transmission facilities in the provision of cellular services. Any research or development performed on a joint or separate basis for the subsidiary must be done on a compensatory basis; and

(3) All transactions between the separate corporation and the carrier or its affiliates which involve the transfer, either direct or by accounting or other record entries, of money, personnel, resources, other assets or anything of value, shall be reduced to writing. A copy of any contract, agreement or other arrangement entered into between such entities with regard to interconnection with landline network exchange and transmission facilities shall be filed with the Commission within thirty days after the contract, agreement or other arrangement is made. A copy of all other contracts, agreements or arrangements between such entities shall be kept available by the separate corporation for inspection upon reasonable request by the Commission. The provision shall not apply to any transaction governed by the provision of an effective state or Federal tariff.

(d) A carrier subject to the restriction in paragraph (b) of this section:

(1) Shall not engage in the sale or promotion of cellular services on behalf of the separate corporation or sell, lease or otherwise make available to the separate corporation any transmission facilities which are used in any way for the provision of its landline telephone services, except on a compensatory, arms-length basis; this section shall not prohibit joint advertising or promotional efforts by the landline carrier and its cellular affiliate; and

(2) May not provide to any such separate corporation any customer proprietary information unless such information is available to any member of the public on the same terms and conditions.

[47 FR 10035, Mar. 9, 1982, as amended at 50 FR 10036, Mar. 13, 1985; 51 FR 37023, Oct. 17, 1986; 53 FR 23766, June 24, 1988]

§ 22.902 Frequencies.

(a) The frequencies available in the Domestic Public Cellular Radio Telecommunications Service are listed below in accordance with Frequency Allocations of § 2.106. Each frequency Block available for use by cellular systems in this service shall be assigned to a single applicant in any cellular system service area. A cellular licensee may use any frequency from its Block at any of its authorized locations, subject to prior coordination as described in paragraph (d) of this section. Only two cellular systems may be authorized in each such area. In the event harmful interference occurs or appears likely to occur between two or more radio systems and such interference cannot be resolved between the licensees thereof, the Commission may require the licensees to make such changes in operating techniques or equipment as it may deem necessary to avoid such interference.

(b) For cellular systems the assignment of frequencies will be divided into two blocks. Assignments will be made from the frequencies listed for cellular Systems A and B. Common carriers not also engaged in the business of affording public landline message telephone service will be assigned frequencies from Cellular System A. Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market; except that, in the final cellular application phase for any initially unapplied for or unlicensed area, either within or without a Metropolitan Statistical Area (MSA) or New England County Metropolitan Area (NECMA), a cellular applicant may apply for either frequency block and the applicant shall indicate in its application which it prefers to be assigned.

(1) Cellular System A: 416 frequency pairs with 30 kHz channel spacing as follows:

Mobile frequencies

824.040, 824.070 ..... 834.990 MHz
845.010, 845.040 ..... 846.480 MHz

Base frequencies

869.040, 869.070 ..... 879.990 MHz
890.010, 890.040 ..... 891.480 MHz

(2) Cellular System B: 416 frequency pairs with 30 kHz channel spacing as follows:

Mobile frequencies

835.020, 835.050 ..... 844.980 MHz
846.510, 846.540 ..... 848.970 MHz

Base frequencies

880.020, 880.050 ..... 889.980 MHz
891.510, 891.540 ..... 893.970 MHz

(c) 21 control channel pairs will be assigned in each cellular system.

(1) For systems operating on the frequencies specified for Cellular System A, the 21 channel pairs are: 834.390 MHz through 834.990 MHz and 879.390 MHz through 879.990 MHz.

(2) For systems operating on the frequencies specified for Cellular System B, the 21 channel pairs are: 835.020 MHz through 835.620 MHz and 880.020 MHz through 880.620 MHz.

(d) *Frequency coordination.* (1) All permittees or licensees in the Domestic Public Cellular Radio Telecommunications Service shall coordinate proposed frequency usage with existing users in Cellular Geographic Service Areas within 75 miles of all base stations affected, and with tentative selectees and other non-mutually exclusive pending applicants whose facilities could affect or be affected by the new proposal in terms of intersystem frequency interference or restricted ultimate system capacity. This coordination requirement shall also apply to permissive changes (i.e. changes in frequency assignment not requiring prior Commission approval) within an authorized Cellular Geographic Service Area.

(2) All permittees and licensees shall cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum; however, the party being coordinated with is not obligated to suggest changes or reengineer a proposal in cases involving conflicts. All permittees and licensees shall make every reasonable effort to avoid blocking the growth of other systems that are likely to need additional capacity in the foreseeable future.

(3) Where technical problems are resolved by an agreement or operating arrangement between the parties that would require special procedures to be taken to reduce the likelihood of intersystem interference or would result in a reduction of quality or capacity of either system, the new licensee or permittee shall notify the Commission. Upon making a permissive change, a licensee shall notify the Commission of its frequency usage and report on its coordination as required under this subsection.

(e) All mobile units must initially be capable of communicating on the 666 channels established by order in

Docket No. 79-318, released May 4, 1981.

[46 FR 27674, May 21, 1981, as amended at 49 FR 23647, June 7, 1984; 50 FR 51527, Dec. 18, 1985; 51 FR 35649, Oct. 7, 1986; 51 FR 37400, Oct. 22, 1986]

§ 22.903 Cellular system service areas.

(a) The Cellular Geographic Service Area (CGSA) of the cellular system shall be defined by the applicant as the area intended to be served. No CGSA, which includes areas within a Metropolitan Statistical Area (MSA), or in New England, a New England County Metropolitan Area (NECMA), as modified in paragraph (e) of this section, below, may extend beyond the boundaries of the MSA or NECMA, except where any such extensions are *de minimus* and do not include areas within another central MSA or NECMA. For MSAs and NECMAs below the top 90, the boundaries of the CGSA must include at least 75% of either the land area or population of the MSA or NECMA. The CGSA(s) must be drawn on one or more U.S. Geological survey map(s) with a scale of 1:250,000. Within the CGSA, the applicant must depict each base station site and its respective 39 dBu contour as determined by the methods described in paragraph (c) of this section. An applicant must state that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA.

(1) *Rural Service Areas.* At the time of initial application filing, no CGSA or 39 dBu contour may extend beyond the boundaries of the Rural Service Area (RSA) into another RSA or any MSA or NECMA, or beyond the coastline of the Gulf of Mexico except to provide service to the Florida Keys. Any such initial application that has a CGSA or 39 dBu contour that extends into another RSA or MSA or NECMA, or beyond the coastline of the Gulf of Mexico will be returned as defective. An applicant may propose multiple CGSAs within the RSA. The 75% coverage of either the land area or the population of the MSA or NECMA does not apply to RSAs. The CGSA must be drawn on one or more U.S. Geological survey map(s) with a scale of 1:250,000. For RSAs the CGSA map need only depict the area(s) encompassed by any CGSA(s) within the RSA (and that portion of the RSA visible on the map) and must clearly depict on the face of the map the longitude, latitude and scale pursuant to § 22.2. Within the CGSA, the applicant must depict each base station site and its respective 39 dBu contour as determined by the methods described in paragraph (c) of this section. An applicant must state that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA.

(b) The service area boundary described in paragraph (a) of this section shall be regarded as determining the limits of the cellular system service area for the purposes of providing protection to such systems, and of defining the area within which we will recognize adverse effects for determining standing.

(c) For the purpose of establishing the reliable service area of a station and performing interference studies, an applicant must use procedures consistent with § 22.504 and F.C.C. Report No. R-6406, "Technical Factors Affecting The Assignment of Facilities In The Public Mobile Service," by Roger B. Carey. Standards and procedures presently applied to stations in the 450-460 MHz band should be used. Any other interference studies utilizing other procedures, which the applicant believes the Commission should consider, in addition to the above required study, may also be submitted and will be considered in accordance with Public Notice, May 2, 1980, Mimeo 30893, 45 FR 30202 (47 FR 2d 666 (1980)). Furthermore, in cases where the applicant believes that Report No. R-6406 does not accurately depict the realistic 39 dBu service contour(s) of the base station(s) proposed, the applicant may submit for the Commission's consideration alternative propagation studies in addition to the above required studies. All supporting data and calculations must be included with the results of the studies.

(d) An applicant whose proposal would extend any 39 dBu contour, as calculated by F.C.C. Report No. R-6406, outside of its presently authorized CGSA will be deemed to be applying for a change in its CGSA.

(e) Listed below are the top 30 MSAs, as modified for purposes of this proceeding in order to have service areas more closely aligned with actual mobile service marketing areas. All other MSAs are in accordance with those listed by the Office of Management and Budget, Metropolitan Statistical Area.

"MODIFIED MSAs"

1. New York, NY/Nassau-Suffolk, NY/Newark, Jersey City and Paterson-Clifton-Passaic, NJ
2. Los Angeles-Long Beach/Anaheim-Santa Ana-Garden Grove/Riverside Santa Bernardino-Ontario, CA
3. Chicago, IL
4. Philadelphia, PA
5. Detroit/Ann Arbor, MI
6. Boston-Lowell-Brockton-Lawrence Haverhill, MA
7. San Francisco-Oakland, CA
8. Washington, DC-MD-VA
9. Dallas-Fort Worth, TX
10. Houston, TX
11. St. Louis, MO-IL
12. Miami/Fort Lauderdale-Hollywood, FL
13. Pittsburgh, PA
14. Baltimore, MD
15. Minneapolis-St. Paul, MN-WI
16. Cleveland, OH
17. Atlanta, GA
18. San Diego, CA
19. Denver-Boulder, CO
20. Seattle-Everett, WA
21. Milwaukee, WI
22. Tampa-St. Petersburg, FL
23. Cincinnati, OH-KY-IN
24. Kansas City, MO-KS
25. Buffalo, NY
26. Phoenix, AZ
27. San Jose, CA
28. Indianapolis, IN
29. New Orleans, LA
30. Portland, OR-WA

[46 FR 27674, May 21, 1981, as amended at 47 FR 10036, Mar. 9, 1982; 52 FR 22472, June 12, 1987; 53 FR 18564, May 24, 1988; 53 FR 26073, July 11, 1988]

§ 22.904 Power limitations.

Stations in this service shall not be permitted to exceed the effective radiated power indicated below.

	Watts (ERP)
Base stations	500
Mobile stations	7
Auxiliary test stations	7

[53 FR 52175, Dec. 27, 1988]

§ 22.905 Antenna height-power for base stations.

In view of the fact that the predominant characteristic of cellular systems is frequency reuse within a given service area, the effective radiated power (ERP) of base stations with transmitting antennas in excess of 500 feet above average terrain (AAT) must be reduced as shown in the table below, unless coordination is performed and agreements are reached with all neighboring carriers that are within 75 miles.

Antenna height (AAT in feet)	Watts (ERP)
500	500
550	397
600	323
700	223
800	166
900	126
1,000	98
1,250	57
1,500	37
2,000	20
2,500	13
3,000	10
3,500	9
4,000	8
5,000	7

For AATs between the above listed values, linear interpolation should be used.

[53 FR 52175, Dec. 27, 1988]

§ 22.906 Types of emissions and modulation requirements.

(a) Stations in this service shall normally be authorized to use only type F3E emissions for voice transmissions (radiotelephony).

(1) F3E emissions shall be used only on the non-control frequencies designated in § 22.902 of this part.

(2) The instantaneous frequency deviation shall be limited to ±12 kHz.

(3) The maximum audio frequency required for satisfactory radiotelephone intelligibility in this service is considered to be 3 kHz.

(4) Preceding the deviation limiter required under paragraph (d) of this section, a compressor circuit followed by a preemphasis stage shall be required for F3E radiotelephony signal processing. These two circuits shall have the characteristics specified in

EXHIBIT B

Notification thresholds and the exemption conferred by § 802.21 apply only to acquisitions of voting securities. Any acquisition of assets that satisfies the three tests of section 7A(a) and is not exempted by the act and rules is reportable. In particular, any acquisition as a result of which the acquiring person would hold 15 percent or $15 million of the acquired person's assets is reportable, even though the reporting person may have previously filed notification with respect to an acquisition of assets from the same person. However, note that under § 801.13(b) assets cease to be assets of the acquired person after 180 days.

The other occurrences of the term are relatively minor and relate to the same purposes. For example, § 802.23(a) is a provision similar to § 802.21 in connection with tender offers. Section 803.7 uses the term in explaining the impact of that rule upon § 802.21. Several rules relating to the application of section 7A(a)(3) also refer to § 801.1(h)(1) in order to assure consistency between the rules and the act. See, e.g., §§ 801.14, 801.21.

BACKGROUND INFORMATION TO § 801.1(h)

Under § 801.13(a) every acquisition as a result of which the acquiring person would hold more than 15 percent or $15 million of the voting securities of the acquired person becomes a reportable acquisition if the tests of section 7A(a) (1) and (2) are satisfied. The Commission has determined, however, that to interpose the notification and waiting period requirements before every acquistion above the 15-percent or $15 million level would entail a burden on reporting persons and the enforcement agencies not justified by the additional information it would provide. See the Statement of Basis and Purpose to § 802.21. The definition of "notification threshold" identifies the points at which reporting subsequent to the 15-percent or $15 million level will be required.

The number of notification thresholds--four—was chosen because it serves the enforcement interests of the agencies without excessively taxing their administrative resources or burdening reporting persons. The particular percentage levels were selected as notification thresholds because they are appropriate levels for the agencies to review the significance of holdings of voting securities. Subparagraph (h)(1), the criterion of section 7A(a)(3), was selected by Congress as the first appropriate level. The second and third notification thresholds are appropriate because the act applies to the acquisition of the stock of companies ranging from quite large to quite small, and from widely to closely held corporations. Thus, working control or significant influence may arise at different points with respect to different companies. The 15-percent (when applicable) and 25-percent thresholds give the enforcement agencies adequate opportunities to assess the ability of a significant minority shareholder to influence or direct management.

The second threshold, which did not appear in the revised rules, was inserted because for larger companies, stock valued at $15 million may represent substantially less than 15 percent of the total number of outstanding shares. A holding that posed no antitrust concern at such a low percentage level may pose concern well before reaching the 25 percent threshold.

The final 50 percent threshold is appropriate because that level represents veto power, if not actual control, and because section 7A(c)(3) exempts acquisitions prior to which the acquiring person already held at least 50 percent of the shares.

The term "notification threshold" first appeared in the revised rules as § 802.21(a), but has been transferred to § 801.1, in which other terms are defined. The dollar amount in subparagraph (h)(1) has been corrected to an amount *exceeding* $15 million, to conform with section 7A(a)(3)(B). The reference in the revised rules to § 802.64 were necessary to accommodate institutional investors that first filed notification not at 15 percent or $15 million, but at the higher limits in that rule. However, § 802.21 has been reworded so that different notification thresholds for institutional investors are no longer required. Note that institutional investors, like other persons, are subject to the 25 percent and 50 percent thresholds.

SECTION 801.1(i)(1) SOLELY FOR THE PURPOSE OF INVESTMENT

The phrase "solely for the purpose of investment" occurs in two statutory exemptions, section 7(A)(c) (9) and (11), and in two exemption rules, §§ 802.9 and 802.64. The definition provides that so long as a person does not intend to participate in the formulation of the basic business decisions of an issuer, that person holds or acquires the issuer's voting securities "solely for the purpose of investment."

BACKGROUND INFORMATION TO § 801.1(i)(1)

The purpose of this definition is to limit the availability of the exemptions contained in section 7A(c) (9) and (11) of the act and §§ 802.9 and 802.64 of the rules to situations in which the acquiring person or the holder has no intention of participating in the management of the issuer. For further information, see the Statements of Basis and Purpose to §§ 802.9 and 802.64. Although the definition has been reworded to conform with the language of the act, its substance is unchanged from § 801.1(i). Original § 802.85(c) included control holdings from the exception, but the original rules did not otherwise define the term.

In the FEDERAL REGISTER notice accompanying the revised rules, 42 FR at 39047 (Aug. 1, 1977), comments were invited on the suggestion that this definition be further limited by requiring that stock purchased for investment purposes not be voted. The comments (e.g., 1020, 1050, 1051, 1058, 1067, 1070, 1090, 1101, 1103, 1110, 1111) were unanimously negative, arguing that voting for directors, without more, was not inconsistent with investment purpose. The Commission has decided not to incorporate this limitation into the final definition. Therefore, merely voting the stock will not be considered evidence of an intent inconsistent with investment pupose. However, certain types of conduct could be so viewed. These include but are not limited to: (1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer. The facts and circumstances of each case will be evaluated whenever any of these actions have been taken by a person claiming that voting securities are held or acquired solely for the purpose of investment and thus not subject to the act's requirements. In appropriate circumstances the Commission may investigate to determine whether an enforcement action under section 7A(g)(1) is warranted.

Comment 1059 suggested that section 7A(c)(9) refers only to acquisitions, but not holdings, for investment purposes, and therefore this rule should not refer to holdings. But section 7A(c)(9) does refer to holdings: it provides that an acquisition "solely for the purpose of investment" is exempt only if, as a result of the acquistion, the amount of stock "acquired or *held*" does not exceed 10 percent of the issuer's outstanding shares (emphasis supplied). Furthermore, the reference to "holding" in the rule is necessary because of the possibility of multiple acquisitions below either the 10 percent limitation of section 7A(c)(9) or the 15 percent and $25 million level of § 802.64(b)(5). In such situations, the question arises whether previously acquired stock is "held" and thus must be aggregated with a