

SUBCHAPTER H—RULES, REGULATIONS, STATEMENTS AND INTERPRETATIONS UNDER THE HART-SCOTT-RODINO ANTI-TRUST IMPROVEMENTS ACT OF 1976

PART 801—COVERAGE RULES

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§ 801.1 Definitions.

When used in the act and these rules—

(a)(1) *Person.* Except as provided in paragraphs (a) and (b) of § 801.12, the term *person* means an ultimate parent entity and all entities which it controls directly or indirectly.

Examples: 1. In the case of corporations, “person” encompasses the entire corporate structure, including all parent corporations, subsidiaries and divisions (whether consolidated or unconsolidated, and whether incorporated or unincorporated), and all related

corporations under common control with any of the foregoing.

2. Corporations A and B are each directly controlled by the same foreign state. They are not included within the same “person,” although the corporations are under common control, because the foreign state which controls them is not an “entity” (see § 801.1(a)(2)). Corporations A and B* are the ultimate parent entities within persons “A”, and “B” which include any entities each may control.

3. Since a natural person is an entity (see § 801.1(a)(2)), a natural person and a corporation which he or she controls are part of the same “person.” If that natural person controls two otherwise separate corporations, both corporations and the natural person are all part of the same “person.”

4. See the example to § 801.2(a).

(2) *Entity.* The term *entity* means any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such; or any joint venture or other corporation which has not been formed but the acquisition of the voting securities or other interest in which, if already formed, would require notification under the act and these rules:

Provided, however, that the term *entity* shall not include any foreign state, foreign government, or agency thereof (other than a corporation or unincorporated entity engaged in commerce), nor the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation or unincorporated entity engaged in commerce).

(3) *Ultimate parent entity.* The term *ultimate parent entity* means an entity

*Throughout the examples to the rules, persons are designated (“A”, “B,” etc.) with quotation marks, and entities are designated (A, B, etc.) without quotation marks.

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which is not controlled by any other entity.

Examples: 1. If corporation A holds 100 percent of the stock of subsidiary B, and B holds 75 percent of the stock of its subsidiary C, corporation A is the ultimate parent entity, since it controls subsidiary B directly and subsidiary C indirectly, and since it is the entity within the person which is not controlled by any other entity.

2. If corporation A is controlled by natural person D, natural person D is the ultimate parent entity.

3. P and Q are the ultimate parent entities within persons "P" and "Q." If P and Q each own 50 percent of the voting securities of R, then P and Q are both ultimate parents of R, and R is part of both persons "P" and "Q."

(b) *Control.* The term *control* (as used in the terms *control(s)*, *controlling*, *controlled by* and *under common control with*) means:

(1) *Either.* (i) Holding 50 percent or more of the outstanding voting securities of an issuer or

(ii) In the case of an unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or

(2) Having the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for-profit corporation, or 50 percent or more of the trustees in the case of trusts that are irrevocable and/or in which the settlor does not retain a reversionary interest.

Examples: 1. Corporation A holds 100 percent of the stock of corporation B, 75 percent of the stock of corporation C, 50 percent of the stock of corporation D, and 30 percent of the stock of corporation E. Corporation A controls corporations B, C and D, but not corporation E. Corporation A is the ultimate parent entity of a person comprised of corporations A, B, C and D, and each of these corporations (but not corporation E) is "included within the person."

2. A statutory limited partnership agreement provides as follows: The general partner "A" is entitled to 50 percent of the partnership profits, "B" is entitled to 40 percent of the profits and "C" is entitled to 10 percent of the profits. Upon dissolution, "B" is entitled to 75 percent of the partnership assets and "C" is entitled to 25 percent of those assets. All limited and general partners are entitled to vote on the following matters: the dissolution of the partnership, the transfer of assets not in the ordinary

course of business, any change in the nature of the business, and the removal of the general partner. The interest of each partner is evidenced by an ownership certificate that is transferable under the terms of the partnership agreement and is subject to the Securities Act of 1933. For purposes of these rules, control of this partnership is determined by paragraph (1)(ii) of this section. Although partnership interests may be securities and have some voting rights attached to them, they do not entitle the owner of that interest to vote for a corporate "director" as required by § 801.1(f)(1). Thus control of a partnership is not determined on the basis of either paragraph (1)(i) or (2) of this section. Consequently, "A" is deemed to control the partnership because of its right to 50 percent of the partnership's profits. "B" is also deemed to control the partnership because it is entitled to 75 percent of the partnership's assets upon dissolution.

3. "A" is a nonprofit charitable foundation that has formed a partnership joint venture with "B," a nonprofit university, to establish C, a nonprofit hospital corporation that does not issue voting securities. Pursuant to its charter "A" and "B" are each entitled to appoint three of C's six directors. "A" and "B" would each be deemed to control C, pursuant to § 801.1(b)(2) because each is deemed to have the contractual power presently to designate 50 percent or more of the directors of a not-for-profit corporation.

4. "A" is entitled to 50 percent of the profits of partnership B and 50 percent of the profits of partnership C. B and C form a partnership E with "D" in which each entity has a right to one-third of the profits. When E acquires company X, "A" must report the transaction (assuming it is otherwise reportable). Pursuant to § 801.1(b)(1)(ii), E is deemed to be controlled by "A," even though "A" ultimately will receive only one-third of the profits of E. Because B and C are considered as part of "A," the rules attribute all profits to which B and C are entitled (two-thirds of the profits of E in this example) to "A."

5. A is the settlor of an irrevocable trust in which it does not retain a reversionary interest in the corpus of the trust. A is entitled under the trust indenture to designate four of the eight trustees of the trust. A controls the trust pursuant to § 801.1(b)(2) and is deemed to hold the assets that constitute the corpus of the trust. Note that the right to designate 50 percent or more of the trustees of a business trust that has equity holders entitled to profits or assets upon dissolution of the business trust does not constitute control. Such business trusts are treated as unincorporated entities and control is determined pursuant to § 801.1(b)(1)(ii).

(c) *Hold.* (1) Subject to the provisions of paragraphs (c) (2) through (8) of this

section, the term *hold* (as used in the terms *hold(s)*, *holding*, *holder* and *held*) means beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means.

Example: If a stockbroker has stock in "street name" for the account of a natural person, only the natural person (who has beneficial ownership) and not the stockbroker (which may have record title) "holds" that stock.

(2) The holdings of spouses and their minor children shall be holdings of each of them.

(3) Except for a common trust fund or collective investment fund within the meaning of 12 CFR 9.18(a) (both of which are hereafter referred to in this paragraph as "collective investment funds"), and any revocable trust or an irrevocable trust in which the settlor retains a reversionary interest in the corpus, a trust, including a pension trust, shall hold all assets and voting securities constituting the corpus of the trust.

Example: Under this paragraph the trust—and not the trustee—"holds" the voting securities and assets constituting the corpus of any irrevocable trust (in which the settlor retains no reversionary interest, and which is not a collective investment fund). Therefore, the trustee need not aggregate its holdings of any other assets or voting securities with the holdings of the trust for purposes of determining whether the requirements of the act apply to an acquisition by the trust. Similarly, the trustee, if making an acquisition for its own account, need not aggregate its holdings with those of any trusts for which it serves as trustee. (However, the trustee must aggregate any collective investment funds which it administers; see paragraph (c)(6) of this section.)

(4) The assets and voting securities constituting the corpus of a revocable trust or the corpus of an irrevocable trust in which the settlor(s) retain(s) a reversionary interest in the corpus shall be holdings of the settlor(s) of such trust.

(5) Except as provided in paragraph (c)(4) of this section, beneficiaries of a trust, including a pension trust or a collective investment fund, shall not hold any assets or voting securities constituting the corpus of such trust.

(6) A bank or trust company which administers one or more collective in-

vestment funds shall hold all assets and voting securities constituting the corpus of each such fund.

Example: Suppose A, a bank or trust company, administers collective investment funds W, X, Y and Z. Whenever person "A" is to make an acquisition, whether or not on behalf of one or more of the funds, it must aggregate the holdings of W, X, Y and Z in determining whether the requirements of the act apply to the acquisition.

(7) An insurance company shall hold all assets and voting securities held for the benefit of any general account of, or any separate account administered by, such company.

(8) A person holds all assets and voting securities held by the entities included within it; in addition to its own holding, an entity holds all assets and voting securities held by the entities which it controls directly or indirectly.

(d)(1) *Affiliate.* An entity is an affiliate of a person if it is controlled, directly or indirectly, by the ultimate parent entity of such person.

(2) *Associate.* For purposes of Items 6 and 7 of the Form, an associate of an acquiring person shall be an entity that is not an affiliate of such person but:

(A) Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a "managing entity"); or

(B) Has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or

(C) Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or

(D) Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.

Examples: 1. ABC Investment Group has organized a number of investment partnerships. Each of the partnerships is its own ultimate parent, but ABC makes the investment decisions for all of the partnerships. One of the partnerships intends to make a reportable acquisition. For purposes of Items 6(c) and 7, each of the other investment partnerships, and ABC Investment Group itself are associates of the partnership that is the acquiring person. In response to Item 6(e)(i), the acquiring person will disclose any of its 5 percent or greater minority holdings that generate revenues in any of the same NAICS

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codes as the acquired entity(s) in the reportable transaction. In Item 6(c)(ii) it would report any 5 percent or greater minority holdings of its associates in the acquired entity(s) and in any entities that generate revenues in any of the same NAICS codes as the acquired entity(s). In Item 7, the acquiring person will indicate whether there are any NAICS code overlaps between the acquired entity(s) in the reportable transaction, on the one hand, and the acquiring person and all of its associates, on the other.

2. XYZ Corporation is its own ultimate parent and intends to make a reportable acquisition. Pursuant to a management contract, Fund MNO has the right to manage the investments of XYZ Corporation. For the HSR filing by XYZ Corporation, Fund MNO is an associate of XYZ, as is any other entity that either controls, or is controlled by, or manages or is managed by Fund MNO or is under common control or common investment management with Fund MNO.

3. EFG Investment Group has the contractual power to determine the investments of PRS Corporation, which is its own ultimate parent. Natural person Mr. X, who is not an employee of EFG Investment Group, has been contracted by EFG Investment Group as its investment manager. When PRS Corporation makes an acquisition, its associates include (i) EFG Investment Group, (ii) any entity over which EFG Investment Group has investment authority, (iii) any entity that controls, or is controlled by, EFG Investment Group, (iv) Natural person Mr. X, (v) any entity over which Natural person Mr. X has investment management authority, and (vi) any entity which is controlled by Natural person Mr. X, directly or indirectly.

4. CORP1 controls GP1 and GP2, the sole general partners of private equity funds LP1 and LP2 respectively. LP1 controls GP3, the sole general partner of MLP1, a newly formed master limited partnership which is its own ultimate parent entity. LP2 controls GP4, the sole general partner of MLP2, another master limited partnership that is its own ultimate parent entity and which owns and operates a natural gas pipeline. In addition, GP4 holds 25 percent of the voting securities of CORP2, which also owns and operates a natural gas pipeline.

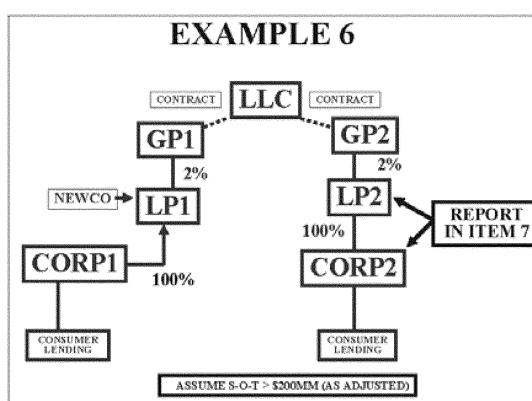
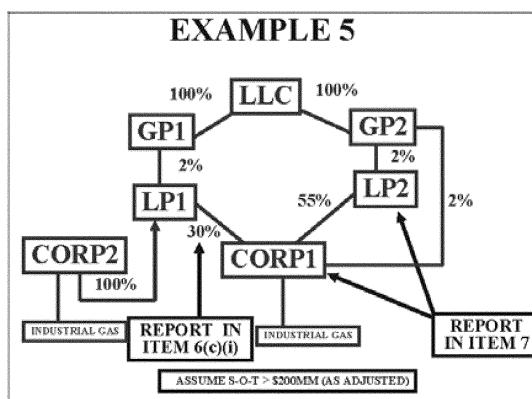
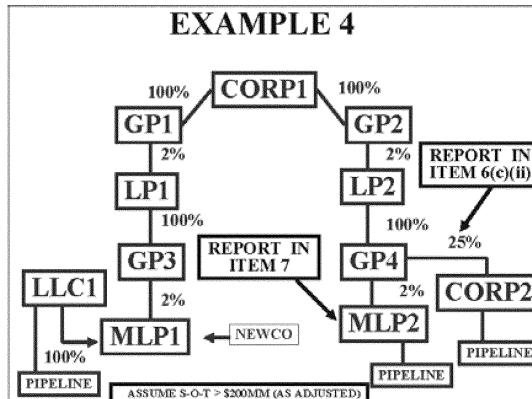
MLP1 is acquiring 100 percent of the membership interests of LLC1, also the owner and operator of a natural gas pipeline. MLP2, CORP2 and LLC1 all derive revenues in the same NAICS code (Pipeline Transportation of Natural Gas). All of the entities under common investment management of CORP1, including GP4 and MLP2, are associates of MLP1, the acquiring person.

In Item 7 of its HSR filing, MLP1 would identify MLP2 as an associate that has an overlap in pipeline transportation of natural

gas with LLC1, the acquired person. Because GP4 does not control CORP2 it would not be listed in Item 7, however, GP4 would be listed in Item 6(c)(ii) as an associate that holds 25 percent of the voting securities of CORP2. In this example, even though there is no direct overlap between the acquiring person (MLP1) and the acquired person (LLC1), there is an overlap reported for an associate (MLP2) of the acquiring person in Item 7. 5. LLC is the investment manager for and ultimate parent entity of general partnerships GP1 and GP2. GP1 is the general partner of LP1, a limited partnership that holds 30 percent of the voting securities of CORP1. GP2 is the general partner of LP2, which holds 55 percent of the voting securities of CORP1. GP2 also directly holds 2 percent of the voting securities of CORP1. LP1 is acquiring 100 percent of the voting securities of CORP2. CORP1 and CORP2 both derive revenues in the same NAICS code (Industrial Gas Manufacturing).

All of the entities under common investment management of the managing entity LLC, including GP1, GP2, LP2 and CORP1 are associates of LP1. In Item 6(c)(i) of its HSR filing, LP1 would report its own holding of 30 percent of the voting securities of CORP1. It would not report the 55 percent holding of LP2 in Item 6(c)(ii) because it is greater than 50 percent. It also would not report GP2's 2 percent holding because it is less than 5 percent. In Item 7, LP1 would identify both LP2 and CORP1 as associates that derive revenues in the same NAICS code as CORP2.

6. LLC is the investment manager for GP1 and GP2 which are the general partners of limited partnerships LP1 and LP2, respectively. LLC holds no equity interests in either general partnership but manages their investments and the investments of the limited partnerships by contract. LP1 is newly formed and its own ultimate parent entity. It plans to acquire 100 percent of the voting securities of CORP1, which derives revenues in the NAICS code for Consumer Lending. LP2 controls CORP2, which derives revenues in the same NAICS code. All of the entities under the common management of LLC, including LP2 and CORP2, are associates of LP1. For purposes of Item 7, LP1 would report LP2 and CORP2 as associates that derive revenues in the NAICS code that overlaps with CORP1. Even though the investment manager (LLC) holds no equity interest in GP1 or GP2, the contractual arrangement with them makes them associates of LP1 through common management.



7. Corporation A is its own ultimate parent entity and is making an acquisition of Corporation B. Although Corporation A is operationally managed by its officers and its in-

vestments, including the acquisition of Corporation B, are managed by its directors, neither the officers nor directors are considered associates of A.

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8. Limited partnership A is an investment partnership that is making an acquisition. LLC B has no equity interest in A, but has a contract to manage its investments for a fee. LLC B has an investment committee comprised of twelve of its employees that makes the actual investment decisions. LLC B is an associate of A but none of the twelve employees are associates of A, as LLC B is a managing entity and the twelve individuals are merely its employees. Contrast this with example 3 where a managing entity, EFG, is itself managed by another entity, Mr. X, who is thus an associate.

9. GP is the general partner of FUND. GP has contracted with LLC to act as an investment advisor with respect to FUND's investments. In this role, LLC acts as a consultant who makes recommendations to GP on what portfolio companies FUND should invest in. The recommendations are non-binding and GP is the only entity that has the authority to exercise investment discretion over FUND's acquisitions of interests in portfolio companies. In this example, GP is an associate of FUND, while LLC is not.

10. GP A is the general partner and investment manager of FUND A1. Mr. X is a principal in the A family of private equity funds and has the contractual right to veto certain proposed actions of GP A and FUND A1, for example, divestitures of stock that would result in a change of control in a portfolio company. His contractual right to veto certain proposed actions does not constitute managing operations. Mr. X does not have the authority under the contract to veto proposed investments of FUND A1 directed by GP A or to direct GP A to authorize investments by FUND A1. In this example, GP A is an associate of FUND A1, while Mr. X is not.

11. LLC is the general partner of LP and has entered into a management contract to exercise investment discretion over LP's investments in portfolio companies as well as to provide certain other administrative services for LP. Mr. Y is the managing member of LLC and as such is the person who actually makes the investment decisions on behalf of LLC. Mr. Y has no management contract with either LLC or LP. In this example, LLC is an associate of LP, while Mr. Y is not. Compare with Example 7 where officers and directors of a corporation are not associates of the corporation.

12. GP is the general partner of LP and has entered into a management contract to exercise investment discretion over LP's investments in portfolio companies. GP has entered into a contract with CORP, under which CORP will manage building maintenance and certain back office functions (e.g., maintenance of phones and computers, accounting, IT and human resources) for LP. GP is an associate of LP because it manages LP's investments. However, the management services provided by CORP do not constitute

operational management, therefore, CORP is not an associate of LP.

(e)(1)(i) *United States person.* The term *United States person* means a person the ultimate parent entity of which—

(A) Is incorporated in the United States, is organized under the laws of the United States or has its principal offices within the United States; or

(B) If a natural person, either is a citizen of the United States or resides in the United States.

(ii) *United States issuer.* The term *United States issuer* means an issuer which is incorporated in the United States, is organized under the laws of the United States or has its principal offices within the United States.

(2)(i) *Foreign person.* The term *foreign person* means a person the ultimate parent entity of which—

(A) Is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States; or

(B) If a natural person, neither is a citizen of the United States nor resides in the United States.

(ii) *Foreign issuer.* The term *foreign issuer* means an issuer which is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States.

(f)(1)(i) *Voting securities.* The term *voting securities* means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer.

(ii) *Non-corporate interest.* The term “non-corporate interest” means an interest in any unincorporated entity which gives the holder the right to any profits of the entity or in the event of dissolution of that entity the right to any of its assets after payment of its debts. These unincorporated entities include, but are not limited to, general partnerships, limited partnerships, limited liability partnerships, limited liability companies, cooperatives and business trusts; but these unincorporated entities do not include trusts that are irrevocable and/or in which the settlor does not retain a reversionary interest and any interest in

such a trust is not a non-corporate interest as defined by this rule.

(2) *Convertible voting security.* The term *convertible voting security* means a voting security which presently does not entitle its owner or holder to vote for directors of any entity.

(3) *Conversion.* The term *conversion* means the exercise of a right inherent in the ownership or holding of particular voting securities to exchange such securities for securities which presently entitle the owner or holder to vote for directors of the issuer or of any entity included within the same person as the issuer.

Examples: 1. The acquisition of convertible debentures which are convertible into common stock is an acquisition of "voting securities." However, § 802.31 exempts the acquisition of such securities from the requirements of the act, provided that they have no present voting rights.

2. Options and warrants are also "voting securities" for purposes of the act, because they can be exchanged for securities with present voting rights. Section 802.31 exempts the acquisition of options and warrants as well, since they do not themselves have present voting rights and hence are convertible voting securities. Notification may be required prior to exercising options and warrants, however.

3. Assume that X has issued preferred shares which presently entitle the holder to vote for directors of X, and that these shares are convertible into common shares of X. Because the preferred shares confer a present right to vote for directors of X, they are "voting securities." (See § 801.1(f)(1).) They are not "convertible voting securities," however, because the definition of that term excludes securities which confer a present right to vote for directors of any entity. (See § 801.1(f)(2).) Thus, an acquisition of these preferred shares issued by X would not be exempt as an acquisition of "convertible voting securities." (See § 802.31.) If the criteria in section 7A(a) are met, an acquisition of X's preferred shares would be subject to the reporting and waiting period requirements of the Act. Moreover, the conversion of these preferred shares into common shares of X would also be potentially reportable, since the holder would be exercising a right to exchange particular voting securities for different voting securities having a present right to vote for directors of the issuer. Because this exchange would be a "conversion," § 801.30 would apply. (See § 801.30(a)(6).)

(g)(1) *Tender offer.* The term *tender offer* means any offer to purchase voting securities which is a tender offer

within the meaning of section 14 of the Securities Exchange Act of 1934, 15 U.S.C. 78n.

(2) *Cash tender offer.* The term *cash tender offer* means a tender offer in which cash is the only consideration offered to the holders of the voting securities to be acquired.

(3) *Non-cash tender offer.* The term *non-cash tender offer* means any tender offer which is not a cash tender offer.

(h) *Notification threshold.* The term "notification threshold" means:

(1) An aggregate total amount of voting securities of the acquired person valued at greater than \$50 million (as adjusted) but less than \$100 million (as adjusted);

(2) An aggregate total amount of voting securities of the acquired person valued at \$100 million (as adjusted) or greater but less than \$500 million (as adjusted);

(3) An aggregate total amount of voting securities of the acquired person valued at \$500 million (as adjusted) or greater;

(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than \$1 billion (as adjusted); or

(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than \$50 million (as adjusted).

(i)(1) *Solely for the purpose of investment.* Voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.

Example: If a person holds stock "solely for the purpose of investment" and thereafter decides to influence or participate in management of the issuer of that stock, the stock is no longer held "solely for the purpose of investment."

(2) *Investment assets.* The term *investment assets* means cash, deposits in financial institutions, other money market instruments, and instruments evidencing government obligations.

(j) *Engaged in manufacturing.* A person is engaged in manufacturing if it produces and derives annual sales or revenues in excess of \$1 million from

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products within industries in Sectors 31–33 as coded by the North American Industry Classification System (2002 Edition) published by the Executive Office of the President, Office of Management and Budget.

(k) *United States.* The term *United States* shall include the several States, the territories, possessions, and commonwealths of the United States, and the District of Columbia.

(l) *Commerce.* The term *commerce* shall have the meaning ascribed to that term in section 1 of the Clayton Act, 15 U.S.C. 12, or section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

(m) *The act.* References to “the act” refer to Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94–435, 90 Stat. 1390, and as amended by Public Law 106–553, 114 Stat. 2762, and Public Law 117–328, Div. GG, 136 Stat. 4459. References to “Section 7A(“) refer to subsections of Section 7A of the Clayton Act. References to “this section” refer to the section of these rules in which the term appears.

(n) *(as adjusted).* The parenthetical “(as adjusted)” refers to the adjusted values published in the FEDERAL REGISTER notice titled “Revised Jurisdictional Threshold for Section 7A of the Clayton Act.” This FEDERAL REGISTER notice will be published in January of each year and the values contained therein will be effective as of the effective date published in the FEDERAL REGISTER notice and will remain effective until superseded in the next calendar year. The notice will also be available at <http://www.ftc.gov>. Such adjusted values will be calculated in accordance with Section 7A(a)(2)(A) and will be rounded up to the next highest \$100,000.

(o) *All commercially significant rights.* For purposes of paragraph (g) of § 801.2, the term all commercially significant rights means the exclusive rights to a patent that allow only the recipient of the exclusive patent rights to use the patent in a particular therapeutic area (or specific indication within a therapeutic area).

(p) *Limited manufacturing rights.* For purposes of paragraph (o) of this section and paragraph (g) of § 801.2, the

term limited manufacturing rights means the rights retained by a patent holder to manufacture the product(s) covered by a patent when all other exclusive rights to the patent within a therapeutic area (or specific indication within a therapeutic area) have been transferred to the recipient of the patent rights. The retained right to manufacture is limited in that it is retained by the patent holder solely to provide the recipient of the patent rights with product(s) covered by the patent (which either the patent holder alone or both the patent holder and the recipient may manufacture).

(q) *Co-rights.* For purposes of paragraph (o) of this section and paragraph (g) of § 801.2, the term co-rights means shared rights retained by the patent holder to assist the recipient of the exclusive patent rights in developing and commercializing the product covered by the patent. These co-rights include, but are not limited to, co-development, co-promotion, co-marketing and co-commercialization.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34429, July 29, 1983; 52 FR 20063, May 29, 1987; 66 FR 8687, Feb. 1, 2001; 66 FR 23565, May 9, 2001; 68 FR 2430, Jan. 17, 2003; 70 FR 4990, Jan. 31, 2005; 70 FR 11510, Mar. 8, 2005; 70 FR 73372, Dec. 12, 2005; 70 FR 77313, Dec. 30, 2005; 76 FR 42479, July 19, 2011; 78 FR 68712, Nov. 15, 2013; 83 FR 32770, July 16, 2018; 88 FR 5750, Jan. 30, 2023]

§ 801.2 Acquiring and acquired persons.

(a) Any person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person, is an acquiring person.

Example: Assume that corporations A and B, which are each ultimate parent entities of their respective “persons,” created a joint venture, corporation V, and that each holds half of V’s shares. Therefore, A and B each control V (see § 801.1(b)), and V is included within two persons, “A” and “B.” Under this section, if V is to acquire corporation X, both “A” and “B” are acquiring persons.

(b) Except as provided in paragraphs (a) and (b) of § 801.12, the person(s) within which the entity whose assets or voting securities are being acquired is included, is an acquired person.

Examples: 1. Assume that person "Q" will acquire voting securities of corporation X held by "P" and that X is not included within person "P." Under this section, the acquired person is the person within which X is included, and is not "P."

2. In the example to paragraph (a) of this section, if V were to be acquired by X, then both "A" and "B" would be acquired persons.

(c) For purposes of the act and these rules, a person may be an acquiring person and an acquired person with respect to separate acquisitions which comprise a single transaction.

(d)(1)(i) Mergers and consolidations are transactions subject to the act and shall be treated as acquisitions of voting securities.

(ii) In a merger, the person which, after consummation, will include the corporation in existence prior to consummation which is designated as the surviving corporation in the plan, agreement, or certificate of merger required to be filed with State authorities to effectuate the transaction shall be deemed to have made an acquisition of voting securities.

(2)(i) Any person party to a merger or consolidation is an acquiring person if, as a result of the transaction, such person will hold any assets or voting securities which it did not hold prior to the transaction.

(ii) Any person party to a merger or consolidation is an acquired person if, as a result of the transaction, the assets or voting securities of any entity included within such person will be held by any other person.

(iii) All persons party to a transaction as a result of which all parties will lose their separate pre-acquisition identities or will become wholly owned subsidiaries of a newly formed entity shall be both acquiring and acquired persons. This includes any combination of corporations and unincorporated entities consolidating into any newly formed entity. In such transactions, each consolidating entity is deemed to be acquiring all of the voting securities (in the case of a corporation) or interests (in the case of an unincorporated entity) of each of the others.

Examples: 1. Corporation A (the ultimate parent entity included within person "A") proposes to acquire Y, a wholly-owned subsidiary of B (the ultimate parent entity included within person "B"). The transaction

is to be carried out by merging Y into X, a wholly-owned subsidiary of A, with X surviving, and by distributing the assets of X to B, the only shareholder of Y. The assets of X consist solely of cash and the voting securities of C, an entity unrelated to "A" or "B". Since X is designated the surviving corporation in the plan or agreement of merger or consolidation and since X will be included in "A" after consummation of the transaction, "A" will be deemed to have made an acquisition of voting securities. In this acquisition, "A" is an acquiring person because it will hold assets or voting securities it did not hold prior to the transaction, and "B" is an acquired person because the assets or the voting securities of an entity previously included within it will be held by A as a result of the acquisition. B will hold the cash and voting securities of C as a result of the transaction, but since § 801.21 applies, this acquisition is not reportable. "A" is therefore an acquiring person only, and "B" is an acquired person only. "B" may, however, have a separate reporting obligation as an acquiring person in a separate transaction involving the voting securities of C.

2. In the above example, suppose the consideration for Y consists of \$8 million worth of the voting securities of A. With regard to the transfer of this consideration, "B" is an acquiring person because it will hold voting securities it did not previously hold, and "A" is an acquired person because its voting securities will be held by B. Since these voting securities are worth less than \$50 million (as adjusted), the acquisition of these securities is not reportable. "A" will therefore report as an acquiring person only and "B" as an acquired person only.

3. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued in excess of \$50 million (as adjusted). "B" is thus an acquiring person and "A" an acquired person in a reportable acquisition of assets. "A" and "B" will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

4. Corporations A (the ultimate parent entity in person "A") and B (the ultimate parent entity in person "B") propose to consolidate into C, a newly formed corporation. All shareholders of A and B will receive shares of C, and both A and B will lose their separate pre-acquisition identities. "A" and "B" are both acquiring and acquired persons because they are parties to a transaction in which all parties lose their separate pre-acquisition identities

5. Partnership A and Corporation B form a new LLC in which they combine their businesses. A and B cease to exist and partners of A and shareholders of B receive membership interests in the new LLC. For purposes of determining reportability, A is deemed to be

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acquiring 100 percent of the voting securities of B and B is deemed to be acquiring 100 percent of the interests of A. Pursuant to § 803.9(b) of this chapter, even if such a transaction consists of two reportable acquisitions, only one filing fee is required.

(e) Whenever voting securities or assets are to be acquired from an acquiring person in connection with an acquisition, the acquisition of voting securities or assets shall be separately subject to the act.

(f)(1)(i) In an acquisition of non-corporate interests which results in an acquiring person controlling the entity, that person is deemed to hold all of the assets of the entity as a result of the acquisition. The acquiring person is the person acquiring control of the entity and the acquired person is the pre-acquisition ultimate parent entity of the entity.

(ii) The value of an acquisition described in paragraph (f)(1)(i) of this section is determined in accordance with § 801.10(d).

(2) Any contribution of assets or voting securities to an existing unincorporated entity or to any successor thereof is deemed an acquisition of such voting securities or assets by the ultimate parent entity of that entity and is not subject to § 801.50.

Examples: 1. A, B and C each hold 33½ percent of the interests in Partnership X. D contributes assets valued in excess of \$50 million (as adjusted) to X and as a result D receives 40 percent of the interests in X and A, B and C are each reduced to 20 percent. Partnership X is deemed to be acquiring the assets from D, in a transaction which may be reportable. This is not treated as a formation of a new partnership. Because no person will control Partnership X, no additional filing is required by any of the four partners.

2. LLC X is its own ultimate parent entity. A contributes a manufacturing plant valued in excess of \$200 million (as adjusted) to X which issues new interests to A resulting in A having a 50% interest in X. A is acquiring non-corporate interests which confer control of X and therefore will file as an acquiring person. Because A held the plant prior to the transaction and continues to hold it through its acquisition of control of LLC X after the transaction is completed no acquisition of the plant has occurred and LLC X is therefore not an acquiring person.

(3) Any person who acquires control of an existing not-for-profit corporation which has no outstanding voting

securities is deemed to be acquiring all of the assets of that corporation.

Example: A becomes the sole corporate member of not-for-profit corporation B and accordingly has the right to designate all of the directors of B. A is deemed to be acquiring all of the assets of B as a result.

(g) Transfers of patent rights within NAICS Industry Group 3254.

(1) This paragraph applies only to patents covering products whose manufacture and sale would generate revenues in NAICS Industry Group 3254, including:

325411 Medical and Botanical Manufacturing
325412 Pharmaceutical Preparation Manufacturing
325413 In-Vitro Diagnostic Substance Manufacturing
325414 Biological Product (except Diagnostic) Manufacturing

(2) The transfer of patent rights covered by this paragraph constitutes an asset acquisition; and

(3) Patent rights are transferred if and only if all commercially significant rights to a patent, as defined in § 801.1(o), for any therapeutic area (or specific indication within a therapeutic area) are transferred to another entity. All commercially significant rights are transferred even if the patent holder retains limited manufacturing rights, as defined in § 801.1(p), or co-rights, as defined in § 801.1(q).

Examples: Although these examples refer to licenses, which are typically used to effect the transfer of pharmaceutical patent rights to a recipient of those rights, other methods of transferring patent rights, by assignment or grant, among others, are similarly covered by these rules and examples.

1. B holds a patent relating to an active pharmaceutical ingredient for cardiovascular use. A will obtain a license from B that grants A the exclusive right to all of B's patent rights except that both A and B can manufacture the active pharmaceutical ingredient to be sold by A under the exclusive license agreement. B retains limited manufacturing rights as defined in § 801.1(p) because it retains the right to manufacture the product covered by the patent for cardiovascular use solely to provide the product to A. A is still receiving all commercially significant rights to the

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patent, and the transfer of these rights via the license constitutes an asset acquisition. Further, even if B retained all rights to manufacture (so that A could not manufacture), B would still retain limited manufacturing rights, and A would still receive all commercially significant rights to the patent. Thus, the transfer of these rights via the license would also constitute an asset acquisition.

2. B holds a patent for an in-vitro diagnostic substance relating to arthritis. B will grant A an exclusive license to all of B's patent rights for all veterinary indications. B retains all patent rights for all human indications. The exclusive license to all commercially significant rights for all veterinary indications is an asset acquisition because A is receiving all rights to the patent for a therapeutic area.

3. B holds a patent relating to a biological product. B will grant A an exclusive license to all of B's patent rights in all therapeutic areas. A and B are also entering into a co-development and co-commercialization agreement under which B will assist A in developing, marketing and promoting the product to physicians. B cannot separately use the patent in the same therapeutic area as A under the co-development and co-commercialization agreement. A will book all sales of the product and will pay B a portion of the profits resulting from those sales. Despite B's retention of these co-rights, A is still receiving all commercially significant rights. The licensing agreement is an asset acquisition. This would be an asset acquisition even if B also retained limited manufacturing rights.

4. B holds a patent relating to an active pharmaceutical ingredient and a bulk compound that contains that active pharmaceutical ingredient. B will grant A an exclusive license to use the bulk compound to manufacture and sell a finished product in the neurological therapeutic area. B cannot manufacture the active pharmaceutical ingredient or bulk compound for any other finished products in the neurological area, but it can manufacture either for use by another party in a different therapeutic area. Despite B's retention of manufacturing rights

of the active pharmaceutical ingredient and bulk compound for therapeutic areas other than neurology, A is still receiving all commercially significant rights in a therapeutic area and the licensing agreement is the acquisition of an asset.

5. B holds a patent related to a pharmaceutical product that has been approved by the FDA. B will enter into an exclusive distribution agreement with A that will give A the right to distribute the product in the U.S. B will manufacture the product for A and will receive a portion of all revenues from the sale of the product. A receives no exclusive patent rights under the distribution agreement. A has not obtained all commercially significant rights to the patent because it is only handling the logistics of selling and distributing the product on B's behalf. Therefore, the exclusive distribution agreement is not an asset acquisition.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34431, July 29, 1983; 66 FR 8688, Feb. 1, 2001; 70 FR 4990, Jan. 31, 2005; 70 FR 11510, Mar. 8, 2005; 78 FR 68713, Nov. 15, 2013]

§ 801.3 Activities in or affecting commerce.

Section 7A(a)(1) is satisfied if any entity included within the acquiring person, or any entity included within the acquired person, is engaged in commerce or in any activity affecting commerce.

Examples: 1. A foreign subsidiary of a U.S. corporation seeks to acquire a foreign business. The acquiring person includes the U.S. parent corporation. If the U.S. corporation, or the foreign subsidiary, or any entity controlled by either one of them, is engaged in commerce or in any activity affecting commerce, section 7A(a)(1) is satisfied. Note, however, that §§ 802.50–802.52 may exempt certain acquisitions of foreign businesses or assets.

2. Even if none of the entities within the acquiring person is engaged in commerce or in any activity affecting commerce, the acquisition nevertheless satisfies section 7A(a)(1) if any entity included within the acquired person is so engaged.

[43 FR 33537, July 31, 1978; 43 FR 36054, Aug. 15, 1978]

§ 801.4 Secondary acquisitions.

(a) Whenever as the result of an acquisition (the "primary acquisition")

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an acquiring person controls an entity which holds voting securities of an issuer that entity does not control, then the acquiring person's acquisition of the issuer's voting securities is a secondary acquisition and is separately subject to the act and these rules.

(b) *Exemptions.* (1) No secondary acquisition shall be exempt from the requirements of the act solely because the related primary acquisition is exempt from the requirements of the act.

(2) A secondary acquisition may itself be exempt from the requirements of the act under section 7A(c) or these rules.

Examples: 1. Assume that acquiring person "A" proposes to acquire all the voting securities of corporation B. This section provides that the acquisition of voting securities of issuers held but not controlled by B or by any entity which B controls are secondary acquisitions by "A." Thus, if B holds more than \$50 million (as adjusted) of the voting securities of corporation X (but does not control X), and "A" and "X" satisfy Sections 7A(a)(1) and (a)(2), "A" must file notification separately with respect to its secondary acquisition of voting securities of X. "X" must file notification within fifteen days (or in the case of a cash tender offer, 10 days) after "A" files, pursuant to § 801.30.

2. If in the previous example "A" acquires only 50 percent of the voting securities of B, the result would remain the same. Since "A" would be acquiring control of B, all of B's holdings in X would be attributable to "A."

3. In the previous examples, if "A's" acquisition of the voting securities of B is exempt, "A" may still be required to file notification with respect to its secondary acquisition of the voting securities of X, unless that acquisition is itself exempt.

4. In the previous examples, assume A's acquisition of B is accomplished by merging B into A's subsidiary, S, and S is designated the surviving corporation. B's voting securities are cancelled, and B's shareholders are to receive cash in return. Since S is designated the surviving corporation and A will control S and also hold assets or voting securities it did not hold previously, "A" is an acquiring person in an acquisition of voting securities by virtue of §§ 801.2(d)(1)(ii) and (d)(2)(i). A will be deemed to have acquired control of B, and A's resulting acquisition of the voting securities of X is a secondary acquisition. Since cash, the only consideration paid for the voting securities of B, is not considered an asset of the person from which it is acquired, by virtue of § 801.2(d)(2) "A" is an acquiring person only. The acquisition of the minority holding of B in X is therefore a secondary acquisition by "A," but since "B"

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is an acquired person only, "B" is not deemed to make any secondary acquisition in this transaction.

5. In previous Example 4, suppose the consideration paid by A for the acquisition of B is in excess of \$50 million (as adjusted) worth of the voting securities of A. By virtue of § 801.2(d)(2), "A" and "B" are each both acquiring and acquired persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although "B" is now also an acquiring person, unless B gains control of A in the transaction, B still makes no secondary acquisitions of stock held by A. If the consideration paid by A is the voting securities of one of A's subsidiaries and B thereby gains control of that subsidiary, B will make secondary acquisitions of any minority holdings of that subsidiary.

6. Assume that A and B propose through consolidation to create a new corporation, C, and that both A and B will lose their corporate identities as a result. Since no participating corporation in existence prior to consummation is the designated surviving corporation, "A" and "B" are each both acquiring and acquired persons by virtue of § 801.2(d)(2)(iii). The acquisition of the minority holdings of entities within each are therefore potential secondary acquisitions by the other.

(c) Where the primary acquisition is—

(1) A cash tender offer, the waiting period procedures established for cash tender offers pursuant to sections 7A(a) and 7A(e) of the act shall be applicable to both the primary acquisition and the secondary acquisition;

(2) A non-cash tender offer, the waiting period procedures established for tender offers pursuant to section 7A(e)(2) of the act shall be applicable to both the primary acquisition and the secondary acquisition.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34432, July 29, 1983; 52 FR 7080, Mar. 6, 1987; 66 FR 8688, Feb. 1, 2001; 67 FR 11902, Mar. 18, 2002; 70 FR 4990, Jan. 31, 2005; 70 FR 11511, Mar. 8, 2005]

§ 801.10 Value of voting securities, non-corporate interests and assets to be acquired.

Except as provided in § 801.13, the value of voting securities and assets to be acquired shall be determined as follows:

(a) *Voting securities.* (1) If the security is traded on a national securities exchange or is authorized to be quoted in

an interdealer quotation system of a national securities association registered with the U.S. Securities and Exchange Commission—

(i) And the acquisition price has been determined, the value shall be the market price or the acquisition price, whichever is greater; or if

(ii) The acquisition price has not been determined, the value shall be the market price.

(2) If paragraph (a)(1) of this section is inapplicable—

(i) But the acquisition price has been determined, the value shall be the acquisition price; or if

(ii) The acquisition price has not been determined, the value shall be the fair market value.

(b) *Assets.* The value of assets to be acquired shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price.

(c) For purposes of this section and § 801.13(a)(2):

(1) *Market price.* (i) For acquisitions subject to § 801.30, the market price shall be the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, within the 45 calendar days prior to the receipt of the notice required by § 803.5(a) or prior to the consummation of the acquisition.

(ii) For acquisitions not subject to § 801.30, the market price shall be the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, within the 45 or fewer calendar days which are prior to the consummation of the acquisition but not earlier than the day prior to the execution of the contract, agreement in principle or letter of intent to merge or acquire.

(iii) When the security was not traded within the period specified by this paragraph, the last closing quotation or closing bid price preceding such period shall be used. If such closing quotations are available in more than one market, the person filing notification may select any such quotation.

(2) *Acquisition price.* The acquisition price shall include the value of all consideration for such voting securities, non-corporate interests or assets to be acquired.

(3) *Fair market value.* The fair market value shall be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if unincorporated, by officials exercising similar functions; or by an entity delegated that function by such board or officials. Such determination must be made as of any day within 60 calendar days prior to the filing of the notification required by the act, or, if such notification has not been filed, within 60 calendar days prior to the consummation of the acquisition.

Example: Corporation A, the ultimate parent entity in person “A,” contracts to acquire assets of corporation B, and the contract provides that the acquisition price is not to be determined until after the acquisition is effected. Under paragraph (b) of this section, for purposes of the act, the value of the assets is to be the fair market value of the assets. Under paragraph (c)(3), the board of directors of corporation A must in good faith determine the fair market value. That determination will control for 60 days whether “A” and “B” must observe the requirements of the act; that is, “A” and “B” must either file notification or consummate the acquisition within that time. If “A” and “B” neither file nor consummate within 60 days, the parties would no longer be entitled to rely on the determination of fair market value, and, if in doubt about whether required to observe the requirements of the act, would have to make a second determination of fair market value.

(d) *Value of interests in an unincorporated entity.* In an acquisition of non-corporate interests that confers control of either an existing or a newly-formed unincorporated entity, the value of the non-corporate interests held as a result of the acquisition is the sum of the acquisition price of the interests to be acquired (provided the acquisition price has been determined), and the fair market value of any of the interests in the same unincorporated entity held by the acquiring person prior to the acquisition; or, if the acquisition price has not been determined, the fair market value of interests held as a result of the acquisition.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8688, Feb. 1, 2001; 70 FR 11511, Mar. 8, 2005; 76 FR 42482, July 19, 2011]

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§ 801.11 Annual net sales and total assets.

(a) The annual net sales and total assets of a person shall include all net sales and all assets held, whether foreign or domestic, except as provided in paragraphs (d) and (e) of this section.

(b) Except for the total assets of a corporation or unincorporated entity at the time of its formation which shall be determined pursuant to Sec. 801.40(d) or 801.50(c) the annual net sales and total assets of a person shall be as stated on the financial statements specified in paragraph (c) of this section: *Provided:*

(1) That the annual net sales and total assets of each entity included within such person are consolidated therein. If the annual net sales and total assets of any entity included within the person are not consolidated in such statements, the annual net sales and total assets of the person filing notification shall be recomputed to include the nonduplicative annual net sales and nonduplicative total assets of each such entity; and

(2) That such statements, and any restatements pursuant to paragraph (b)(1) of this section (insofar as possible), have been prepared in accordance with the accounting principles normally used by such person, and are of a date not more than 15 months prior to the date of filing of the notification required by the act, or the date of consummation of the acquisition.

Example: Person "A" is composed of entity A, subsidiaries B1 and B2 which A controls, subsidiaries C1 and C2 which B1 controls, and subsidiary C3 which B2 controls. Suppose that A's most recent financial statement consolidates the annual net sales and total assets of B1, C1, and C2, but not B2 or C3. In order to determine whether person "A" meets the criteria of Section 7A(a)(2)(B), as either an acquiring or an acquired person, A must recompute its annual net sales and total assets to reflect consolidation of the nonduplicative annual net sales and nonduplicative total assets of B2 and C3.

(c) Subject to the provisions of paragraph (b) of this section:

(1) The annual net sales of a person shall be as stated on the last regularly prepared annual statement of income and expense of that person; and

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(2) The total assets of a person shall be as stated on the last regularly prepared balance sheet of that person.

Example: Suppose "A" sells assets to "B" on January 1. "A's" next regularly prepared balance sheet, dated February 1, reflects that sale. On March 1, "A" proposes to sell more assets to "B." "A's" total assets on March 1 are "A's" total assets as stated on its February 1 balance sheet.

(d) No assets of any natural person or of any estate of a deceased natural person, other than investment assets, voting securities and other income-producing property, shall be included in determining the total assets of a person.

(e) Subject to the limitations of paragraph (d) of this section, the total assets of:

(1) An acquiring person that does not have the regularly prepared balance sheet described in paragraph (c)(2) of this section shall be, for acquisitions of each acquired person:

(i) All assets held by the acquiring person at the time of the acquisition,

(ii) Less all cash that will be used by the acquiring person as consideration in an acquisition of assets from, or in an acquisition of voting securities issued by, or in an acquisition of non-corporate interests of, that acquired person (or an entity within that acquired person) and less all cash that will be used for expenses incidental to the acquisition, and less all securities of the acquired person (or an entity within that acquired person); and

(2) An acquired person that does not have the regularly prepared balance sheet described in paragraph (c)(2) of this section shall be either

(i) All assets held by the acquired person at the time of the acquisition, or

(ii) Where applicable, its assets as determined in accordance with § 801.40(d).

Examples: For examples 1-4, assume that A is a newly-formed company which is not controlled by any other entity. Assume also that A has no sales and does not have the balance sheet described in paragraph (c)(2) of this section.

1. A will borrow \$105 million in cash and will purchase assets from B for \$100 million. In order to establish whether A's acquisition of B's assets is reportable, A's total assets are determined by subtracting the \$100 million that it will use to acquire B's assets

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from the \$105 million that A will have at the time of the acquisition. Therefore, A has total assets of less than \$10 million (as adjusted) and does not meet any size-of-person test of Section 7A(a)(2).

2. Assume that A will acquire assets from B and that, at the time it acquires B's assets, A will have \$85 million in cash and a factory valued at \$60 million. A will exchange the factory and \$80 million cash for B's assets. To determine A's total assets, A should subtract from the \$85 million cash the \$80 million that will be used to acquire assets from B and add the remainder to the value of the factory. Thus, A has total assets of \$65 million. Even though A will use the factory as part of the consideration for the acquisition, the value of the factory must still be included in A's total assets. Note that A and B may also have to report the acquisition by B of A's non-cash assets (i.e., the factory). For that acquisition, the value of the cash A will use to buy B's assets is not excluded from A's total assets. Thus, in the acquisition by B, A's total assets are \$145 million.

3. Assume that company A will make a \$150 million acquisition and that it must pay a loan origination fee of \$5 million. A borrows \$161 million. A does not meet the size-of-person test in Section 7A(a)(2) because its total assets are less than \$10 million (as adjusted). \$150 million is excluded because it will be consideration for the acquisition and \$5 million is excluded because it is an expense incidental to the acquisition. Therefore, A is only a \$6 million person. Note that if A were making an acquisition valued at over \$200 million (as adjusted), the acquisition would be reportable without regard to the sizes of the persons involved.

4. Assume that "A" borrows \$195 million to acquire \$100 million of assets from "B" and \$60 million of voting securities of "C." The balance of the loan will be used for working capital. To determine its size for purposes of its acquisition from "B," "A" subtracts the \$100 million that it will use for that acquisition. Therefore, A has total assets of \$95 million for purposes of its acquisition from "B." To determine its size with respect to its acquisition from "C," "A" subtracts the \$60 million that will be paid for "C's" voting securities. Thus, for purposes of its acquisition from "C," "A" has total assets of \$135 million. In the first acquisition "A" meets the \$10 million (as adjusted) size-of-person test and in the second acquisition "A" meets the \$100 million (as adjusted) size-of-person test of Section 7A(a)(2).

[43 FR 33537, July 31, 1978, as amended at 48 FR 34429, July 29, 1983; 52 FR 7080, Mar. 6, 1987; 66 FR 8688, Feb. 1, 2001; 70 FR 4990, Jan. 31, 2005; 70 FR 11511, Mar. 8, 2005; 70 FR 73372, Dec. 12, 2005]

§ 801.12 Calculating percentage of voting securities.

(a) *Voting securities.* Whenever the act or these rules require calculation of the percentage of voting securities to be held or acquired, the issuer whose voting securities are being acquired shall be deemed the "acquired persons."

Example: Person "A" is composed of corporation A1 and subsidiary A2; person "B" is composed of corporation B1 and subsidiary B2. Assume that A2 proposes to sell assets to B1 in exchange for common stock of B2. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the "acquired person" is B2. For all other purposes, the acquired person is "B." (For all purposes, the "acquiring persons" are "A" and "B.")

(b) *Percentage of voting securities.* (1) Whenever the act or these rules require calculation of the percentage of voting securities of an issuer to be held or acquired, the percentage shall be the sum of the separate ratios for each class of voting securities, expressed as a percentage. The ratio for each class of voting securities equals:

(i)(A) The number of votes for directors of the issuer which the holder of a class of voting securities is presently entitled to cast, and as a result of the acquisition, will become entitled to cast, divided by,

(B) The total number of votes for directors of the issuer which presently may be cast by that class, and which will be entitled to be cast by that class after the acquisition, multiplied by,

(ii)(A) The number of directors that class is entitled to elect, divided by (B) the total number of directors.

Examples: In each of the following examples company X has two classes of voting securities, class A, consisting of 1000 shares with each share having one vote, and class B, consisting of 100 shares with each share having one vote. The class A shares elect four of the ten directors and the class B shares elect six of the ten directors.

In this situation, § 801.12(b) requires calculations of the percentage of voting securities held to be made according to the following formula:

Number of votes of class A held divided by Total votes of class A times Directors elected by class A stock divided by Total number of directors

Plus

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Number of votes of class B held divided by Total votes of class B times Directors elected by class B stock divided by Total number of directors

1. Assume that company Y holds all 100 shares of class B stock and no shares of class A stock. By virtue of its class B holdings, Y has all 100 of the votes which may be cast by class B stock and can elect six of company X's ten directors. Applying the formula which results from the rule, Y calculates that it holds $100/100 \times 6/10$ or 60 percent of the voting securities of company X because of its holdings of class B stock and no additional percentage derived from holdings of class A stock. Consequently, Y holds a total of 60 percent of the voting securities of company X.

2. Assume that company Y holds 500 shares of class A stock and no shares of class B stock. By virtue of its class A holdings, Y has 500 of the 1000 votes which may be cast by class A to elect four of company X's ten directors. Applying the formula, Y calculates that it holds $500/1000 \times 4/10$ or 20 percent of the voting securities of company X from its holdings of class A stock and no additional percentage derived from holdings of class B stock. Consequently, Y holds a total of 20 percent of the voting securities of company X.

3. Assume that company Y holds 500 shares of class A stock and 60 shares of class B stock. Y calculates that it holds 20 percent of the voting securities of company X because of its holdings of class A stock (see example 2). Additionally, as a result of its class B holdings Y has 60 of the 100 votes which may be cast by class B stock to elect six of company X's ten directors. Applying the formula, Y calculates that it holds $60/100 \times 6/10$ or 36 percent of the voting securities of company X because of its holdings of class B stock. Since the formula requires that a person that holds different classes of voting securities of the same issuer add together the separate percentages calculated for each class, Y holds a total of 56 percent (20 percent plus 36 percent) of the voting securities of company X.

(2) Authorized but unissued voting securities and treasury voting securities shall not be considered securities presently entitled to vote for directors of the issuer.

(3) For purposes of determining the number of outstanding voting securities of an issuer, a person may rely upon the most recent information set forth in filings with the U.S. Securities and Exchange Commission, unless such person knows or has reason to believe that the information contained therein is inaccurate.

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Examples: 1. In the example to paragraph (a), to determine the percentage of B2's voting securities which will be held by "A" after the transaction, all voting securities of B2 held by "A," the "acquiring person" (including A2 and all other entities included in person "A"), must be aggregated. If "A" holds convertible securities of B2 which meet the definition of voting securities in § 801.1(f), these securities are to be disregarded in calculating the percentage of voting securities held by "A."

2. Under this formula, any votes obtained by means of proxies from other persons are also disregarded in calculating the percentage of voting securities to be held or acquired.

[43 FR 33537, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 52 FR 7081, Mar. 6, 1987; 66 FR 8689, Feb. 1, 2001]

§ 801.13 Aggregation of voting securities, assets and non-corporate interests.

(a) *Voting securities.* (1) Subject to the provisions of § 801.15, and paragraph (a)(3) of this section, all voting securities of the issuer which will be held by the acquiring person after the consummation of an acquisition shall be deemed voting securities held as a result of the acquisition. The value of such voting securities shall be the sum of the value of the voting securities to be acquired, determined in accordance with § 801.10(a), and the value of the voting securities held by the acquiring person prior to the acquisition, determined in accordance with paragraph (a)(2) of this section.

(2) The value of voting securities of an issuer held prior to an acquisition shall be—

(i) If the security is traded on a national securities exchange or is authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission, the market price calculated in accordance with § 801.10(c)(1); or

(ii) If paragraph (a)(2)(i) of this section is not applicable, the fair market value determined in accordance with § 801.10(c)(3).

Examples: 1. Assume that acquiring person "A" holds in excess of \$50 million (as adjusted) of the voting securities of X, and is to acquire another \$1 million of the same voting securities. Since under paragraph (a) of

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this section all voting securities “A” will hold after the acquisition are held “as a result of” the acquisition, “A” will hold in excess of \$50 million (as adjusted) of the voting securities of X as a result of the acquisition. “A” must therefore observe the requirements of the act before making the acquisition, unless the present acquisition is exempt under Section 7A(c), § 802.21 or any other rule.

2. See § 801.15 and the examples to that rule.

3. See § 801.20 and the examples to that rule.

4. On January 1, company A acquired in excess of \$50 million (as adjusted) of voting securities of company B. “A” and “B” filed notification and observed the waiting period for that acquisition. Company A plans to acquire \$1 million of assets from company B on May 1 of the same year. Under § 801.13(a)(3), “A” and “B” do not aggregate the value of the earlier acquired voting securities to determine whether the acquisition is subject to the act. Therefore, the value of the acquisition is \$1 million and it is not reportable.

(3) Voting securities held by the acquiring person prior to an acquisition shall not be deemed voting securities held as a result of that subsequent acquisition if:

(i) The acquiring person is, in the subsequent acquisition, acquiring only assets; and

(ii) The acquisition of the previously acquired voting securities was subject to the filing and waiting requirements of the act (and such requirements were observed) or was exempt pursuant to § 802.21.

(b) *Assets.* (1) All assets to be acquired from the acquired person shall be assets held as a result of the acquisition. The value of such assets shall be determined in accordance with § 801.10(b).

(2) If the acquiring person signs a letter of intent or agreement in principle to acquire assets from an acquired person, and within the previous 180 days the acquiring person has

(i) Signed a letter of intent or agreement in principle to acquire assets from the same acquired person, which is still in effect but has not been consummated, or has acquired assets from the same acquired person which it still holds; and

(ii) The previous acquisition (whether consummated or still contemplated) was not subject to the requirements of the Act; then for purposes of the size-of-transaction test of Section 7A(a)(2),

both the acquiring and the acquired persons shall treat the assets that were the subject of the earlier letter of intent or agreement in principle as though they are being acquired as part of the present acquisition. The value of any assets which are subject to this paragraph is determined in accordance with § 801.10(b).

Examples: 1. On day 1, A enters into an agreement with B to acquire assets valued at \$45 million. On day 90, A and B sign a letter of intent pursuant to which A will acquire additional assets from B, valued at \$45 million. The original transaction has not closed, however, the agreement is still in effect. For purposes of the size-of-transaction test in Section 7A(a)(2), A must aggregate the value of both of its acquisitions and file prior to acquiring the assets if the aggregate value exceeds \$50 million (as adjusted).

2. On March 30, A enters into a letter of intent to acquire assets of B valued at \$45 million. On January 31, earlier the same year, A closed on an acquisition of assets of B valued at \$45 million. For purposes of the size-of-transaction test in Section 7A(a)(2), A must aggregate the value of both of its acquisitions and file prior to acquiring the assets of B if the aggregate value exceeds \$50 million (as adjusted).

3. On day 1, A enters into an agreement with B to acquire assets valued in excess of \$50 million (as adjusted). A and B file notification and observe the waiting period. On day 60, A signs a letter of intent to acquire an additional \$40 million of assets from B. Because the earlier acquisition was subject to the requirements of the Act, A does not aggregate the two acquisitions of assets and is free to acquire the additional assets of B without filing an additional notification.

4. On day 1, A consummates an acquisition of assets of B valued at \$45 million. On day 60, A consummates a sale of the same assets to an unrelated third party. On day 120, A enters into an agreement to acquire additional assets of B valued at \$45 million. Because A no longer holds the assets from the previous acquisition, no aggregation of the two asset acquisitions is required and A may acquire all of the additional assets without filing notification.

(c)(1) *Non-corporate interests.* In an acquisition of non-corporate interests, any previously acquired non-corporate interests in the same unincorporated entity is aggregated with the newly acquired interests. The value of such an acquisition is determined in accordance with § 801.10(d) of these rules.

(2) *Other assets or voting securities of the same acquired person.* An acquisition

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of non-corporate interests which does not confer control of the unincorporated entity is not aggregated with any other assets or voting securities which have been or are currently being acquired from the same acquired person.

Examples: 1. A currently has the right to 30 percent of the profits in LLC. B has the right to the remaining 70 percent. A acquires an additional 30 percent interest in LLC from B for \$90 million in cash. As a result of the acquisition, A is deemed to now have a 60 percent interest in LLC. The current acquisition is valued at \$90 million, the acquisition price. The value of the 30 percent interest that A already holds is the fair market value of that interest. The value for size-of-transaction purposes is the sum of the two.

2. A acquires the following from B: (1) All of the assets of a subsidiary of B; (2) all of the voting securities of another subsidiary of B; and (3) a 30 percent interest in an LLC which is currently wholly-owned by B. In determining the size-of-transaction, A aggregates the value of the voting securities and assets of the subsidiaries that it is acquiring from B, but does not include the value of the 30 percent interest in the LLC, pursuant to § 801.13(c)(2).

[43 FR 33537, July 31, 1978, as amended at 52 FR 7081, Mar. 6, 1987; 66 FR 8689, Feb. 1, 2001; 70 FR 4991, Jan. 31, 2005; 70 FR 11513, Mar. 8, 2005]

§ 801.14 Aggregate total amount of voting securities and assets.

For purposes of Section 7A(a)(2) and § 801.1(h), the aggregate total amount of voting securities and assets shall be the sum of:

(a) The value of all voting securities of the acquired person which the acquiring person would hold as a result of the acquisition, determined in accordance with § 801.13(a); and

(b) The value of all assets of the acquired person which the acquiring person would hold as a result of the acquisition, determined in accordance with § 801.13(b).

Examples: 1. Acquiring person "A" previously acquired less than \$50 million (as adjusted) of the voting securities (not convertible voting securities) of corporation X. "A" now intends to acquire additional assets of X. Under paragraph (a) of this section, "A" looks to § 801.13(a) and determines that the voting securities are to be held "as a result of" the acquisition. Section 801.13(a) also provides that "A" must determine the present value of the previously acquired se-

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curities. Under paragraph (b) of this section, "A" looks to § 801.13(b)(1) and determines that the assets to be acquired will be held "as a result of" the acquisition, and are valued under § 801.10(b). Therefore, if the voting securities have a present value which when combined with the value of the assets would exceed \$50 million (as adjusted), the asset acquisition is subject to the requirements of the act since, as a result of it, "A" would hold an aggregate total amount of the voting securities and assets of "X" in excess of \$50 million (as adjusted).

2. In the previous example, assume that the assets acquisition occurred first, and that the acquisition of the voting securities is to occur within 180 days of the first acquisition. "A" now looks to § 801.13(b)(2) and determines that because the second acquisition is of voting securities and not assets, the asset and voting securities acquisitions are not treated as one transaction. Therefore, the second acquisition would not be subject to the requirements of the act since the value of the securities to be acquired does not exceed the \$50 million (as adjusted) size-of-transaction test.

(c) The value of all non-corporate interests of the acquired person which the acquiring person would hold as a result of the acquisition, determined in accordance with § 801.13(c).

[43 FR 33537, July 31, 1978, as amended at 66 FR 8689, Feb. 1, 2001; 67 FR 11902, Mar. 18, 2002; 70 FR 4991, Jan. 31, 2005; 70 FR 73372, Dec. 12, 2005]

§ 801.15 Aggregation of voting securities, non-corporate interests and assets the acquisition of which was exempt.

Notwithstanding § 801.13, for purposes of determining the aggregate total amount of voting securities, non-corporate interests and assets of the acquired person held by the acquiring person under Section 7A(a)(2) and § 801.1(h), none of the following will be held as a result of an acquisition:

(a) Assets, non-corporate interests or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the act and these rules been in effect), or the present acquisition of which is exempt, under—

(1) Sections 7A(c)(1), (3), (5), (6), (7), (8), and (11)(B);

(2) Sections 802.1, 802.2, 802.5, 802.6(b)(1), 802.8, 802.30, 802.31, 802.35, 802.52, 802.53, 802.63, and 802.70 of this chapter;

(b) Assets, non-corporate interests or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under Section 7A(c)(9) and §§ 802.3, 802.4, and 802.64 of this chapter unless the limitations contained in Section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held; and

(c) Voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under section 7A(c)(11)(A) unless additional voting securities of the same issuer have been or are being acquired; and

(d) Assets or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under §§ 802.50(a), 802.51(a), 802.51(b) of this chapter unless the limitations, in aggregate for §§ 802.50(a), 802.51(a), 802.51(b), do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held.

Examples: 1. Assume that acquiring person "A" is simultaneously to acquire in excess of \$50 million (as adjusted) of the convertible voting securities of X and less than \$50 million (as adjusted) of the voting common stock of X. Although the acquisition of the convertible voting securities is exempt under § 802.31, since the overall value of the securities to be acquired is greater than \$50 million (as adjusted), "A" must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. Because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this section, "A" would not hold the convertible voting securities as a result of the acquisition. Therefore, since as a result of the acquisition "A" would hold only the common stock, the size-of-transaction tests of Section 7A(a)(2) would not be satisfied, and "A" need not observe the requirements of the act before acquiring the common stock. (Note, however, that the value of the convertible voting securities would be reflected in "A's" next regularly prepared balance sheet, for purposes of § 801.11).

2. In the previous example, the rule was applied to voting securities the present acquisition of which is exempt. Assume instead that "A" had acquired the convertible voting securities prior to its acquisition of the common stock. "A" still would not hold the convertible voting securities as a result of the acquisition of the common stock, because the rule states that voting securities the previous acquisition of which was exempt also fall within the rule. Thus, the size-of-transaction tests of Section 7A(a)(2) would again not be satisfied, and "A" need not observe the requirements of the act before acquiring the common stock.

3. In example 2, assume instead that "A" acquired the convertible voting securities in 1975, before the act and rules went into effect. Since the rule applies to voting securities the acquisition of which would have been exempt had the act and rules been in effect, the result again would be identical. If the rules had been in effect in 1975, the acquisition of the convertible voting securities would have been exempt under § 802.31.

4. Assume that acquiring person "B," a United States person, acquired from corporation "X" two manufacturing plants located abroad, and assume that the acquisition price was in excess of \$50 million (as adjusted). In the most recent year, sales into the United States attributable to the plants were less than \$50 million (as adjusted), and thus the acquisition was exempt under § 802.50(a)(2). Within 180 days of that acquisition, "B" seeks to acquire a third plant from "X," to which United States sales were attributable in the most recent year. Since under § 801.13(b)(2), as a result of the acquisition, "B" would hold all three plants of "X," if the \$50 million (as adjusted) limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this section, "B" would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition, "B" would hold assets of "X" exceeding \$50 million (as adjusted) in value, would not qualify for the exemption in § 802.50(a)(2), and must observe the requirements of the act and file notification for the acquisition of all three plants before acquiring the third plant.

5. "A" acquires producing oil reserves valued at \$400 million from "B." Two months later, "A" agrees to acquire oil and gas rights valued at \$75 million from "B." Paragraph (b) of this section and § 801.13(b)(2) require aggregating the previously exempt acquisition of oil reserves with the second acquisition. If the two acquisitions, when aggregated, exceed the \$500 million limitation on the exemption for oil and gas reserves in § 802.3(a), "A" and "B" will be required to file notification for the latter acquisition, including within the filings the earlier acquisition. Since, in this example, the total value of the assets in the two acquisitions, when

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aggregated, is less than \$500 million, both acquisitions are exempt from the notification requirements. In determining whether the value of the assets in the two acquisitions exceeds \$500 million, "A" need not determine the current fair market value of the oil reserves acquired in the first transaction, since these assets are now within the person of "A." Instead, "A" is directed by § 801.13(b)(2)(ii) to use the value of the oil reserves at the time of their prior acquisition in accordance with § 801.10(b).

6. "X" acquired 55 percent of the voting securities of M, an entity controlled by "Z," six months ago and now proposes to acquire 50 percent of the voting stock of N, another entity controlled by "Z." M's assets consist of \$150 million worth of producing coal reserves plus less than \$50 million (as adjusted) worth of non-exempt assets and N's assets consist of a producing coal mine worth \$100 million together with non-exempt assets with a fair market value of less than \$50 million (as adjusted). "X's" acquisition of the voting securities of M was exempt under § 802.4(a) because M held exempt assets pursuant to § 802.3(b) and less than \$50 million (as adjusted) of non-exempt assets. Because "X" acquired control of M in the earlier transaction, M is now within the person of "X," and the assets of M need not be aggregated with those of N to determine if the subsequent acquisition of N will exceed the limitation for coal reserves or for non-exempt assets. Since the assets of N alone do not exceed these limitations, "X's" acquisition of N also is not reportable.

7. In previous Example 6, assume that "X" acquired 30 percent of the voting securities of M and proposes to acquire 40 percent of the voting securities of N, another entity controlled by "Z." Assume also that M's assets at the time of "X's" acquisition of M's voting securities consisted of \$90 million worth of producing coal reserves and non-exempt assets with a fair market value of less than \$50 million (as adjusted), and that N's assets currently consist of \$60 million worth of producing coal reserves and non-exempt assets with a fair market value which when aggregated with M's non-exempt assets would exceed \$50 million (as adjusted). Since "X" acquired a minority interest in M and intends to acquire a minority interest in N, and since M and N are controlled by "Z," the assets of M and N must be aggregated, pursuant to Secs. 801.15(b) and 801.13, to determine whether the acquisition of N's voting securities is exempt. "X" is required to determine the current fair market value of M's assets. If the fair market value of M's coal reserves is unchanged, the aggregated exempt assets do not exceed the limitation for coal reserves. However, if the present fair market value of N's non-exempt assets also is unchanged, the present fair market value of the non-exempt assets of M and N when aggregated

is greater than \$50 million. Thus the acquisition of the voting securities of N is not exempt. If "X" proposed to acquire 50 percent or more of the voting securities of both M and N in the same acquisition, the assets of M and N must be aggregated to determine if the acquisition of the voting securities of both issuers is exempt. Since the fair market value of the aggregated non-exempt assets exceeds \$50 million (as adjusted), the acquisition would not be exempt.

8. "A" acquired 49 percent of the voting securities of M and 45 percent of the voting securities of N. Both M and N are controlled by "B." At the time of the acquisition, M held rights to producing coal reserves worth \$90 million and N held a producing coal mine worth \$90 million. This acquisition was exempt since the aggregated holdings fell below the \$200 million limitation for coal in § 802.3(b) of this chapter. A year later, "A" proposes to acquire an additional 10 percent of the voting securities of both M and N. In the intervening year, M has acquired coal reserves so that its holdings are now valued at \$140 million, and the value of N's assets remained unchanged. "A's" second acquisition would not be exempt. "A" is required to determine the value of the exempt assets and any non-exempt assets held by any issuer whose voting securities it intends to acquire before each proposed acquisition (unless "A" already owns 50 percent or more of the voting securities of the issuer) to determine if the value of those holdings of the issuer falls below the limitation of the applicable exemption. Here, the holdings of M and N now exceed the \$200 million exemption for acquisitions of coal reserves in § 802.3 of this chapter, and thus do not qualify for the exemption of voting securities provided by § 802.4(a) of this chapter.

9. A acquires assets of B located outside of the U.S. with sales into the U.S. of \$45 million. It also acquires voting securities of B's foreign subsidiary X which has sales into the U.S. of \$45 million. Both the assets and the voting securities of X are exempt under §§ 802.50 and 802.51 respectively when analyzed separately. However, because § 801.15(d) requires that the sales into the U.S. for both the assets and the voting securities be aggregated to determine whether the \$50 million (as adjusted) limitation has been exceeded, both are held as a result of the acquisition because the aggregate sales into the U.S. total in excess of \$50 million (as adjusted).

[43 FR 33537, July 31, 1978, as amended at 52 FR 7081, Mar. 6, 1987; 61 FR 13684, Mar. 28, 1996; 66 FR 8689, Feb. 1, 2001; 67 FR 11902, Mar. 18, 2002; 70 FR 11512, Mar. 8, 2005; 76 FR 42482, July 19, 2011]

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§ 801.20 Acquisitions subsequent to exceeding threshold.

Acquisitions meeting the criteria of section 7A(a), and not otherwise exempted by section 7A(c) or § 802.21 or any other of these rules, are subject to the requirements of the act even though:

(a) Earlier acquisitions of assets or voting securities may have been subject to the requirements of the act;

(b) The acquiring person's holdings initially may have met or exceeded a notification threshold before the effective date of these rules; or

(c) The acquiring person's holdings initially may have met or exceeded a notification threshold by reason of increases in market values or events other than acquisitions.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

§ 801.21 Securities and cash not considered assets when acquired.

For purposes of determining the aggregate total amount of assets under Section 7A(a)(2)(A), Section 7A(a)(2)(B)(i), Sec. 801.13(b), and Sec. 802.4:

(a) Cash shall not be considered an asset of the person from which it is acquired; and

(b) Neither voting or nonvoting securities nor obligations referred to in section 7A(c)(2) shall be considered assets of another person from which they are acquired.

Examples: 1. Assume that acquiring person "A" acquires voting securities of issuer X from "B," a person unrelated to X. Under this paragraph, the acquisition is treated only as one of voting securities, requiring "A" and "X" to comply with the requirements of the act, rather than one in which "A" acquires the assets of "B," requiring "A" and "B" to comply. See also example 2 to § 801.30. Note that for purposes of section 7A(a)(2)—that is, for the next regularly prepared balance sheet of "A" referred to in § 801.11—the voting securities of X must be reflected after their acquisition; see § 801.11(c)(2).

2. In the previous example, if "A" acquires nonvoting securities of X from "B," then under this section the acquisition would be treated only as one of nonvoting securities of X (and would be exempt under section 7A(c)(2)), rather than one in which "A" acquires assets of "B," requiring "A" and "B" to comply. Again, the nonvoting securities of

X would have to be reflected in "A's" next regularly prepared balance sheet for purposes of section 7A(a)(2).

3. In example 1, assume that "B" receives only cash from "A" in exchange for the voting securities of X. Under this section, "B's" acquisition of cash is *not* an acquisition of the "assets" of "A," and "B" is not required to file notification as an acquiring person.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 68 FR 2430, Jan. 17, 2003; 70 FR 4992, Jan. 31, 2005]

§ 801.30 Tender offers and acquisitions of voting securities and non-corporate interests from third parties.

(a) This section applies to:

(1) Acquisitions on a national securities exchange or through an interdealer quotation system registered with the United States Securities and Exchange Commission;

(2) Acquisitions described by § 801.31;

(3) Tender offers;

(4) Secondary acquisitions;

(5) All acquisitions (other than mergers and consolidations) in which voting securities or non-corporate interests are to be acquired from a holder or holders other than the issuer or unincorporated entity or an entity included within the same person as the issuer or unincorporated entity;

(6) Conversions; and

(7) Acquisitions of voting securities resulting from the exercise of options or warrants which are—

(i) Issued by the issuer whose voting securities are to be acquired (or by any entity included within the same person as the issuer); and

(ii) The subject of a currently effective registration statement filed with the United States Securities and Exchange Commission under the Securities Act of 1933.

(b) For acquisitions described by paragraph (a) of this section:

(1) The waiting period required under the act shall commence upon the filing of notification by the acquiring person as provided in § 803.10(a); and

(2) The acquired person shall file the notification required by the act, in accordance with these rules, no later than 5 p.m. Eastern Time on the 15th (or, in the case of cash tender offers, the 10th) calendar day following the date of receipt, as defined by § 803.10(a), by the Federal Trade Commission and

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Assistant Attorney General of the notification filed by the acquiring person. Should the 15th (or, in the case of cash tender offers, the 10th) calendar day fall on a weekend day or federal holiday, the notification shall be filed no later than 5 p.m. Eastern Time on the next following business day.

Examples: 1. Acquiring person "A" proposes to acquire from corporation B the voting securities of B's wholly owned subsidiary, corporation S. Since "A" is acquiring the shares of S from its parent, this section does not apply, and the waiting period does not begin until both "A" and "B" file notification.

2. Acquiring person "A" proposes to acquire in excess of \$50 million (as adjusted) of the voting securities of corporation X on a securities exchange. The waiting period begins when "A" files notification. "X" must file notification within 15 calendar days thereafter. The seller of the X shares is not subject to any obligations under the act.

3. Suppose that acquiring person "A" proposes to acquire 50 percent of the voting securities of corporation B which in turn owns 30 percent of the voting securities of corporation C. Thus "A's" acquisition of C's voting securities is a secondary acquisition (see § 801.4) to which this section applies because "A" is acquiring C's voting securities from a third party (B). Therefore, the waiting period with respect to "A's" acquisition of C's voting securities begins when "A" files its separate Notification and Report Form with respect to C, and "C" must file within 15 days (or in the case of a cash tender offer, 10 days) thereafter. "A's" primary and secondary acquisitions of the voting securities of B and C are subject to separate waiting periods; see § 801.4.

[43 FR 33537, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 52 FR 7082, Mar. 6, 1987; 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005; 76 FR 42482, July 19, 2011]

§ 801.31 Acquisitions of voting securities by offerees in tender offers.

Whenever an offeree in a noncash tender offer is required to, and does, file notification with respect to an acquisition described in § 801.2(e):

(a) The waiting period with respect to such acquisition shall begin upon filing of notification by the offeree, pursuant to §§ 801.30 and 803.10(a)(1);

(b) The person within which the issuer of the shares to be acquired by the offeree is included shall file notification as required by § 801.30(b);

(c) Any request for additional information or documentary material pur-

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suant to section 7A(e) and § 803.20 shall extend the waiting period in accordance with § 803.20(c); and

(d) The voting securities to be acquired by the offeree may be placed into escrow, for the benefit of the offeree, pending expiration or termination of the waiting period with respect to the acquisition of such securities; *Provided however,* That no person may vote any voting securities placed into escrow pursuant to this paragraph.

Example: Assume that "A," which has annual net sales exceeding \$100 million (as adjusted), makes a tender offer for voting securities of corporation X. The consideration for the tender offer is to be voting securities of A. "S," a shareholder of X with total assets exceeding \$10 million (as adjusted), wishes to tender its holdings of X and in exchange would receive shares of A valued in excess of \$50 million (as adjusted). Under this section, "S's" acquisition of the shares of A would be an acquisition separately subject to the requirements of the act. Before "S" may acquire the voting securities of A, "S" must first file notification and observe a waiting period—which is separate from any waiting period that may apply with respect to "A" and "X." Since § 801.30 applies, the waiting period applicable to "A" and "S" begins upon filing by "S," and "A" must file with respect to "S's" acquisition within 15 days pursuant to § 801.30(b). Should the waiting period with respect to "A" and "X" expire or be terminated prior to the waiting period with respect to "S" and "A," "S" may wish to tender its X-shares and place the A-shares into a nonvoting escrow until the expiration or termination of the latter waiting period.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

§ 801.32 Conversion and acquisition.

A conversion is an acquisition within the meaning of the act.

Example: Assume that acquiring person "A" wishes to convert convertible voting securities of issuer X, and is to receive common stock of X valued in excess of \$50 million (as adjusted). If "A" and "X" satisfy the criteria of Section 7A(a)(1) and Section 7A(a)(2)(B)(ii), then "A" and "X" must file notification and observe the waiting period before "A" completes the acquisition of the X common stock, unless exempted by Section 7A(c) or the regulations in this part. Since § 801.30 applies, the waiting period begins upon notification by "A," and "X" must file notification within 15 days.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

Federal Trade Commission**§ 801.40****§ 801.33 Consummation of an acquisition by acceptance of tendered shares of payment.**

The acceptance for payment of any shares tendered in a tender offer is the consummation of an acquisition of those shares within the meaning of the act.

[48 FR 34433, July 29, 1983]

§ 801.40 Formation of joint venture or other corporations.

(a) In the formation of a joint venture or other corporation (other than in connection with a merger or consolidation), even though the persons contributing to the formation of a joint venture or other corporation and the joint venture or other corporation itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of § 801.2, the contributors shall be deemed acquiring persons only, and the joint venture or other corporation shall be deemed the acquired person only.

(b) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act.

(c) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act if:

(1)(i) The acquiring person has annual net sales or total assets of \$100 million (as adjusted) or more;

(ii) The joint venture or other corporation will have total assets of \$10 million (as adjusted) or more; and

(iii) At least one other acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more; or

(2)(i) The acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more;

(ii) The joint venture or other corporation will have total assets of \$100 million (as adjusted) or more; and

(iii) At least one other acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more.

(d) For purposes of paragraphs (b) and (c) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce.

Examples: 1. Persons "A," "B," and "C" agree to create new corporation "N," a joint venture. "A," "B," and "C" will each hold one third of the shares of "N." "A" has more than \$100 million (as adjusted) in annual net sales. "B" has more than \$10 million (as adjusted) in total assets but less than \$100 million (as adjusted) in annual net sales and total assets. Both "C's" total assets and its annual net sales are less than \$10 million (as adjusted). "A," "B," and "C" are each engaged in commerce. "A," "B," and "C" have agreed to make an aggregate initial contribution to the new entity of \$18 million in assets and each to make additional contributions of \$21 million in each of the next three years. Under paragraph (d) of this section, the assets of the new corporation are \$207 million. Under paragraph (c) of this section, "A" and "B" must file notification. Note that "A" and "B" also meet the criterion of Section 7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity in excess of \$50 million (as adjusted). N need not file notification; see § 802.41.

2. In the preceding example "A" has over \$10 million (as adjusted) but less than \$100 million (as adjusted) in sales and assets, "B"

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and "C" have less than \$10 million (as adjusted) in sales and assets. "N" has total assets of \$500 million. Assume that "A" will acquire 50 percent of the voting securities of "N" and "B" and "C" will each acquire 25 percent. Since "A" will acquire in excess of \$200 million (as adjusted) in voting securities of "N", the size-of-person test in § 801.40(c) is inapplicable and "A" is required to file notification.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34434, July 29, 1983; 52 FR 7082, Mar. 6, 1987; 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

§ 801.50 Formation of unincorporated entities.

(a) In the formation of an unincorporated entity (other than in connection with a consolidation), even though the persons contributing to the formation of the unincorporated entity and the unincorporated entity itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of § 801.2, the contributors shall be deemed acquiring persons only and the unincorporated entity shall be deemed the acquired person only.

(b) Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a consolidation), a person is subject to the requirements of the Act if it acquires control of the newly-formed entity. Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1), the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a consolidation), a person is subject to the requirements of the Act if:

(1)(i) The acquiring person has annual net sales or total assets of \$100 million (as adjusted) or more;

(ii) The newly-formed entity has total assets of \$10 million (as adjusted) or more; and

(iii) The acquiring person acquires control of the newly-formed entity; or

(2)(i) The acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more;

(ii) The newly-formed entity has total assets of \$100 million (as adjusted) or more; and

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(iii) The acquiring person acquires control of the newly-formed entity.

(c) For purposes of paragraph (b) of this section, the total assets of the newly-formed entity is determined in accordance with § 801.40(d).

(d) Any person acquiring control of the newly-formed entity determines the value of its acquisition in accordance with § 801.10(d).

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the Activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the Activities of the newly-formed entity will be in or will affect commerce.

Example: A and B form a new partnership (LP) in which each will acquire a 50 percent interest. A contributes a plant valued at \$250 million and \$100 million in cash. B contributes \$350 million in cash. Because each is acquiring non-corporate interests, valued in excess of \$50 million (as adjusted) which confer control of LP both A and B are acquiring persons in the formation. Each must now determine if the exemption in § 802.4 is applicable to their acquisitions of non-corporate interests in LP. For A, LP's exempt assets consist of all of the cash contributed by A and B (pursuant to § 801.21) and A's contribution of the plant (pursuant to § 802.30(c)). Because all of the assets of LP are exempt with regard to A, A's acquisition of non-corporate interests in LP is exempt under § 802.4. For B, LP's exempt assets include only the cash contributions by A and B. The plant contributed by A, valued at \$250 million is not exempt under § 802.30(c) with regard to B. Because LP has non-exempt assets in excess of \$50 million (as adjusted) with regard to B, B's acquisition of non-corporate interests in LP is not exempt under § 802.4. B must now value its acquisition of non-corporate interests pursuant to § 801.10(d) and because the value of the non-corporate interests is the same as B's contribution to the formation (\$350 million), the value exceeds \$200 million (as adjusted) and B must file notification prior to acquiring non-corporate interests in LP. See additional examples following §§ 802.30(c) and 802.4.

[70 FR 11512, Mar. 8, 2005]

§ 801.90 Transactions or devices for avoidance.

Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation

to comply shall be determined by applying the act and these rules to the substance of the transaction.

Examples: 1. Suppose corporations A and B wish to form a joint venture. A and B contemplate a total investment of over \$100 million (as adjusted) in the joint venture; persons "A" and "B" each have total assets in excess of \$100 million (as adjusted). Instead of filing notification pursuant to § 801.40, A creates a new subsidiary, A1, which issues half of its authorized shares to A. Assume that A1 has total assets of \$3000. "A" then sells 50 percent of its A1 stock to "B" for \$1500. Thereafter, "A" and "B" each contribute in excess of \$50 million (as adjusted) to A1 in exchange for the remaining authorized A1 stock (one-fourth each to "A" and "B"). A's creation of A1 was exempt under Sec. 802.30; its \$1500 sale of A1 stock to "B" did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisition of stock in A1 by "A" and "B" was exempt under § 802.30 and Sections 7A(c)(3) and (10). Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by "A" and "B" having over \$10 million (as adjusted) in assets. Such a transaction would be covered by § 801.40 and "A" and "B" must file notification and observe the waiting period.

2. Suppose "A" wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than \$10 million. The aggregate fair market value of the assets of the twenty store corporations is in excess of \$50 million (as adjusted). "A" proposes to sell the stores to "B" for in excess of \$50 million (as adjusted). For various reasons it is decided that "B" will buy the stock of each of the store corporations from "A." Instead of filing notification and observing the waiting period as contemplated by the act, "A" and "B" enter into a series of five stock purchase-sale agreements for \$12 million each. Under the terms of each contract, the stock of four stores will pass from "A" to "B". The five agreements are to be consummated on five successive days. Because after each of these transactions the store corporations are no longer part of the acquired person (§ 801.13(a) does not apply because control has passed, see § 801.2), and because \$12 million is below the size-of-transaction filing threshold of Section 7A(a)(2)(B), none of the contemplated acquisitions would be subject to the requirements of the act. However, if the stock of all of the store corporations were to be purchased in one transaction, no exemption would be applicable, and the act's requirements would have to be met. Because it appears that the purpose of making five sep-

arate contracts is to avoid the requirements of the act, this section would ignore the form of the separate transactions and consider the substance to be one transaction requiring compliance with the act.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8691, Feb. 1, 2001; 67 FR 11903, Mar. 18, 2002; 70 FR 4992, Jan. 31, 2005]

PART 802—EXEMPTION RULES

Sec.

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AUTHORITY: 15 U.S.C. 18a(d).

SOURCE: 43 FR 33544, July 31, 1978, unless otherwise noted.

§ 802.1 Acquisitions of goods in the ordinary course of business.

Pursuant to section 7A(c)(1) of the Clayton Act (the "Act"), acquisitions of goods transferred in the ordinary course of business are exempt from the notification requirements of the Act. This section identifies certain acquisitions of goods that are exempt as transfers in the ordinary course of business. This section also identifies certain acquisitions of goods that are not in the ordinary course of business and, therefore, do not qualify for the exemption.

(a) *Operating unit.* An acquisition of all or substantially all the assets of an operating unit is not an acquisition in the ordinary course of business. *Operating unit* means assets that are operated by the acquired person as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity.

(b) *New goods.* An acquisition of new goods is in the ordinary course of business, except when the goods are acquired as part of an acquisition described in paragraph (a) of this section.

(c) *Current supplies.* An acquisition of current supplies is in the ordinary course of business, except when acquired as part of an acquisition described in paragraph (a) of this section. The term "current supplies" includes the following kinds of new or used assets:

(1) Goods acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person (e.g., inventory),

(2) Goods acquired for consumption in the acquiring person's business (e.g., office supplies, maintenance supplies or electricity), and

(3) Goods acquired to be incorporated in the final product (e.g., raw materials and components).

(d) *Used durable goods.* A good is "durable" if it is designed to be used repeatedly and has a useful life greater than one year. An acquisition of used durable goods is an acquisition in the ordinary course of business if the goods

are not acquired as part of an acquisition described in paragraph (a) of this section and any of the following criteria are met:

(1) The goods are acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person; or

(2) The goods are acquired from an acquired person who acquired and has held the goods solely for resale or leasing to an entity not within the acquired person; or

(3) The acquired person has replaced, by acquisition or lease, all or substantially all of the productive capacity of the goods being sold within six months of that sale, or the acquired person has in good faith executed a contract to replace within six months after the sale, by acquisition or lease, all or substantially all of the productive capacity of the goods being sold; or

(4) The goods have been used by the acquired person solely to provide management and administrative support services for its business operations, and the acquired person has in good faith executed a contract to obtain substantially similar services as were provided by the goods being sold. Management and administrative support services include services such as accounting, legal, purchasing, payroll, billing and repair and maintenance of the acquired person's own equipment. Manufacturing, research and development, testing and distribution (i.e., warehousing and transportation) are not considered management and administrative support services.

Examples: 1. Greengrocer Inc. intends to sell to "A" all of the assets of one of the 12 grocery stores that it owns and operates throughout the metropolitan area of City X. Each of Greengrocer's stores constitutes an operating unit, i.e., a business undertaking in a particular location. Thus "A's" acquisition is not exempt as an acquisition in the ordinary course of business. However, the acquisition will not be subject to the notification requirements if the acquisition price or fair market value of the store's assets does not exceed \$50 million (as adjusted).

2. "A," a manufacturer of airplane engines, agrees to pay in excess of \$50 million (as adjusted) to "B," a manufacturer of airplane parts, for certain new engine components to be used in the manufacture of airplane engines. The acquisition is exempt under

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§ 802.1(b) as new goods as well as under § 802.1(c)(3) as current supplies.

3. "A," a power generation company, proposes to purchase from "B," a coal company, in excess of \$50 million (as adjusted) of coal under a long-term contract for use in its facilities to supply electric power to a regional public utility and steam to several industrial sites. This transaction is exempt under § 802.1(c)(2) as an acquisition of current supplies. However, if "A" proposed to purchase coal reserves rather than enter into a contract to acquire output of a coal mine, the acquisition would not be exempt as an acquisition of goods in the ordinary course of business. The acquisition may still be exempt pursuant to § 802.3(b) as an acquisition of reserves of coal if the requirements of that section are met.

4. "A," a national producer of canned fruit, preserves, jams and jellies, agrees to purchase from "B" for in excess of \$50 million (as adjusted) a total of 20,000 acres of orchards and vineyards in several locations throughout the U.S. "A" plans to harvest the fruit from the acreage for use in its canning operations. The acquisition is not exempt under this section because orchards and vineyards are real property, not "goods." If, on the other hand, "A" had contracted to acquire from "B" the fruit and grapes harvested from the orchards and vineyards, the acquisition would qualify for the exemption as an acquisition of current supplies under paragraph (c)(3) of this section. Although the transfer of orchards and vineyards is not exempt under this section, the acquisition could be exempt under § 802.2(g) as an acquisition of agricultural property.

5. "A," a railcar leasing company, will purchase in excess of \$50 million (as adjusted) of new railcars from a railcar manufacturer in order to expand its existing fleet of cars available for lease. The transaction is exempt under § 802.1(b) as an acquisition of new goods and § 802.1(c), as an acquisition of current supplies. If "A" subsequently sells the railcars to "C," a commercial railroad company, that acquisition would be exempt under § 802.1(d)(2), provided that "A" acquired and held the railcars solely for resale or leasing to an entity not within itself.

6. "A," a major oil company, proposes to sell two of its used oil tankers for in excess of \$50 million (as adjusted) to "B," a dealer who purchases oil tankers from the major U.S. oil companies. "B's" acquisition of the used oil tankers is exempt under § 802.1(d)(1) provided that "B" is actually acquiring beneficial ownership of the used tankers and is not acting as an agent of the seller or purchaser.

7. "A," a cruise ship operator, plans to sell for in excess of \$50 million (as adjusted) one of its cruise ships to "B," another cruise ship operator. "A" has, in good faith, executed a contract to acquire a new cruise ship with

substantially the same capacity from a manufacturer. The contract specifies that "A" will receive the new cruise ship within one month after the scheduled date of the sale of its used cruise ship to "B." Since "B" is acquiring a used durable good that "A" has contracted to replace within six months of the sale, the acquisition is exempt under § 802.1(d)(3).

8. "A," a luxury cruise ship operator, proposes to sell to "B," a credit company engaged in the ordinary course of its business in lease financing transactions, its fleet of six passenger ships under a 10-year sale/leaseback arrangement. That acquisition is exempt pursuant to § 802.1(d)(1), used durable goods acquired for leasing purposes. The acquisition is also exempt under § 802.63(a) as a bona fide credit transaction entered into in the ordinary course of "B's" business. "B" now proposes to sell the ships, subject to the current lease financing arrangement, to "C," another lease financing company. This transaction is exempt under §§ 802.1(d)(1) and 802.1(d)(2).

9. Three months ago "A," a manufacturing company, acquired several new machines that will replace equipment on one of its production lines. "A's" capacity to produce the same products increased modestly when the integration of the new equipment was completed. "B," a manufacturing company that produces products similar to those produced by "A," has entered into a contract to acquire for in excess of \$50 million (as adjusted) the machinery that "A" replaced. Delivery of the equipment by "A" to "B" is scheduled to occur within thirty days. Since "A" purchased new machinery to replace the productive capacity of the used equipment, which it sold within six months of the purchase of the new equipment, the acquisition by "B" is exempt under § 802.1(d)(3).

10. "A" will sell to "B" for in excess of \$50 million (as adjusted) all of the equipment "A" uses exclusively to perform its billing requirements. "B" will use the equipment to provide "A's" billing needs pursuant to a contract which "A" and "B" executed 30 days ago in conjunction with the equipment purchase agreement. Although the assets "B" will acquire make up essentially all of the assets of one of "A's" management and administrative support services divisions, the acquisition qualifies for the exemption under § 802.1(d)(4) because a company's internal management and administrative support services, however organized, are not an operating unit as defined by § 802.1(a). Management and administrative support services are not a "business undertaking" as that term is used in § 802.1(a). Rather, they provide support and benefit to the company's operating units and support the company's business operations. However, if the assets being sold also derived revenues from providing billing services for third parties, then

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the transfer of these assets would not be exempt under § 802.1(d)(4), since the equipment is not being used solely to provide management and administrative support services to "A".

11. "A," a manufacturer of pharmaceutical products, and "B" have entered into a contract under which "B" will provide all of "A's" research and development needs. Pursuant to the contract, "B" will also purchase all of the equipment that "A" formerly used to perform its own research and development activities. The sale of the equipment is not an exempt transaction under § 802.1(d)(3) because "A" is not replacing the productive capacity of the equipment being sold. The sale is also not exempt under § 802.1(d)(4), because functions such as research and development and testing are not management and administrative support services of a company but are integral to the design, development or production of the company's products.

12. "A," an automobile manufacturer, is discontinuing its manufacture of metal seat frames for its cars. "A" enters into a contract with "B," a manufacturer of various fabricated metal products, to sell its seat frame production lines and to purchase from "B" all of its metal seat frame needs for the next five years. This transfer of productive capacity by "A" is not exempt pursuant to § 802.1(d)(3), since "A" is not replacing the productive capacity of the equipment being sold. The acquisition is also not exempt under § 802.1(d)(4). "A's" sale of production lines is not the transfer of goods that provide management and administrative services to support the business operations of "A"; this manufacturing equipment is an integral part of "A's" production operations.

[61 FR 13684, Mar. 28, 1996, as amended at 66 FR 8691, Feb. 1, 2001; 70 FR 4993, Jan. 31, 2005; 83 FR 32770, July 16, 2018]

§ 802.2 Certain acquisitions of real property assets.

(a) *New facilities.* An acquisition of a new facility shall be exempt from the requirements of the act. A new facility is a structure that has not produced income and was either constructed by the acquired person for sale or held at all times by the acquired person solely for resale. The new facility may include realty, equipment or other assets incidental to the ownership of the new facility. In an acquisition that includes a new facility, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(b) *Used facilities.* An acquisition of a used facility shall be exempt from the

requirements of the act if the facility is acquired from a lessor that has held title to the facility for financing purposes in the ordinary course of the lessor's business by a lessee that has had sole and continuous possession and use of the facility since it was first built as a new facility. The used facility may include realty, equipment or other assets associated with the operation of the facility. In an acquisition that includes a used facility that meets the requirements of this paragraph, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were acquired in a separate transaction.

(c) *Unproductive real property.* An acquisition of unproductive real property shall be exempt from the requirements of the act. In an acquisition that includes unproductive real property, the transfer of any assets that are not unproductive real property shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(1) Subject to the limitations of (c)(2), unproductive real property is any real property, including raw land, structures or other improvements (but excluding equipment), associated production and exploration assets as defined in § 802.3(c), natural resources and assets incidental to the ownership of the real property, that has not generated total revenues in excess of \$5 million during the thirty-six (36) months preceding the acquisition.

(2) Unproductive real property does not include the following:

(i) Manufacturing or non-manufacturing facilities that have not yet begun operation;

(ii) Manufacturing or non-manufacturing facilities that were in operation at any time during the twelve (12) months preceding the acquisition; and

(iii) Real property that is either adjacent to or used in conjunction with real property that is not unproductive real property and is included in the acquisition.

(d) *Office and residential property.* (1) An acquisition of office or residential property shall be exempt from the requirements of the act. In an acquisition that includes office or residential property, the transfer of any assets

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that are not office or residential property shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

(2) Office and residential property is real property that is used primarily for office or residential purposes. In determining whether real property is used primarily for office or residential purposes, all real property, the acquisition of which is exempt under another provision of the act and these rules, shall be excluded from the determination. Office and residential property includes:

- (i) Office buildings,
- (ii) Residences,
- (iii) Common areas on the property, including parking and recreational facilities, and
- (iv) Assets incidental to the ownership of such property, including cash, prepaid taxes or insurance, rental receivables and the like.

(3) If the acquisition includes the purchase of a business conducted on the office and residential property, the transfer of that business, including the space in which the business is conducted, shall be subject to the requirements of the act and these rules as if such business were being transferred in a separate acquisition.

(e) *Hotels and motels.* (1) An acquisition of a hotel or motel, its improvements such as golf, swimming, tennis, restaurant, health club or parking facilities (but excluding ski facilities), and assets incidental to the ownership and operation of the hotel or motel (e.g., prepaid taxes or insurance, management contracts and licenses to use trademarks associated with the hotel or motel being acquired) shall be exempt from the requirements of the act. In an acquisition that includes a hotel or motel, the transfer of any assets that are not a hotel or motel, its improvements such as golf, swimming, tennis, restaurant, health club or parking facilities (but excluding ski facilities) and assets incidental to the ownership of the hotel or motel, shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(2) Notwithstanding paragraph (1) of the section, an acquisition of a hotel or

motel that includes a gambling casino shall be subject to the requirements of the act and these rules.

(f) *Recreational land.* An acquisition of recreational land shall be exempt from the requirements of the act. Recreational land is real property used primarily as a golf course or a swimming or tennis club facility, and assets incidental to the ownership of such property. In an acquisition that includes recreational land, the transfer of any property or assets that are not recreational land shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(g) *Agricultural property.* An acquisition of agricultural property and assets incidental to the ownership of such property shall be exempt from the requirements of the Act. Agricultural property is real property that primarily generates revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (certain activities within NAICS sector 11).

(1) Agricultural property does not include either:

(i) Processing facilities such as poultry and livestock slaughtering, processing and packing facilities; or

(ii) Any real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition; or

(iii) Timberland or other real property that generates revenues from activities within NAICS subsector 113 (Forestry and logging) or NAICS industry group 1153 (Support activities for forestry and logging).

(2) In an acquisition that includes agricultural property, the transfer of any assets that are not agricultural property or assets incidental to the ownership of such property (cash, prepaid taxes or insurance, rentals receivable and the like) shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

(h) *Retail rental space; warehouses.* An acquisition of retail rental space (including shopping centers) or warehouses and assets incidental to the ownership of retail rental space or warehouses shall be exempt from the requirements of the act, except when

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the retail rental space or warehouse is to be acquired in an acquisition of a business conducted on the real property. In an acquisition that includes retail rental space or warehouses, the transfer of any assets that are neither retail rental space nor warehouses shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

Examples. 1. "A," a major automobile manufacturer, builds a new automobile plant in anticipation of increased demand for its cars. The market does not improve and "A" never occupies the facility. "A" then sells the facility, which is fully equipped and ready for operation, to "B," another automobile manufacturer. The acquisition of this plant, including any equipment and assets associated with its operation, is not exempt as an acquisition of a new facility, even though the facility has not produced any income, since "A" did not construct the facility for sale or hold it at all times solely for resale. Also, the acquisition is not exempt as an acquisition of unproductive property, because manufacturing facilities that have not yet begun operations are explicitly excluded from that exemption.

2. "B," a subsidiary of "A," a financial institution, acquired a newly constructed power plant, which it leased to "X" pursuant to a lease financing arrangement. "A's" acquisition of the plant through B was exempt under § 802.63(a) as a bona fide credit transaction entered into in the ordinary course of "A's" business. "X" operated the plant as sole lessee for the next eight years and now proposes to exercise an option to buy the plant for in excess of \$50 million (as adjusted). "X's" acquisition of the plant is exempt pursuant to § 802.2(b). The plant is being acquired from B, the lessor, which held title to the plant for financing purposes, and the purchaser, "X," has had sole and continuous possession and use of the plant since its construction.

3. "A" proposes to acquire a tract of wilderness land from "B" for consideration in excess of \$50 million (as adjusted). Copper deposits valued in excess of \$50 million (as adjusted) and timber reserves valued in excess of \$50 million (as adjusted) are situated on the land and will be conveyed as part of this transaction. During the last three fiscal years preceding the sale, the property generated \$50,000 from the sale of a small amount of timber cut from the reserves two years ago. "A's" acquisition of the wilderness land from "B" is exempt as an acquisition of unproductive real property because the property did not generate revenues exceeding \$5 million during the thirty-six months preceding the acquisition. The cop-

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per deposits and timber reserves are by definition unproductive real property and, thus, are not separately subject to the notification requirements.

4. "A" proposes to purchase from "B" for in excess of \$200 million (as adjusted) an old steel mill that is not currently operating to add to "A's" existing steel production capacity. The mill has not generated revenues during the 36 months preceding the acquisition but contains equipment valued in excess of \$50 million (as adjusted) that "A" plans to refurbish for use in its operations. "A's" acquisition of the mill and the land on which it is located is exempt as unproductive real property. However, the transfer of the equipment and any assets other than the unproductive property is not exempt and is separately subject to the notification requirements of the act.

5. "A" proposes to purchase two downtown lots, Parcels 1 and 2, from "B" for in excess of \$50 million (as adjusted). Parcel 1, located in the southwest section, contains no structures or improvements. A hotel is located in the northeast section on Parcel 2, and it has generated \$9 million in revenues during the past three years. The purchase of Parcel 1 is exempt if it qualifies as unproductive real property, i.e., it has not generated annual revenues in excess of \$5 million in the three fiscal years prior to the acquisition. Parcel 2 is not unproductive real property, but its acquisition is exempt under § 802.2(e) as the acquisition of a hotel.

6. "A" plans to purchase from "B," a manufacturer, a newly-constructed building that "B" had intended to equip for use in its manufacturing operations. "B" was unable to secure financing to purchase the necessary equipment and "A," also a manufacturer, will be required to invest in excess of \$50 million (as adjusted) in order to equip the building for use in its production operations. This building is not a new facility under § 802.2(a), because it was not constructed or held by "B" for sale or resale. However, the acquisition of the building qualifies for exemption as unproductive real property pursuant to § 802.2(c)(1). The building is not yet a manufacturing facility since it does not contain equipment and requires significant capital investment before it can be used as a manufacturing facility.

7. "A" proposes to purchase from "B," for in excess of \$50 million (as adjusted), a 100 acre parcel of land that includes a currently operating factory occupying 10 acres. The other 90 adjoining acres are vacant and unimproved and are used by "B" for storage of supplies and equipment. The factory and the unimproved acreage have an aggregate fair market value of in excess of \$50 million (as adjusted). The transaction is not exempt under § 802.2(c) because the vacant property is adjacent to property occupied by the operating factory. Moreover, if the 90 acres were

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not adjacent to the 10 acres occupied by the factory, the transaction would not be exempt because the 90 acres are being used in conjunction with the factory being acquired and thus are not unproductive property.

8. "X" proposes to buy a five-story building from "Y." The ground floor of this building houses a department store, and "X" currently leases the third floor to operate a medical laboratory. The remaining three floors are used for offices. "X" is not acquiring the business of the department store. Because the ground floor is rental retail space, the acquisition of which is exempt under § 802.2(h), this part of the building is excluded from the determination of whether the building is used primarily for office purposes. The laboratory is therefore the only non-office use, and, since it makes up 25 percent of the remainder of the building, the building is used 75 percent for offices. Thus the building qualifies as an office building and its acquisition is therefore exempt under § 802.2(d).

9. "A" intends to acquire three shopping centers from "B" for a total of in excess of \$200 million (as adjusted). The anchor stores in two of the shopping centers are department stores, the businesses of which "A" is buying from "B" as part of the overall transaction. The acquisition of the shopping centers is an acquisition of retail rental space that is exempt under § 802.2(h). However, "A's" acquisition of the department store businesses, including the portion of the shopping centers that the two department stores being purchased occupy, are separately subject to the notification requirements. If the value of these assets exceeds \$50 million (as adjusted), "A" must comply with the requirements of the act for this part of the transaction.

10. "A" wishes to purchase from "B" a parcel of land for in excess of \$50 million (as adjusted). The parcel contains a race track and a golf course. The golf course qualifies as recreational land pursuant to § 802.2(f), but the race track is not included in the exemption. Therefore, if the value of the race track is more than \$50 million (as adjusted), "A" will have to file notification for the purchase of the race track.

11. "A" intends to purchase a poultry farm from "B." The acquisition of the poultry farm is a transfer of agricultural property that is exempt pursuant to § 802.2(g). If, however, "B" has a poultry slaughtering and processing facility on his farm that is included in the acquisition, "A's" acquisition of the farm is not exempt as an acquisition of agricultural property because agricultural property does not include property or assets adjacent to or used in conjunction with a processing facility that is included in an acquisition.

12. "A" proposes to purchase the prescription drug wholesale distribution business of "B" for in excess of \$50 million (as adjusted).

The business includes six regional warehouses used for "B's" national wholesale drug distribution business. Since "A" is acquiring the warehouses in connection with the acquisition of "B's" prescription drug wholesale distribution business, the acquisition of the warehouses is not exempt.

[61 FR 13686, Mar. 28, 1996, as amended at 66 FR 8692, Feb. 1, 2001; 66 FR 23565, May 9, 2001; 67 FR 11903, Mar. 18, 2002; 70 FR 4993, Jan. 31, 2005; 70 FR 11513, Mar. 8, 2005]

§ 802.3 Acquisitions of carbon-based mineral reserves.

(a) An acquisition of reserves of oil, natural gas, shale or tar sands, or rights to reserves of oil, natural gas, shale or tar sands together with associated exploration or production assets shall be exempt from the requirements of the act if the value of the reserves, the rights and the associated exploration or production assets to be held as a result of the acquisition does not exceed \$500 million. In an acquisition that includes reserves of oil, natural gas, shale or tar sands, or rights to reserves of oil, natural gas, shale or tar sands and associated exploration or production assets, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(b) An acquisition of reserves of coal, or rights to reserves of coal and associated exploration or production assets, shall be exempt from the requirements of the act if the value of the reserves, the rights and the associated exploration or production assets to be held as a result of the acquisition does not exceed \$200 million. In an acquisition that includes reserves of coal, rights to reserves of coal and associated exploration or production assets, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(c) Associated exploration or production assets means equipment, machinery, fixtures and other assets that are integral and exclusive to current or future exploration or production activities associated with the carbon-based mineral reserves that are being acquired. Associated exploration or production assets do not include the following:

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(1) Any pipeline and pipeline system or processing facility which transports or processes oil and gas after it passes through the meters of a producing field located within reserves that are being acquired; and

(2) Any pipeline or pipeline system that receives gas directly from gas wells for transportation to a natural gas processing facility or other destination.

Examples: 1. "A" proposes to purchase from "B" for \$550 million gas reserves that are not yet in production and have not generated any income. "A" will also acquire from "B," for \$280 million producing oil reserves and associated assets such as wells, compressors, pumps and other equipment. The acquisition of the gas reserves is exempt as a transfer of unproductive property under § 802.2(c). The acquisition of the oil reserves and associated assets is exempt pursuant to § 802.3(a), since the value of the reserves and associated assets does not exceed the \$500 million limitation.

2. "A," an oil company, proposes to acquire for \$180 million oil reserves currently in production along with field pipelines and treating and metering facilities which serve such reserves exclusively. The acquisition of the reserves and the associated assets are exempt. "A" will also acquire from "B" for in excess of \$50 million (as adjusted) a natural gas processing plant and its associated gathering pipeline system. This acquisition is not exempt since § 802.3(c) excludes these assets from the exemption in § 802.3 for transfers of associated exploration or production assets.

3. "A," an oil company, proposes to acquire a coal mine currently in operation and associated production assets for \$90 million from "B," an oil company. "A" will also purchase from "B" producing oil reserves valued at \$100 million and an oil refinery valued at \$13 million. The acquisition of the coal mine and the oil reserves is exempt pursuant to § 802.3. Although § 802.3(c) excludes the refinery from the exemption in § 802.3 for transfers of associated exploration and production assets, "A's" acquisition of the refinery is not subject to the notification requirements of the act because its value does not exceed \$50 million (as adjusted).

4. "X" proposes to acquire from "Z" coal reserves which, together with associated exploration assets, are valued at \$230 million. Since the value of the reserves and the assets exceeds the \$200 million limitation in § 802.3(b), this transaction is not exempt under § 802.3. However, if the coal reserves qualify as unproductive property under the requirements of § 802.2(c), their acquisition,

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along with the acquisition of their associated assets, would be exempt.

[61 FR 13688, Mar. 28, 1996, as amended at 66 FR 8692, Feb. 1, 2001; 70 FR 4994, Jan. 31, 2005]

§ 802.4 Acquisitions of voting securities of issuers or non-corporate interests in unincorporated entities holding certain assets the acquisition of which is exempt.

(a) An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to section 7A(c) of the Act, this part 802, or pursuant to § 801.21, is exempt from the reporting requirements if the acquired issuer or unincorporated entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than \$50 million (as adjusted). The value of voting or non-voting securities of any other issuer or interests in any unincorporated entity not included within the acquired issuer or unincorporated entity does not count toward the \$50 million (as adjusted) limitation for non-exempt assets.

(b) For purposes of paragraph (a) of this section, the assets of all issuers and unincorporated entities that are being acquired from the same acquired person are included in determining if the limitation for non-exempt assets is exceeded.

(c) In connection with paragraph (a) of this section and § 801.15 (b), the value of the assets of an issuer whose voting securities or an unincorporated entity whose non-corporate interests are being acquired pursuant to this section shall be the fair market value, determined in accordance with § 801.10(c).

Examples: 1. "A," a real estate investment company, proposes to purchase 100 percent of the voting securities of C, a wholly-owned subsidiary of "B," a construction company. C's assets are a newly constructed, never occupied hotel, including fixtures, furnishings and insurance policies. The acquisition of the hotel would be exempt under § 802.2(a) as a new facility and under § 802.2(d). Therefore, the acquisition of the voting securities of C is exempt pursuant to § 802.4(a) since C holds

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assets whose direct purchase would be exempt under § 802.2 and does not hold non-exempt assets exceeding \$50 million (as adjusted) in value.

2. "A" proposes to acquire 60 percent of the voting securities of C from "B." C's assets consist of a portfolio of mortgages valued at \$55 million and a small manufacturing plant valued at \$26 million. The manufacturing plant is an operating unit for purposes of § 802.1(a). Since the acquisition of the mortgages would be exempt pursuant to Section 7A(c)(2) of the act and since the value of the non-exempt manufacturing plant is less than \$50 million (as adjusted), this acquisition is exempt under § 802.4(a).

3. "A" proposes to acquire from "B" 100 percent of the voting securities of each of three issuers, M, N and O, simultaneously. M's assets consist of oil reserves worth \$160 million and coal reserves worth \$40 million. N has assets consisting of \$130 million of gas reserves and \$100 million of coal reserves. O's assets are oil shale reserves worth \$140 million and a coal mine worth \$80 million. Since "A" is simultaneously acquiring the voting securities of three issuers from the same acquired person, it must aggregate the assets of the issuers to determine if any of the limitations in § 802.3 is exceeded. As a result of aggregating the assets of M, N and O, "A's" holdings of oil and gas reserves are below the \$500 limitation for such assets in § 802.3(a). However, the aggregated holdings exceed the \$200 million limitation for coal reserves in § 802.3(b). "A's" acquisition therefore is not exempt, and it must report the entire transaction.

[61 FR 13688, Mar. 28, 1996, as amended at 66 FR 8693, Feb. 1, 2001; 70 FR 4994, Jan. 31, 2005; 70 FR 11513, Mar. 8, 2005; 76 FR 42482, July 19, 2011]

§ 802.5 Acquisitions of investment rental property assets.

(a) Acquisitions of investment rental property assets shall be exempt from the requirements of the act.

(b) Investment rental property assets. "Investment rental property assets" means real property that will not be rented to entities included within the acquiring person except for the sole purpose of maintaining, managing or supervising the operation of the real property, and will be held solely for rental or investment purposes. In an acquisition that includes investment rental property assets, the transfer of any property or assets that are not investment rental property assets shall be subject to the requirements of the act and these rules as if they were

being acquired in a separate transaction. Investment rental property assets include:

- (1) Property currently rented,
- (2) Property held for rent but not currently rented,
- (3) Common areas on the property, and
- (4) Assets incidental to the ownership of property, which may include cash, prepaid taxes or insurance, rental receivables and the like.

Example: 1. "X", a corporation, proposes to purchase a sports/entertainment complex which it will rent to professional sports teams and promoters of special events for concerts, ice shows, sporting events and other entertainment activities. "X" will provide office space in the complex for "Y", a management company which will maintain and manage the facility for "X." This acquisition is an exempt acquisition of investment rental property assets since "X" intends to rent the facility to third parties and is providing space within the facility to a management company solely to maintain, manage or supervise the operation of the facility on its behalf. If, however, "X" controls Z, a concert promoter to whom it also intends to rent the complex, the acquisition would not be exempt under § 802.5, since the property would not meet the requirements of § 802.5(b)(1).

2. "X" intends to buy from "Y" a development commonly referred to as an industrial park. The industrial park contains a warehouse/distribution center, a retail tire and automobile parts store, an office building, and a small factory. The industrial park also contains several parcels of vacant land. If "X" intends to acquire this industrial park as investment rental property, the acquisition will be exempt pursuant to § 802.5. If, however, "X" intends to use the factory for its own manufacturing operations, this exemption would be unavailable. The exemptions in § 802.2 for warehouses, rental retail space, office buildings, and undeveloped land may still apply and, if the value of the factory is \$50 million (as adjusted) or less, the entire transaction may be exempted by that section.

[61 FR 13688, Mar. 28, 1996, as amended at 66 FR 8693, Feb. 1, 2001; 70 FR 4994, Jan. 31, 2005]

§ 802.6 Federal agency approval.

(a) For the purposes of section 7A (c)(6) and (c)(8), the term *information and documentary material* includes one copy of all documents, application forms, and all written submissions of

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any type whatsoever. In lieu of providing all such information and documentary material, or any portion thereof, one copy of an index describing such information and documentary material may be provided, together with a certification that any such information or documentary material not provided will be provided within 10 calendar days upon request by the Federal Trade Commission or Assistant Attorney General, or a delegated official of either. Any material submitted pursuant to this section shall be submitted to the offices specified in § 803.10(c).

(b)(1) A mixed transaction is one that has some portion that is exempt under Section 7A (c)(6), (c)(7) or (c)(8) because it requires regulatory agency premerger competitive review and approval, and another portion that does not require such review.

(2) The portion of a mixed transaction that does not require advance competitive review and approval by a regulatory agency is subject to the act and these rules as if it were being acquired in a separate acquisition.

Example: Bank “A” acquires Bank “B”, which owns a financial subsidiary engaged in securities underwriting. “A”’s acquisition of “B” requires agency approval by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System or Federal Deposit Insurance Corporation (depending on whether “A” is a national bank, state member bank, or state non-member bank under section 18(c) of the FDI Act), and therefore is exempt from filing under Section 7A (c)(7). However, the acquisition of the financial subsidiary is subject to HSR reporting requirements, and “A” and “B” each must make a filing for that portion of the transaction and observe the waiting period if the act’s thresholds are met.

[43 FR 33544, July 31, 1978, as amended at 48 FR 34435, July 29, 1983; 66 FR 8693, Feb. 1, 2001; 67 FR 11903, Mar. 18, 2002]

§ 802.8 Certain supervisory acquisitions.

(a) A merger, consolidation, purchase of assets, or acquisition requiring agency approval under sections 403 or 408(e) of the National Housing Act, 12 U.S.C. 1726, 1730a(e), or under section 5 of the Home Owners’ Loan Act of 1933, 12 U.S.C. 1464, shall be exempt from the requirements of the act, including specifically the filing requirement of Sec-

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tion 7A(c)(8), if the agency whose approval is required finds that approval of such merger, consolidation, purchase of assets, or acquisition is necessary to prevent the probable failure of one of the institutions involved.

(b)(1) A merger, consolidation, purchase of assets, or acquisition which requires agency approval under 12 U.S.C. 1817(j) or 12 U.S.C. 1730(q) shall be exempt from the requirements of the act if copies of all information and documentary materials filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed acquisition.

(2) A transaction described in paragraph (b)(1) of this section shall be exempt from the requirements of the act, including specifically the filing requirement, if the agency whose approval is required finds that approval of such transaction is necessary to prevent the probable failure of one of the institutions involved.

[43 FR 33544, July 31, 1978, as amended at 48 FR 34435, July 29, 1983; 67 FR 11903, Mar. 18, 2002]

§ 802.9 Acquisition solely for the purpose of investment.

An acquisition of voting securities shall be exempt from the requirements of the act pursuant to section 7A(c)(9) if made solely for the purpose of investment and if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer, regardless of the dollar value of voting securities so acquired or held.

Examples: 1. Suppose that acquiring person “A” acquires 6 percent of the voting securities of issuer X, valued in excess of \$50 million (as adjusted). If the acquisition is solely for the purpose of investment, it is exempt under Section 7A(c)(9).

2. After the acquisition in example 1, “A” decides to acquire an additional 7 percent of the voting securities of X. Regardless of “A”’s intentions, the acquisition is not exempt under section 7A(c)(9).

3. After the acquisition in example 1, acquiring person “A” decides to participate in the management of issuer X. Any subsequent

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acquisitions of X stock by "A" would not be exempt under section 7A(c)(9).

[43 FR 33544, July 31, 1978, as amended at 66 FR 8693, Feb. 1, 2001; 70 FR 4994, Jan. 31, 2005]

§ 802.10 Stock dividends and splits; reorganizations.

(a) The acquisition of voting securities pursuant to a stock split or pro rata stock dividend is exempt from the requirements of the Act under section 7A(c)(10).

(b) An acquisition of non-corporate interests or voting securities as a result of the conversion of a corporation or unincorporated entity into a new entity is exempt from the requirements of the Act if:

(1) No new assets will be contributed to the new entity as a result of the conversion; and

(2) Either:

(i) As a result of the transaction the acquiring person does not increase its per centum holdings in the new entity relative to its per centum holdings in the original entity; or

(ii) The acquiring person controlled the original entity.

Examples: 1. Partners A and B hold 60 percent and 40 percent respectively of the partnership interests in C. C is converted to a corporation in which A and B hold 60 percent and 40 percent respectively of the voting securities. No new assets are contributed. The conversion to a corporation is exempt from notification for both A and B.

2. Shareholder A holds 55% and B holds 45% of the voting securities of corporation C. C is converted to a limited liability company in which A holds 60% and B holds 40% of the membership interests. No new assets are contributed. The conversion to a limited liability company is exempt from notification because A controlled the corporation. If however, B holds 55% and A holds 45% in the new limited liability company, the conversion is not exempt for B and may require notification because control changes.

3. Shareholders A, B and C each hold one third of the voting securities of corporation X. Pursuant to a reorganization agreement, A and B each contribute new assets to X and C contributes cash. X is then being reincorporated in a new state. Each of A, B and C receive one third of the voting securities of newly reincorporated C. The reincorporation is not exempt from notification and may be reportable for A, B and C because of the contribution of new assets.

[70 FR 11513, Mar. 8, 2005]

§ 802.20 [Reserved]**§ 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold (as adjusted).**

(a) An acquisition of voting securities shall be exempt from the requirements of the act if:

(1) The acquiring person and all other persons required by the act and these rules to file notification filed notification with respect to an earlier acquisition of voting securities of the same issuer;

(2) The waiting period with respect to the earlier acquisition has expired, or been terminated pursuant to § 803.11, and the acquisition will be consummated within 5 years of such expiration or termination; and

(3) The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold (as adjusted) greater than the greatest notification threshold met or exceeded in the earlier acquisition.

Examples: 1. In 2004, Corporation A acquired \$53 million of the voting securities of corporation B and both "A" and "B" filed notification as required, indicating the \$50 million threshold. Within five years of the expiration of the original waiting period, "A" acquires additional voting securities of B but not in an amount sufficient to meet or exceed \$100 million (as adjusted) or 50 percent of the voting securities of B. No additional notification is required.

2. In 2004, Corporation A acquired \$53 million of the voting securities of corporation B and both "A" and "B" filed notification as required, indicating the \$50 million threshold. Suppose that in year three following the expiration of the waiting period, the \$50 million notification threshold has been adjusted to \$56 million pursuant to Section 7A(a)(2)(a) of the Act. "A" now intends to acquire an additional \$5 million of the voting securities of B. "A" is not required to file another notification even though it now holds voting securities in excess of the \$56 million notification threshold (which is greater than the \$50 million notification threshold indicated in its filing), because it has not met or exceeded a notification threshold (as adjusted) greater than the notification threshold exceeded in the earlier acquisition (i.e. \$100 million (as adjusted) or 50% notification thresholds).

3. Same facts as in Example 2 above except now the five year period has expired. Suppose that, the \$50 million notification threshold has been adjusted to \$57 million

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pursuant to Section 7A(a)(2)(a) of the Act. "A" now holds \$58 million of voting securities of B. Because §802.21(a)(2) is no longer satisfied, the acquisition of any additional voting securities of B will require a new filing because "A" will hold voting securities valued in excess of the \$57 million notification threshold. If, however, the \$50 million notification threshold had been adjusted to \$60 million at the end of the five-year period, A could acquire up to that threshold without a new filing.

4. This section also allows a person to recross any of the threshold notification levels that were in effect at the time of filing notification any number of times within five years of the expiration of the waiting period following notification. Thus, if in Example 1, "A" had disposed of some voting securities so that it held less than \$50 million of the voting securities of B, and thereafter had increased its holdings to more than \$50 million but less than \$100 million or 50 percent of B, notification would not be required if the increase occurred within 5 years of the expiration of the original waiting period.

5. A files notification at the \$50 million notification threshold and acquires \$51 million of the voting securities of B in the year following expiration of the waiting period. The next greater notification threshold at the time of filing was \$100 million. In year three, the \$100 million notification threshold has been adjusted to \$106 million. A can now acquire up to, but not meet or exceed, voting securities of B valued at \$106 million. As the original \$100 million threshold is adjusted upward in years four and five, A can acquire up to those new thresholds as the adjustments are effected.

6. A files notification at the \$50 million threshold in January of year one. In February of year one, the \$50 million threshold is adjusted to \$52 million. A only needs to acquire in excess of \$50 million of voting securities of B, not in excess of \$52 million, to have exceeded the threshold which was filed for in the year following expiration of the waiting period (see §803.7). It may then acquire up to the next greater notification threshold (as adjusted) during the five years following expiration of the waiting period.

(b) [Reserved]

[43 FR 33544, July 31, 1978, as amended at 66 FR 8693, Feb. 1, 2001; 67 FR 11906, Mar. 18, 2002; 70 FR 4995, Jan. 31, 2005; 76 FR 42482, July 19, 2011]

§ 802.23 Amended or renewed tender offers.

Whenever a tender offer is amended or renewed after notification has been filed by the offeror, no new notification shall be required, and the running of

the waiting period shall be unaffected, except as follows:

(a) If the number of voting securities to be acquired pursuant to the offer is increased such that a greater notification threshold would be met or exceeded, only the acquiring person need again file notification, but a new waiting period must be observed;

(b) If a noncash tender offer is amended to become a cash tender offer, (1) one copy of the amended tender offer shall be filed in the manner prescribed by §803.10(c) with the Federal Trade Commission and Assistant Attorney General, and (2) subject to the provisions of §803.10(b)(1), the waiting period shall expire on the 15th day after the date of receipt (determined in accordance with §803.10(c)) of the amended tender offer, or on the 30th day after filing notification, whichever is earlier; or

(c) If a cash tender offer is amended to become a noncash tender offer, (1) one copy of the amended tender offer shall be filed in the manner prescribed by §803.10(c) with the Federal Trade Commission and Assistant Attorney General, and (2) subject to the provisions of §803.10(b)(1), the waiting period shall expire on the 15th day after the date of receipt (as determined in accordance with §803.10(c)) of the amended tender offer, or on the 30th day after filing notification, whichever is later.

Examples: 1. Assume that corporation A makes a tender offer for 20 percent of the voting securities of corporation B and that "A" files notification. Under this section, if A subsequently amends its tender offer only as to the amount of consideration offered, the waiting period so commenced is not affected, and no new notification need be filed.

2. In the previous example, assume that A makes an amended tender offer for 27 percent of the voting securities of B, valued at greater than \$1 billion. Since a new notification threshold will be crossed, this section requires that "A" must again file notification and observe a new waiting period. Paragraph (a) of this section, however, provides that "B" need not file notification again.

3. Assume that "A" makes a tender offer for shares of corporation B. "A" includes its voting securities as part of the consideration. "A" files notification. Five days later, "A" changes its tender offer to a cash tender offer, and on the same day files copies of its amended tender offer with the offices designated in §803.10(c). Under paragraph (b) of

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this section, the waiting period expires (unless extended or terminated) 15 days after the receipt of the amended offer (on the 20th day after filing notification), since that occurs earlier than the expiration of the original waiting period (which would occur on the 30th day after filing).

4. Assume that "A" makes a cash tender offer for shares of corporation B and files notification. Six days later, "A" amends the tender offer and adds voting securities as consideration, and on the same day files copies of the amended tender offer with the offices designated in § 803.10(c). Under paragraph (c) of this section, the waiting period expires (unless extended or terminated) on the 30th day following the date of filing of notification (determined under § 803.10(c)), since that occurs later than the 15th day after receipt of the amended tender offer (which would occur on the 21st day).

[43 FR 33544, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 66 FR 8694, Feb. 1, 2001]

§ 802.30 Intraperson transactions.

(a) An acquisition (other than the formation of a corporation or unincorporated entity under § 801.40 or § 801.50 of this chapter) in which the acquiring and at least one of the acquired persons are, the same person by reason of § 801.1(b)(1) of this chapter, or in the case of a not-for-profit corporation which has no outstanding voting securities, by reason of § 801.1(b)(2) of this chapter, is exempt from the requirements of the Act.

Examples to paragraph (a): 1. A and B each have the right to 50% of the profits of partnership X. A also holds 100% of the voting securities of corporation Y. A pays B in excess of \$50 million in cash (as adjusted) and transfers certain assets of X to Y. Because A is the acquiring person through its control of Y, pursuant to § 801.1(b)(1)(i), and one of the acquired persons through its control of X pursuant to § 801.1(b)(1)(ii), the acquisition of assets is exempt under § 802.30(a).

2. A and B each have the right to 50% of the profits of partnership X. A contributes assets to X valued in excess of \$50 million (as adjusted). B contributes cash to X. Because B is an acquiring person but not an acquired person, its acquisition of the assets contributed to X by A is not exempt under § 802.30(a). However, A is both an acquiring and acquired person, and its acquisition of the assets it is contributing to X is exempt under § 802.30(a).

(b) The formation of any wholly owned entity is exempt from the requirements of the Act.

(c) For purposes of applying § 802.4(a) to an acquisition that may be reportable under § 801.40 or § 801.50, assets, voting securities, or non-corporate interests contributed by the acquiring person to a new entity upon its formation are assets, voting securities, or non-corporate interests whose acquisition by that acquiring person is exempt from the requirements of the Act.

Examples to paragraph (c): 1. A and B form a new partnership to which A contributes a manufacturing plant valued at \$102 million and acquires a 51% interest in the partnership. B contributes \$98 million in cash and acquires a 49% interest. B is not acquiring non-corporate interests which confer control of the partnership and therefore is not making a reportable acquisition. A is acquiring non-corporate interests which confer control of the partnership, however, the manufacturing plant it is contributing to the formation is exempt under § 802.30(c) and the cash contributed by B is excluded under § 801.21, therefore, the acquisition of non-corporate interests by A is exempt under § 802.4.

2. A and B form a new corporation to which A contributes a plant valued at \$120 million and acquires 60% of the voting securities of the new corporation. B contributes a plant valued at \$80 million and acquires 40% of the voting securities of the new corporation. While the assets contributed to the formation are exempted by § 802.30(c) for each of A and B, the new corporation holds more than \$50 million (as adjusted) in non-exempt assets (the plant contributed by the other person) with respect to both acquisitions. A is now acquiring voting securities of an issuer which holds \$80 million in non-exempt assets (the plant contributed by B), and B is acquiring voting securities of an issuer which holds \$120 million in non-exempt assets (the plant contributed by A). Therefore neither acquisition of voting securities is exempt under § 802.4. Note that in contrast to the formation of the partnership in Example 1, B is not required to acquire a controlling interest in the corporation in order to have a reportable transaction.

3. A and B form a 50/50 partnership. A contributes a plant valued at \$100 million and B contributes a plant valued at \$40 million and \$60 million in cash. Because with respect to A, the new partnership has non-exempt assets of \$40 million (the plant contributed by B), A's acquisition of non-corporate interests is exempt under § 802.4. With respect to B, the new partnership holds in excess of \$50 million (as adjusted) in non-exempt assets (the plant contributed by A), therefore B's

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acquisition of non-corporate interests would not be exempt under § 802.4.

[70 FR 11513, Mar. 8, 2005, as amended at 83 FR 32771, July 16, 2018]

§ 802.31 Acquisitions of convertible voting securities.

Acquisitions of convertible voting securities shall be exempt from the requirements of the act.

Example: This section applies regardless of the dollar value of the convertible voting securities held or to be acquired. Note, however, that subsequent conversions of convertible voting securities may be subject to the requirements of the act. See § 801.32.

[43 FR 33544, July 31, 1978, as amended at 66 FR 8694, Feb. 1, 2001]

§ 802.35 Acquisitions by employee trusts.

An acquisition of voting securities shall be exempt from the notification requirements of the act if:

(a) The securities are acquired by a trust that meets the qualifications of section 401 of the Internal Revenue Code;

(b) The trust is controlled by a person that employs the beneficiaries and,

(c) The voting securities acquired are those of that person or an entity within that person.

Examples: 1. Company A establishes a trust for its employees that meets the qualifications of section 401 of the Internal Revenue Code. Company A has the power to designate the trustee of the trust. That trust then acquires 30% of the voting securities of Company A for in excess of \$50 million (as adjusted). Later, the trust acquires 20% of the stock of Company B, a wholly-owned subsidiary of Company A, for in excess of \$50 million (as adjusted). Neither acquisition is reportable.

2. Assume that in the example above, "A" has total assets of \$100 million (as adjusted). "C" also has total assets of \$100 million (as adjusted) and is not controlled by Company A. The trust controlled by Company A plans to acquire 40 percent of the voting securities of Company C for in excess of \$50 million (as adjusted). Since Company C is not included within "A," "A" must observe the requirements of the act before the trust makes the acquisition of Company C's shares.

[52 FR 7082, Mar. 6, 1987, as amended at 66 FR 8694, Feb. 1, 2001; 70 FR 4995, Jan. 31, 2005]

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§ 802.40 Exempt formation of corporations or unincorporated entities.

The formation of an entity is exempt from the requirements of the Act if the entity will be not-for-profit within the meaning of sections 501(c)(1)-(4), (6)-(15), (17)-(20) or (d) of the Internal Revenue Code.

[70 FR 11514, Mar. 8, 2005]

§ 802.41 Corporations or unincorporated entities at time of formation.

Whenever any person(s) contributing to the formation of an entity are subject to the requirements of the Act by reason of § 801.40 or § 801.50 of this chapter, the new entity need not file the notification required by the Act and § 803.1 of this chapter.

Examples: 1. Corporations A and B, each having sales of in excess of \$100 million (as adjusted), each propose to contribute in excess of \$50 million (as adjusted) in assets in exchange for 50 percent of the voting securities of a new corporation, N. Under this section, the new corporation need not file notification, although both A and B must do so and observe the waiting period prior to receiving any voting securities of N.

2. In addition to the facts in Example 1 of this section, A and B have agreed that upon creation N will purchase 100 percent of the voting securities of corporation C for in excess of \$50 million (as adjusted). Because N's purchase of C is not a transaction in connection with N's formation, and because in any event C is not a contributor to the formation of N, "A," "B" and "C" must file with respect to the proposed acquisition of C and must observe the waiting period.

[43 FR 33544, July 31, 1978, as amended at 52 FR 7082, Mar. 6, 1987; 70 FR 4995, Jan. 31, 2005; 70 FR 11514, Mar. 8, 2005; 83 FR 32771, July 16, 2018]

§ 802.42 Partial exemption for acquisitions in connection with the formation of certain joint ventures or other corporations.

(a) Whenever one or more of the contributors in the formation of a joint venture or other corporation which otherwise would be subject to the requirements of the act by reason of § 801.40 are exempt from these requirements under section 7A(c)(8), any other contributor in the formation which is subject to the act and not exempt under section 7A(c)(8) need not file a

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Notification and Report Form, provided that no less than 30 days prior to the date of consummation any such contributor claiming this exemption has submitted an affidavit to the Federal Trade Commission and to the Assistant Attorney General stating its good faith intention to make the proposed acquisition and asserting the applicability of this exemption.

(b) Persons relieved of the requirement to file a Notification and Report Form pursuant to paragraph (a) of this section remain subject to all other provisions of the act and these rules.

[48 FR 34436, July 29, 1983]

§ 802.50 Acquisitions of foreign assets.

(a) The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding \$50 million (as adjusted) during the acquired person's most recent fiscal year.

(b) Where the foreign assets being acquired exceed the threshold in paragraph (a) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than \$110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) are less than \$110 million (as adjusted); and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

Example to § 802.50: 1. Assume that "A" and "B" are both U.S. persons. "A" proposes selling to "B" a manufacturing plant located abroad. Sales in or into the United States attributable to the plant totaled \$13 million in the most recent fiscal year. The transaction is exempt under this paragraph (a) of this section.

2. Sixty days after the transaction in example 1, "A" proposes to sell to "B" a sec-

ond manufacturing plant located abroad; sales in or into the United States attributable to this plant, when combined with the sales into the United States of the first plant, totaled in excess of \$50 million (as adjusted) in the most recent fiscal year. Since "B" would be acquiring the second plant within 180 days of the first plant, both plants would be considered assets of "A" held by "B" as a result of the second acquisition (see § 801.13(b)(2) of this chapter). Since the total sales in or into the United States exceed \$50 million (as adjusted), the acquisition of the second plant would not be exempt under this paragraph (a) of this section.

3. Assume that "A" and "B" are foreign persons with aggregate sales in or into the United States of in excess of \$110 million (as adjusted). If "A" acquires only foreign assets of "B," and if those assets generated \$50 million (as adjusted) or less in sales in or into the United States, the transaction is exempt.

4. Assume that "A" and "B" are foreign persons with aggregate sales in or into the United States and assets located in the United States of less than \$110 million (as adjusted). If "A" acquires only foreign assets of "B," and those assets generated in excess of \$50 million (as adjusted) in sales in or into the United States during the most recent fiscal year, the transaction is exempt from reporting if the assets are valued at \$200 million (as adjusted) or less, but is reportable if valued at greater than \$200 million (as adjusted).

[67 FR 11903, Mar. 18, 2002, as amended at 70 FR 4995, Jan. 31, 2005]

§ 802.51 Acquisitions of voting securities of a foreign issuer.

(a) *By U.S. persons.* (1) The acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or non-voting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) having an aggregate total value of over \$50 million (as adjusted); or made aggregate sales in or into the United States of over \$50 million (as adjusted) in its most recent fiscal year.

(2) If interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the

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issuers must be aggregated to determine whether either \$50 million (as adjusted) limitation is exceeded.

(b) *By foreign persons.* (1) The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) having an aggregate total value of over \$50 million (as adjusted); or made aggregate sales in or into the United States of over \$50 million (as adjusted) in its most recent fiscal year.

(2) If controlling interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either \$50 million (as adjusted) limitation is exceeded.

(c) Where a foreign issuer whose securities are being acquired exceeds the threshold in paragraph (b)(1) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than \$110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) are less than \$110 million (as adjusted); and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

Example to § 802.51 1. “A,” a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of in excess of 50 million (as adjusted) in the most recent fiscal year. The transaction is not exempt under this section.

2. Assume that “A” and “B” are foreign persons with aggregate sales in or into the United States in excess of \$110 million (as ad-

justed), and that “A” is acquiring 100% of the voting securities of “B.” Included within “B” is U.S. issuer C, whose total U.S. assets are valued in excess of \$50 million (as adjusted). Since “A” will be acquiring control of an issuer, C, with total U.S. assets of more than \$50 million (as adjusted), and the parties’ aggregate sales in or into the U.S. in the relevant time period exceed \$110 million (as adjusted), the acquisition is not exempt under this section.

3. “A,” a foreign person, intends to acquire 100 percent of the voting securities of two wholly owned subsidiaries of “B” for a total of in excess of \$50 million (as adjusted). BSUB1 is a foreign issuer with less than \$50 million (as adjusted) in sales into the U.S. in its most recent fiscal year and with assets of less than \$50 million (as adjusted) located in the U.S. Less than \$50 million (as adjusted) of the acquisition price has been allocated to BSUB1. BSUB2 is a U.S. issuer with more than \$50 million (as adjusted) in U.S. sales and more than \$50 million (as adjusted) in assets located in the U.S. Less than \$50 million (as adjusted) of the acquisition price is allocated to BSUB2. Since BSUB1 does not exceed the \$50 million (as adjusted) limitation for U.S. sales or assets in § 802.51(b), its voting securities are not held as a result of the acquisition (see § 801.15(b) of this chapter). Since the acquisition price for BSUB2 alone would not result in “A” holding in excess of \$50 million (as adjusted) of voting securities of the acquired person, the transaction is non-reportable in its entirety. Note that the U.S. sales and assets of BSUB1 are not aggregated with those of BSUB2 for purposes of determining whether the limitations in paragraph (b) of this section are exceeded. If BSUB2 were also a foreign issuer, such aggregation would be required under paragraph (b)(2) of this section, and the transaction in its entirety would be reportable.

[67 FR 11904, Mar. 18, 2002; 67 FR 13716, Mar. 26, 2002, as amended at 70 FR 4996, Jan. 31, 2005]

§ 802.52 Acquisitions by or from foreign governmental entities.

An acquisition shall be exempt from the requirements of the act if:

(a) The ultimate parent entity of either the acquiring person or the acquired person is controlled by a foreign state, foreign government, or agency thereof; and

(b) The acquisition is of assets located within that foreign state or of voting securities or non-corporate interests of an entity organized under the laws of that state.

Example: The government of foreign country X has decided to sell assets of its wholly

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owned corporation, B, all of which are located in foreign country X. The buyer is "A," a U.S. person. Regardless of the aggregate sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate sales were \$50 million (as adjusted) or less, the transaction would also be exempt under §802.50).

[43 FR 33544, July 31, 1978, as amended at 67 FR 11904, Mar. 18, 2002; 70 FR 4996, Jan. 31, 2005; 76 FR 42482, July 19, 2011]

§ 802.53 Certain foreign banking transactions.

An acquisition which requires the consent or approval of the Board of Governors of the Federal Reserve System under section 25 or section 25(a) of the Federal Reserve Act, 12 U.S.C. 601, 615, shall be exempt from the requirements of the act if copies of all information and documentary material filed with the Board of Governors are contemporaneously filed with the Federal Trade Commission and Assistant Attorney General at least 30 days prior to consummation of the acquisition. In lieu of such information and documentary material or any portion thereof, an index describing such material may be provided in the manner authorized by §802.6(a).

[43 FR 33544, July 31, 1978, as amended at 48 FR 34435, July 29, 1983]

§ 802.60 Acquisitions by securities underwriters.

An acquisition of voting securities by a person acting as a securities underwriter, in the ordinary course of business, and in the process of underwriting, shall be exempt from the requirements of the act.

§ 802.63 Certain acquisitions by creditors and insurers.

(a) *Creditors.* An acquisition of collateral or receivables, or an acquisition in foreclosure, or upon default, or in connection with the establishment of a lease financing, or in connection with a bona fide debt work-out shall be exempt from the requirements of the act if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business.

(b) *Insurers.* An acquisition pursuant to a condition in a contract of insur-

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ance relating to fidelity, surety, or casualty obligations shall be exempt from the requirements of the act if made by an insurer in the ordinary course of business.

Examples: 1. A bank makes a loan and takes actual or constructive possession of collateral in any form. Since the bank is not the beneficial owner of the collateral, the bank's receipt of it is not an acquisition which is subject to the requirements of the act. However, if upon default the bank becomes the beneficial owner of the collateral, that acquisition is exempt under this section.

2. This section exempts only the acquisition by the creditor or insurer, and not the subsequent disposition of the assets or voting securities. If a creditor or insurer sells voting securities or assets that have come into its possession in a transaction which is exempt under this section, the requirements of the act may apply to that disposition.

§ 802.64 Acquisitions of voting securities by certain institutional investors.

(a) *Institutional investor.* For purposes of this section, the term *institutional investor* means any entity of the following type:

- (1) A bank within the meaning of 15 U.S.C. 80b-2(a)(2);
- (2) Savings bank;
- (3) Savings and loan or building and loan company or association;
- (4) Trust company;
- (5) Insurance company;
- (6) Investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*);
- (7) Finance company;
- (8) Broker-dealer within the meaning of 15 U.S.C. 78c(a)(4) or (a)(5);
- (9) Small Business Investment Company or Minority Enterprise Small Business Investment Company regulated by the U.S. Small Business Administration pursuant to 15 U.S.C. 662;
- (10) A stock bonus, pension, or profit-sharing trust qualified under section 401 of the Internal Revenue Code;
- (11) Bank holding company within the meaning of 12 U.S.C. 1841;
- (12) An entity which is controlled directly or indirectly by an institutional investor and the activities of which are in the ordinary course of business of the institutional investor;

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(13) An entity which may supply incidental services to entities which it controls directly or indirectly but which performs no operating functions, and which is otherwise engaged only in holding controlling interests in institutional investors; or

(14) A nonprofit entity within the meaning of sections 501(c) (1) through (4), (6) through (15), (17) through (20), or (d) of the Internal Revenue Code.

(b) *Exemption.* An acquisition of voting securities shall be exempt from the requirements of the act, except as provided in paragraph (c) of this section, if:

(1) Made directly by an institutional investor;

(2) Made in the ordinary course of business;

(3) Made solely for the purpose of investment; and

(4) As a result of the acquisition the acquiring person would hold fifteen percent or less of the outstanding voting securities of the issuer.

(c) *Exception to exemption.* Notwithstanding paragraph (b) of this section:

(1) No acquisition of voting securities of an institutional investor of the same type as any entity included within the acquiring person shall be exempt under this section; and

(2) No acquisition by an institutional investor shall be exempt under this section if any entity included within the acquiring person which is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired.

Examples: 1. Assume that A and its subsidiary, B, are both institutional investors as defined in paragraph (a) of this section, that X is not, and that the conditions set forth in paragraphs (b)(2), (3) and (4) of this section are satisfied. Either A or B may acquire voting securities of X worth in excess of \$50 million (as adjusted) as long as the aggregate amount held by person "A" as a result of the acquisition does not exceed 15 percent of X's outstanding voting securities. If the aggregate holdings would exceed 15 percent, "A" may acquire no more than \$50 million (as adjusted) worth of voting securities without being subject to the requirements of the act.

2. In example 1, assume that B plans to make the acquisition, but that corporation B's parent, corporation A, is not an institutional investor and is engaged in manufacturing. Subparagraph (c)(2) provides that acquisitions by B can never be exempt under

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this section if A owns any amount of X's voting securities.

3. In example 1, the exemption does not apply if X is also an institutional investor of the same type as either A or B.

4. Assume that H is a holding company which controls a life insurance company, a casualty insurer and a finance company. The life insurance company controls a data processing company which performs services for the two insurers. Any acquisition by any of these entities could qualify for exemption under this section.

5. In example 4, if H also controls a manufacturing entity, H is not an institutional investor, and only the acquisitions made by the two insurance companies, the finance company and the data processing company can qualify for the exemption under this section.

[43 FR 33544, July 31, 1978, as amended at 66 FR 8694, Feb. 1, 2001; 70 FR 4996, Jan. 31, 2005]

§ 802.65 Exempt acquisition of non-corporate interests in financing transactions.

An acquisition of non-corporate interests that confers control of a new or existing unincorporated entity is exempt from the notification requirements of the Act if:

(a) The acquiring person is contributing only cash to the unincorporated entity;

(b) For the purpose of providing financing; and

(c) The terms of the financing agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return.

[70 FR 11514, Mar. 8, 2005]

§ 802.70 Acquisitions subject to order.

An acquisition shall be exempt from the requirements of the act if the voting securities or assets are to be acquired from an entity pursuant to and in accordance with:

(a) An order of the Federal Trade Commission or of any Federal court in an action brought by the Federal Trade Commission or the Department of Justice;

(b) An Agreement Containing Consent Order that has been accepted by the Commission for public comment, pursuant to the Commission's Rules of Practice; or

(c) A proposal for a consent judgment that has been submitted to a Federal

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court by the Federal Trade Commission or the Department of Justice and that is subject to public comment.

[63 FR 34594, June 25, 1998]

§ 802.71 Acquisitions by gift, intestate succession or devise, or by irrevocable trust.

Acquisitions resulting from a gift, intestate succession, testamentary disposition or transfer by a settlor to an irrevocable trust shall be exempt from the requirements of the act.

§ 802.80 Transitional rule for transactions investigated by the agencies.

§§ 801.2 and 801.50 shall not apply to any transaction that has been the subject of investigation by either the Federal Trade Commission or the Antitrust Division of the Department of Justice in which, prior to the effective date of that section, the reviewing agency obtained documentary material and information under compulsory process from all parties that would be required to submit a Notification and Report Form for Certain Mergers and Acquisitions under Section 801.50 but for this transitional rule.

[70 FR 11514, Mar. 8, 2005]

PART 803—TRANSMITTAL RULES

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APPENDIX A TO PART 803—NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

APPENDIX B TO PART 803—INSTRUCTIONS TO THE NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

AUTHORITY: 15 U.S.C. 18a(d).

SOURCE: 43 FR 33548, July 31, 1978, unless otherwise noted.

§ 803.1 Notification and Report Form.

(a) The notification required by the act shall be the Notification and Report Form set forth in the appendix to this part, as amended from time to time. All acquiring and acquired persons required to file notification by the act and these rules shall do so by completing and filing the Notification and Report Form, in accordance with the instructions thereon and these rules. The current version of the Form can be obtained at <http://www.ftc.gov>.

(b) Any person filing notification may, in addition to the submissions required by this section, submit any other information or documentary material which such person believes will be helpful to the Federal Trade Commission and Assistant Attorney General in assessing the impact of the acquisition upon competition.

[43 FR 33548, July 31, 1978, as amended at 66 FR 8695, Feb. 1, 2001; 71 FR 35998, June 23, 2006; 81 FR 60259, Sept. 1, 2016]

§ 803.2 Instructions applicable to Notification and Report Form.

(a) The notification required by the act shall be filed by the preacquisition ultimate parent entity, or by any entity included within the person authorized by such preacquisition ultimate parent entity to file notification on its behalf. In the case of a natural person required by the act to file notification, such notification may be filed by his or her legal representative: *Provided however*, That notwithstanding §§ 801.1(c)(2) and 801.2, only one notification shall be filed by or on behalf of a natural person, spouse and minor children with respect to an acquisition as a result of which more than one such natural person will hold voting securities of the same issuer.

Example: Jane Doe, her husband and minor child collectively hold more than 50 percent

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of the shares of family corporation F. Therefore, Jane Doe (or her husband or minor child) is the "ultimate parent entity" of a "person" composed to herself (or her husband or minor child) and F; see paragraphs (a)(3), (b) and (c)(2) of § 801.1. If corporation F is to acquire corporation X, under this paragraph only one notification is to be filed by Jane Doe, her husband and minor child collectively.

(b) Except as provided in paragraph (b)(2) of this section and paragraph (c) of this section:

(1) Items 5–8 of the Notification and Report Form must be completed—

(i) By acquiring persons, with respect to all entities included within the acquiring person;

(ii) By acquired persons, in the case of an acquisition of assets, only with respect to the assets to be acquired;

(iii) By acquired persons, in the case of an acquisition of voting securities, with respect to only the issuer whose voting securities are being acquired, and all entities controlled by such issuer; and

(iv) By acquired persons, in the case of an acquisition of non-corporate interests, with respect to the unincorporated entity whose non-corporate interests are being acquired, and all entities controlled by such unincorporated entity; and

(v) By persons which are both acquiring and acquired persons, separately in the manner that would be required of acquiring and acquired persons under this paragraph, if different.

(2) For purposes of item 7 of the Notification and Report Form, the acquiring person shall regard the acquired person in the manner described in paragraphs (b)(1)(ii), (iii) and (iv) of this section.

Example: Person "A" is comprised of entities separately engaged in grocery retailing, auto rental, and coal mining. Person "B" is comprised of entities separately engaged in wholesale magazine distribution, auto rental and book publishing. "A" proposes to purchase 100 percent of the voting securities of "B's" book publishing subsidiary. For purposes of item 5, under clause (b)(1)(i), "A" reports the activities of all its entities; under clause (b)(1)(iii), "B" reports only the operations of its book publishing subsidiary. For purposes of items 7 and 8, under paragraph (b)(2) of this section, "A" must regard "B" as consisting only of its book publishing subsidiary and must disregard the fact that "A"

and "B" are both engaged in the auto rental business.

(c) In response to items 5, 7, and 8 of the Notification and Report Form—Information need not be supplied with respect to assets or voting securities to be acquired, the acquisition of which is exempt from the requirements of the act.

(d) The term *dollar revenues*, as used in the Notification and Report Form, means value of shipments for manufacturing operations, and sales, receipts, revenues, or other appropriate dollar value measure for operations other than manufacturing, f.o.b. the plant or establishment less returns, after discounts and allowances and excluding freight charges and excise taxes. Dollar revenues including delivery may be supplied if delivery is an integral part of the sales price. Dollar revenues include interplant transfers.

(e) For documents required by item 4(b) of the Notification and Report Form, a person filing the notification may, instead of submitting a document, provide a cite to an operative Internet address directly linking to the document, if the linked document is complete and payment is not required to access the document. If an Internet address becomes inoperative during the waiting period, or the document is otherwise rendered inaccessible or incomplete, upon notification by the Commission or Assistant Attorney General, the parties must make the document available to the agencies by either referencing an operative Internet address where the complete document may be accessed or by providing paper copies to the agencies as provided in § 803.10(c)(1) by 5 p.m. on the next regular business day. Failure to make the document available, by the Internet or by providing paper copies, by 5 p.m. on the next regular business day, will result in notice of a deficient filing pursuant to § 803.10(c)(2).

(f) Filings made via DVD must comply with all format requirements set forth at the Premerger Notification Office pages at <http://www.ftc.gov>. The use of any format not specified as acceptable, or any other failure to comply

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with the applicable format requirements, shall render the entire filing deficient within the meaning of § 803.10(c)(2).

[43 FR 33548, July 31, 1978, as amended at 48 FR 34438, July 29, 1983; 66 FR 8695, Feb. 1, 2001; 66 FR 23565, May 9, 2001; 70 FR 11514, Mar. 8, 2005; 70 FR 73372, Dec. 12, 2005; 71 FR 35998, June 23, 2006; 76 FR 42483, July 19, 2011; 81 FR 60259, Sept. 1, 2016]

§ 803.3 Statement of reasons for non-compliance.

A complete response shall be supplied to each item on the Notification and Report Form and to any request for additional information pursuant to section 7A(e) and § 803.20. Whenever the person filing notification is unable to supply a complete response, that person shall provide, for each item for which less than a complete response has been supplied, a statement of reasons for noncompliance. The statement of reasons for noncompliance shall contain all information upon which a person relies in explanation of its noncompliance and shall include at least the following:

- (a) Why the person is unable to supply a complete response;
- (b) What information, and what specific documents or categories of documents, would have been required for a complete response;
- (c) Who, if anyone, has the required information, and specific documents or categories of documents; and a description of all efforts made to obtain such information and documents, including the names of persons who searched for required information and documents, and where the search was conducted. If no such efforts were made, provide an explanation of the reasons why, and a description of all efforts necessary to obtain required information and documents;
- (d) Where noncompliance is based on a claim of privilege, a statement of the claim of privilege and all facts relied on in support thereof, including the identity of each document, its author, the author's title/position, addressee, the addressee's title/position, date, subject matter, all recipients of the original and of any copies, the recipients'

titles/positions, the document's present location, and who has control of it.

[48 FR 34439, July 29, 1983, as amended at 81 FR 60259, Sept. 1, 2016]

§ 803.4 Foreign persons refusing to file notification.

(a) In an acquisition to which § 801.30 does not apply, and in which no assets (other than investment assets) located in the United States and no voting securities of a United States issuer will be acquired directly or indirectly, if a foreign acquired person refuses to file notification, then any other person which is a party to the acquisition may file notification on behalf of the foreign person. Such notification shall constitute the notification required of the foreign person by the act and these rules.

(b) Any person filing on behalf of the foreign person pursuant to this section must state in the affidavit required by § 803.5(b) that such foreign person has refused to file notification and must explain all efforts made by the person filing on behalf of the foreign person to obtain compliance with the act and these rules by such foreign person.

(c) Any notification filed on behalf of a foreign person pursuant to this section must contain all information and documentary material reasonably available to the person filing on behalf of the foreign person which such foreign person would be required to provide. Whenever information or documentary material is not reasonably available, the person filing on behalf of the foreign person shall so indicate on the Notification and Report Form, and need not supply the statement of reasons for noncompliance required by § 803.3.

(d) Any foreign person on whose behalf notification has been filed by another person pursuant to this section shall be a "person filing notification" for purposes of the act and these rules. Nothing in this section shall exempt a foreign person from the requirements of the act or these rules with respect to a request for additional information or an extension of the waiting period pursuant to section 7A(e) and these rules.

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§ 803.5 Affidavits required.

(a)(1) *Section 801.30 acquisitions.* For acquisitions to which § 801.30 applies, the notification required by the Act from each acquiring person shall contain an affidavit, attached to the front of the notification, or with the DVD submission, attesting that the issuer or unincorporated entity whose voting securities or non-corporate interests are to be acquired has received written notice delivered to an officer (or a person exercising similar functions in the case of an entity without officers) by email, certified or registered mail, wire, or hand delivery, at its principal executive offices, of:

(i) The identity of the acquiring person;

(ii) The fact that the acquiring person intends to acquire voting securities or non-corporate interests of the issuer or unincorporated entity;

(iii) The specific classes of voting securities or non-corporate interests of the issuer or unincorporated entity sought to be acquired; and if known, the number of voting securities or non-corporate interests of each such class that would be held by the acquiring person as a result of the acquisition or, if the number of voting securities is not known in the case of an issuer, the specific notification threshold that the acquiring person intends to meet or exceed; and, if designated by the acquiring person, a higher threshold for additional voting securities it may hold in the year following the expiration of the waiting period;

(iv) The fact that the acquisition may be subject to the act, and that the acquiring person will file notification under the act with the Federal Trade Commission and Assistant Attorney General;

(v) The anticipated date of receipt of such notification under § 803.10(c); and

(vi) The fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the act.

Example to paragraph (a)(1)(vi): 1. Company A intends to acquire voting securities of Company B. “A” sends, via email, a notice letter to a general email account, information@CompanyB.com. “A” has not provided sufficient notice. Alternatively, “A” sends, via email, a notice letter to “B’s”

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President, Jane Doe, at Jane.Doe@CompanyB.com. “A” has provided email notice to a specific officer of “B.”

(2) The affidavit required by this paragraph must also state the good faith intention of the person filing notification to make the acquisition, and, in the case of a tender offer, that the intention to make the tender offer has been publicly announced.

Examples to paragraph (a)(2) 1. This paragraph permits the tender offeror to file notification at any time after the intention to make the tender offer has been publicly announced.

In examples 2–5 assume that one percent of B’s shares are valued at \$15 million.

2. “A” holds 100,000 shares of the voting securities of Company B. “A” has a good faith intention to acquire an additional 900,000 shares of Company B’s voting securities. “A” states in its notice to B, *inter alia*, that as a result of the acquisition it will hold 1,000,000 shares. If 1,000,000 shares of Company B represent 20 percent of Company B’s outstanding voting securities, the statement will be deemed by the enforcement agencies a notification for the \$100 million threshold (as adjusted).

3. Company A intends to acquire voting securities of Company B. “A” does not know exactly how many shares it will acquire, but it knows it will definitely acquire in excess of \$50 million (as adjusted) worth and may acquire 50 percent of Company B’s shares. “A”’s notice to the acquired person would meet the requirements of Sec. 803.5(a)(1)(iii) if it states, *inter alia*, either: “Company A has a present good faith intention to acquire in excess of \$50 million (as adjusted) of the outstanding voting securities of Company B, and depending on market conditions, may acquire more of the voting securities of Company B and thus designates the 50 percent threshold,” or “Company A has a present good faith intention to acquire in excess of \$50 million (as adjusted) of the outstanding voting securities of Company B, and depending on market conditions may acquire 50 percent or more of the voting securities of Company B.” The Commission would deem either of these statements as intending to give notice for the 50 percent threshold.

4. “A” states, *inter alia*, that, “depending on market conditions, it may acquire 100 percent of the shares of B.” “A”’s notice does not comply with § 803.5 because it does not state an intent to meet or exceed any notification threshold. “A”’s filing will be considered deficient within the meaning of § 803.10(c)(2).

5. “A” states, *inter alia*, that it has commenced a tender offer for “up to 55 percent of the outstanding voting securities of Company B.” “A”’s notice does not comply with

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§ 803.5 because use of the term “up to” does not state an intent to meet or exceed any notification threshold. The filing will therefore be considered deficient within the meaning of § 803.10 (c)(2).

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section. For DVD filings, the written notice (in a form specified in the instructions) must be included on the DVD.

(b) *Non-section 801.30 acquisitions.* For acquisitions to which § 801.30 does not apply, the notification required by the act shall contain an affidavit, attached to the front of the notification, or with the DVD submission, attesting that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34439, July 29, 1983; 52 FR 7082, Mar. 6, 1987; 66 FR 8695, Feb. 1, 2001; 70 FR 4996, Jan. 31, 2005; 71 FR 35998, June 23, 2006; 76 FR 42483, July 19, 2011; 81 FR 60259, Sept. 1, 2016; 83 FR 32771, July 16, 2018]

§ 803.6 Certification.

(a) The notification required by the act shall be certified:

(1) In the case of a partnership, by any general partner thereof;

(2) In the case of a corporation, by any officer or director thereof;

(3) In the case of a person lacking officers, directors, or partners, by any individual exercising similar functions;

(4) In the case of a natural person, by such natural person or his or her legal representative;

(5) In the case of the estate of a deceased natural person, by any duly authorized legal representative of such estate.

(b) Additional information or documentary material submitted in response to a request pursuant to section 7A(e) and § 803.20 shall be accompanied by a certification in the format appearing at the end of the Notification and Report Form, completed in accordance with paragraph (a) of this section by the person or individual to whom it was directed.

(c) In all cases, the certifying individual must possess actual authority to make the certification on behalf of the person filing notification.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34429, July 29, 1983]

§ 803.7 Expiration of notification.

(a) *One year after waiting period expired.* Notification with respect to an acquisition shall expire 1 year following the expiration of the waiting period. If the acquiring person's holdings do not, within such time period, meet or exceed the notification threshold with respect to which the notification was filed, the requirements of the act must thereafter be observed with respect to any notification threshold not met or exceeded.

Example: “A” files notification that in excess of \$100 million (as adjusted) of the voting securities of corporation B are to be acquired. One year after the expiration of the waiting period, “A” has acquired less than \$100 million (as adjusted) of B’s voting securities. Although § 802.21 will permit “A” to purchase any amount of B’s voting securities short of \$100 million (as adjusted) within 5 years from the expiration of the waiting period, A’s holdings may not meet or exceed the \$100 million (as adjusted) notification threshold without “A” and “B” again filing notification and observing a waiting period.

(b) *Upon failure to comply with request for additional information.* An acquiring person’s notification and, in the case of an acquisition to which § 801.30 does not apply, an acquired person’s notification, shall expire eighteen months following the date of receipt of such person’s notification if a request for additional information or documentary material remains outstanding to such person (or entities included therein, officers, directors, partners, agents or employees thereof), without a certification as required by § 803.6(b), on such date. If either person’s notification expires pursuant to this paragraph, both parties must file a new notification in order to carry out the transaction.

Example: A files notification on January 15 of Year 1 to acquire voting securities of B. On February 15 of Year 1, prior to expiration of the waiting period, requests for additional information or documentary material are issued to A and B. Before A supplies the information and documentary material requested, business conditions change, and A

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and B decide not to go forward with the transaction. A does not withdraw its filing and takes the position that it will comply with the request for additional information and documentary material if and when the proposed transaction is ever revived. A's notification expires July 15 of Year 2, eighteen months following the date of receipt of its notification. If A and B wish to revive their transaction, both parties must file a new notification and observe the waiting period in order to carry out the transaction.

[70 FR 73372, Dec. 12, 2005]

§ 803.8 Foreign language documents.

(a) Whenever at the time of filing a Notification and Report Form there is an English language outline, summary, extract or verbatim translation of any information or of all or portions of any documentary materials in a foreign language required to be submitted by the act or these rules, all such English language versions shall be filed along with the foreign language information or materials.

(b) Documentary materials or information in a foreign language required to be submitted in responses to a request for additional information or documentary material shall be submitted with verbatim English language translations, or all existing English language versions, or both, as specified in such request.

[48 FR 34440, July 29, 1983]

§ 803.9 Filing fee.

(a) Each acquiring person shall pay the filing fee required by the act to the Federal Trade Commission, except as provided in paragraphs (b), (c), and (f) of this section. No additional fee is to be submitted to the Antitrust Division of the Department of Justice. Examples:

(1) "A" wishes to acquire voting securities issued by B, where the greater of the acquisition price and the market price is in excess of \$50 million (as adjusted) but less than \$100 million (as adjusted) pursuant to § 801.10 of this chapter. When "A" files notification for the transaction, it must indicate the \$50 million (as adjusted) threshold. If the value of the voting securities is less than \$161.5 million, "A" must pay a filing fee of \$30,000 because the aggregate total amount of the acquisition is greater than \$50 million (as adjusted) but less than \$161.5 million. If the ag-

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gregate total value of the voting securities is at least \$161.5 million, but less than \$500 million, "A" must pay a filing fee of \$100,000.

(2) "A" acquires \$75 million of assets from "B." The parties meet the size of person criteria of section 7A(a)(2)(B) of the act, but the transaction is not reportable because it does not exceed the \$50 million (as adjusted) size of transaction threshold of that provision. Two months later "A" acquires additional assets from "B" valued at \$175 million. Pursuant to the aggregation requirements of § 801.13(b)(2)(ii) of this chapter, the aggregate total amount of "B's" assets that "A" will hold as a result of the second acquisition is \$250 million. Accordingly, when "A" files notification for the second transaction, "A" must pay a filing fee of \$100,000 because the aggregate total amount of the acquisition is less than \$500 million, but not less than \$161.5 million.

(3) In 2023, "A" acquires \$115 million of voting securities issued by B after submitting its notification and \$30,000 filing fee and indicates the \$50 million (as adjusted) threshold. Two years later, "A" files to acquire additional voting securities issued by B valued at \$114.4 million because it will exceed the next higher reporting threshold (see § 801.1(h) of this chapter). Assuming the second transaction is reportable, and the value of its initial holdings is unchanged (see §§ 801.13(a)(2) and 801.10(c) of this chapter), the provisions of § 801.13(a)(1) of this chapter require that "A" report that the total value of the second transaction is \$229.4 million, which is in excess of \$100 million (as adjusted) notification threshold. This is because "A" must aggregate previously acquired securities in calculating the value of B's voting securities that it will hold as a result of the second acquisition. "A" should pay a filing fee of \$100,000 because the total value is greater than \$161.5 million but less than \$500 million.

(4) "A" signs a contract with a stated purchase price of \$162 million, subject to adjustments, to acquire all of the assets of "B." If the amount of adjustments can be reasonably estimated, the acquisition price—as adjusted to reflect that estimate—is determined. If the amount of adjustments cannot be

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reasonably estimated, the acquisition price is undetermined. In either case the board or its delegee must also determine in good faith the fair market value. (§801.10(b) of this chapter states that the value of an asset acquisition is to be the fair market value or the acquisition price, if determined and greater than fair market value.) “A” files notification and submits a \$30,000 filing fee. “A”’s decision to pay that fee may be justified on either of two bases. First, “A” may have concluded that the acquisition price can be reasonably estimated to be less than \$161.5 million, because of anticipated adjustments—*e.g.*, based on due diligence by “A”’s accounting firm indicating that one third of the inventory is not saleable. If fair market value is also determined in good faith to be less than \$161.5 million, the \$30,000 fee is appropriate. Alternatively, “A” may conclude that because the adjustments cannot reasonably be estimated, the acquisition price is undetermined. If so, “A” would base the valuation on the good faith determination of fair market value. The acquiring party’s execution of the Certification also attests to the good faith valuation of the value of the transaction.

(5) “A” contracts to acquire all of the assets of “B” for in excess of \$500 million. The assets include hotels, office buildings, and rental retail property, all of which are exempted by §802.2 of this chapter. Section 802.2 directs that these assets are exempt from the requirements of the act and that reporting requirements for the transaction should be determined by analyzing the remainder of the acquisition as if it were a separate transaction. Furthermore, §801.15(a)(2) of this chapter states that those exempt assets are never held as a result of the acquisition. Accordingly, the aggregate amount of the transaction is in excess of \$161.5 million), but less than \$500 million. “A” will be liable for a filing fee of \$100,000, rather than \$250,000, because the value of the transaction is not less than \$161.5 million but is less than \$500 million.

(6) “A” acquires coal reserves from “B” valued at \$150 million. No notification or filing fee is required because the acquisition is exempted by §802.3(b)

of this chapter. Three months later, A proposes to acquire additional coal reserves from “B” valued at \$500 million. This transaction is subject to the notification requirements of the act because the value of the acquisition exceeds the \$200 million limitation on the exemption in §802.3(b). As a result of §801.13(b)(2)(ii) of this chapter, the prior \$150 million acquisition must be added because the additional \$500 million of coal reserves were acquired from the same person within 180 days of the initial acquisition. Because aggregating the two acquisitions exceeds the \$200 million exemption limitation, §801.15(b) of this chapter directs that “A” will also hold the previously exempt \$150 million acquisition; thus, the aggregate amount held as a result of the \$500 million acquisition exceeds \$500 million. Accordingly, “A” must file notification to acquire the coal reserves valued in excess of \$500 million), but less than \$1 billion and pay a filing fee of \$250,000.

(7) In 2023, “A” intends to acquire 20 percent of the voting securities of B, a non-publicly traded issuer. The agreed upon acquisition price is \$160.5 million subject to post-closing adjustments of up to plus or minus \$2 million. “A” estimates that the adjustments will be minus \$1 million. In this example, since “A” is able in good faith to reasonably estimate the adjustments to the agreed-on price, the acquisition price is deemed to be determined and the appropriate filing fee threshold is \$50 million (as adjusted). Even if the post-closing adjustments cause the final price actually paid to exceed \$161.5 million, “A” would be deemed to hold \$159.5 million in B voting securities as a result of this acquisition. Note, that any additional acquisition by “A” of B voting may trigger another filing and require the appropriate fee.

(8) “A” intends to make a cash tender offer for a minimum of 50 percent plus one share of the voting securities of B, a non-publicly traded issuer, but will accept up to 100 percent of the shares if they are tendered. There are 12 million shares of B voting stock outstanding and the tender offer price is \$100 per share. In this instance, since there is no cap on the number of shares

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that can be tendered, the value of the transaction will be the value of 100 percent of B's voting securities, and "A" must pay the \$400,000 fee for the \$1 billion filing fee threshold. Note that if the tender offer had been for a maximum of 50 percent plus one share the value of the transaction would be \$600 million, and the appropriate fee would be \$250,000, based on the \$500 million filing fee threshold. This would be true even if the tender offer were to be followed by a merger which would be exempt under section 7A(c)(3) of the act.

(b) For a transaction described by § 801.2(d)(2)(iii), the parties shall pay only one filing fee. In accordance with § 801.2(d)(2)(iii), both parties to a consolidation are acquiring and acquired persons and must submit a Notification and Report Form where the transaction meets the reporting requirements of that act; however, only one filing fee is required in connection with such a transaction, and is payable by either party to the transaction. The filing fee is based on the greater of the two sizes of transaction in the consolidation.

(c) 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 item 5 of the Notification and Report Form, only one filing fee is required in connection with the transaction.

(d) *Manner of payment.* Fees may be paid by United States postal money order, bank money order, bank cashier's check, certified check or by electronic wire transfer (EWT). The fee must be paid in U.S. currency.

(1) Fees paid by money order or check shall be made payable to the "Federal Trade Commission," omitting the name or title of any official of the Commission, and shall be submitted to the Premerger Notification Office of the Federal Trade Commission along with the Notification and Report Form.

(2) Fees paid by EWT shall be deposited to the Treasury's account at the New York Federal Reserve Bank. Specific instructions for making EWT payments are contained in the Instruc-

tions to the Notification and Report Form.

(e) *Refunds.* Except as provided in this paragraph, no filing fee received by the Commission will be returned to the payer and no part of the filing fee shall be refunded. The filing fee shall be refunded only if the Commission's staff determines, based on the information and representations contained in the filing person's notification, that premerger notification was not required by the act. Once the Commission's staff has determined that the notification was required, the filing fee shall not be refunded even if it appears at the time of consummation that the transaction does not meet the reporting requirements established in the act.

(f) For a transaction described by paragraph (c) of § 803.12, the parties shall pay no additional filing fee.

[66 FR 8695, Feb. 1, 2001, as amended at 68 FR 2431, Jan. 17, 2003; 70 FR 4997, Jan. 31, 2005; 78 FR 41296, July 10, 2013; 88 FR 5750, Jan. 30, 2023]

§ 803.10 Running of time.

(a) *Beginning of waiting period.* The waiting period required by the act shall begin on the date of receipt of the notification required by the act, in the manner provided by these rules (or, if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance in accordance with § 803.3) from:

(1) In the case of acquisitions to which § 801.30 applies, the acquiring person;

(2) In the case of the formation of a corporation covered by Sec. 801.40 or an unincorporated entity covered by Sec. 801.50, all persons contributing to the formation of the joint venture or other corporation that are required by the act and these rules to file notification;

(3) In the case of all other acquisitions, all persons required by the act and these rules to file notification.

(b) *Expiration of waiting period.* (1) Subject to paragraph (b)(3) of this section, for purposes of Section 7A(b)(1)(B), the waiting period shall expire at 11:59 p.m. Eastern Time on the 30th (or in the case of a cash tender offer or of an acquisition covered by 11

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U.S.C. 363(b), the 15th) calendar day (or if § 802.23 applies, such other day as that section may provide) following the beginning of the waiting period as determined under paragraph (a) of this section, unless extended pursuant to Section 7A(e) and § 803.20, or Section 7A(g)(2), or unless terminated pursuant to Section 7A(b)(2) and § 803.11.

(2) Unless further extended pursuant to Section 7A(g)(2), or terminated pursuant to Section 7A(b)(2) and § 803.11, any waiting period which has been extended pursuant to Section 7A(e)(2) and § 803.20 shall, subject to paragraph (b)(3) of this section, expire at 11:59 p.m. Eastern Time—

(i) On the 30th (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), the 10th) day following the date of receipt of all additional information or documentary material requested from all persons to whom such requests have been directed (or, if a request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such non-compliance in accordance with § 803.3), by the Federal Trade Commission or Assistant Attorney General, whichever requested additional information or documentary material, at the office designated in paragraph (c) of this section, or

(ii) As provided in paragraph (b)(1) of this section, whichever is later.

(3) If any waiting period would expire on a Saturday, Sunday, or legal public holiday (as defined in 5 U.S.C. 6103(a)) the waiting period shall be extended to 11:59 p.m. Eastern Time of the next regular business day.

(c)(1) *Date of receipt and means of delivery.* For purposes of this section, these procedures shall apply.

(i) For paper copy filings and DVD filings, the date of receipt shall be the date on which delivery is effected to the designated offices (Premerger Notification Office, Federal Trade Commission, Room 5301, 400 7th Street SW., Washington, DC 20024, and Director of Civil Enforcement, Office of Operations, Antitrust Division, Department of Justice, 950 Pennsylvania Avenue NW., Room #3335, Washington, DC 20530) during normal business hours. Delivery should be effected directly to

the designated offices, either by hand or by certified or registered mail (including FedEx and UPS). In the event one or both of the delivery sites are unavailable, the FTC and DOJ may designate alternate sites for delivery of the filing. Notification of the alternate delivery sites will normally be made through a press release and, if possible, on the <http://www.ftc.gov> Web site.

(ii) Delivery effected after 5 p.m. eastern time on a business day, or at any time on any day other than a business day, shall be deemed effected on the next following business day. If delivery of all required filings to all offices required to receive such filings is not effected on the same date, the date of receipt shall be the latest of the dates on which delivery is effected.

Example: In an acquisition other than a tender offer, assume that requests for additional information are issued to both the acquiring and acquired persons on the 26th day of the waiting period. One person submits the additional information on the 35th day, while the other responds on the 44th day. Under this section, the waiting period expires thirty days following the last receipt of additional information, that is, it expires on the 74th day (unless that day is a Saturday, Sunday or legal public holiday).

(2) *Deficient filings.* If notification or a response to a request for additional information or documentary material received by the Commission or Assistant Attorney General does not comply with these rules, the Commission or the Assistant Attorney General shall promptly notify the person filing such notification or response of the deficiencies in such filing, and the date of receipt shall be the date on which a filing which complies with these rules is received.

[43 FR 33548, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 52 FR 7083, Mar. 6, 1987; 66 FR 8696, Feb. 1, 2001; 70 FR 11514, Mar. 8, 2005; 71 FR 35998, June 23, 2006; 79 FR 25663, May 6, 2014; 81 FR 60260, Sept. 1, 2016]

§ 803.11 Termination of waiting period.

(a) Except as provided in paragraph (c) of this section, no waiting period shall be terminated pursuant to section 7A(b)(2) unless—

(1) All notifications required to be filed with respect to the acquisition by

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the act and these rules (or, if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance in accordance with § 803.3) have been received,

(2) It has been determined that no additional information or documentary material pursuant to section 7A(e) and § 803.20 will be requested, or, if such additional information or documentary material has been requested, it (or, if a request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance in accordance with § 803.3) has been received, and

(3) The Federal Trade Commission and the Assistant Attorney General have concluded that neither intends to take any further action within the waiting period.

(b) Any request for additional information or documentary material pursuant to section 7A(e) and § 803.20 shall constitute a denial of all pending requests for termination of the waiting period.

(c) The Federal Trade Commission and the Assistant Attorney General may, in their discretion, terminate a waiting period upon the written request of any person filing notification or, notwithstanding paragraph (a) of this section, *sua sponte*. A request for termination of the waiting period shall be sent to the offices designated in § 803.10(c). Termination shall be effective upon notice to any requesting person by either email or telephone, and such notice shall be given as soon as possible. Such notice shall be made to each person which has filed notification, and notice of termination shall be published in the *FEDERAL REGISTER* in accordance with section 7A(b)(2) of the Clayton Act (the “act”). The Federal Trade Commission and the Assistant Attorney General also may use other means to make the termination public, prior to publication in the *FEDERAL REGISTER* in a manner that will make the information equally accessible to all members of the public.

[43 FR 33548, July 31, 1978, as amended at 54 FR 21427, May 18, 1989; 83 FR 32771, July 16, 2018]

§ 803.12 Withdraw and refile notification.

(a) *Voluntary*. An acquiring person, and in the case of an acquisition to which § 801.30 does not apply, an acquired person, may withdraw its notification by notifying the Federal Trade Commission and the Antitrust Division in writing by email or mail of such withdrawal.

(b) *Upon public announcement of termination*. An acquiring person’s notification or, in the case of an acquisition to which § 801.30 of this chapter does not apply, an acquiring or an acquired person’s notification, will be deemed to have been withdrawn if any filing that publicly announces the expiration, termination or withdrawal of a tender offer or the termination of an agreement or letter of intent is made by the acquiring person or the acquired person with the U.S. Securities and Exchange Commission (“SEC”) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) and rules promulgated under that act. The acquiring person or acquired person must notify the Federal Trade Commission and the Antitrust Division in writing by email or mail that such filing has been made with the SEC and the withdrawal shall be deemed effective on the date of the SEC filing. Withdrawal of the HSR notification(s) shall occur even if statements are made in the SEC filing indicating a desire to recommence the tender offer or enter into a new or amended agreement or letter of intent. This paragraph is inapplicable if the initial 15-day or 30-day waiting period has expired without issuance of a request for additional information or documentary material and without an agreement in place with the Agencies to delay closing of the transaction (“a timing agreement”); or early termination of that waiting period has been granted, without a timing agreement in place; or if a request for additional information or documentary material has been issued and the Agencies have either granted early termination or allowed the extended waiting period to expire following certification of compliance without a timing agreement in place.

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(c) *Resubmission without a new filing fee.* (1) An acquiring person whose notification has been voluntarily withdrawn pursuant to paragraph (a) of this section, or an acquiring person whose notification is deemed to have been automatically withdrawn under paragraph (b) of this section, may resubmit its notification, thereby initiating a new waiting period for the same transaction without an additional filing fee pursuant to § 803.9(f). This procedure may be used only one time, and only under the following circumstances:

(i) The notification is withdrawn prior to the expiration or early termination of the waiting period and prior to the issuance of a request for additional information pursuant to § 803.20 and section 7A(e) of the act;

(ii) The proposed acquisition does not change in any material way;

(iii) The resubmitted notification is recertified, and the submission, as it relates to Items 4(a), 4(b), 4(c), and 4(d) of the Notification and Report Form, is updated to the date of the resubmission;

(iv) A new executed affidavit is provided with the resubmitted HSR filing; and

(v) The resubmitted notification is refiled prior to the close of the second business day after withdrawal.

(2) If the acquired person, in the case of an acquisition to which § 801.30 of this chapter does not apply, withdraws its notification under paragraph (a) of this section or if its notification is automatically withdrawn under paragraph (b) of this section, no resubmission is available under this paragraph.

Examples: 1. A commences a tender offer to acquire 100% of B's voting securities and files a Schedule TO with the SEC and a premerger notification filing with the Federal Trade Commission and the Antitrust Division ("the Agencies"). Subsequently, A decides to withdraw the tender offer and files an amended Schedule TO announcing the withdrawal. A states in its amended filing, designated as a Schedule TO-T/A on EDGAR, the SEC's Electronic Data Gathering, Analysis, and Retrieval system, which announces the tender offer withdrawal that it reserves the right to recommend the tender offer, should circumstances change. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC.

2. A commences a tender offer for at least 75% of B's voting securities and files a Schedule TO with the SEC stating that the tender offer will expire after 30 days. A also files a premerger notification filing with the Agencies and a request for additional information or documentary material ("Second Request") is issued. At the end of the 30 day effective period of the tender offer sufficient shares have not been tendered and the tender offer expires. A files a closing Schedule TO-T/A with the SEC announcing the expiration of the tender offer. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC.

3. A commences a tender offer for 100% of B's voting securities and files a Schedule TO with the SEC stating that shareholders tendering their shares will receive \$2.00 per share. During the effective period of the tender offer, A increases the amount it will pay per share to \$2.25 and files a Schedule TO-T/A with the SEC announcing the increased share price. A's premerger notification filing is not deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC because it is not notifying the SEC that the tender offer has expired or is being withdrawn.

4. A commences a tender offer for 100% of B's voting securities and files a Schedule TO with the SEC. During the effective period of the tender offer, A and B enter into a merger agreement and A files a Schedule TO-T/A with the SEC announcing the withdrawal of the tender offer. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC. A can, however, refile within two business days on the merger agreement, commencing a new waiting period, without paying an additional filing fee, if it meets the requirements of § 803.12(c).

5. A and B enter into a merger agreement conditioned on successful completion of due diligence. A and B file premerger notification filings with the Agencies and also Form 8-Ks with the SEC announcing they have entered into an agreement to merge. Subsequent findings in the course of due diligence cause A and B to terminate the merger agreement and A files an additional Form 8-K announcing the termination of an agreement. A states that it may seek to enter into a new or amended merger agreement with B. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Form 8-K announcing the termination of the merger agreement. A can, however, refile within two business days on a new merger agreement, commencing a new waiting period, without paying an additional filing fee, if it meets the requirements of § 803.12(c).

6. A and B enter into a merger agreement and file premerger notification filings with

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the Agencies and Form 8-Ks with the SEC. Second requests are issued. A and B subsequently certify compliance with the second request, starting the extended waiting period. Prior to the expiration of the extended waiting period, the parties enter into an agreement with the agency conducting the investigation to delay closing of the transaction, allowing the consummation of the acquisition only after 30-days' notice (a "timing agreement"), and the extended waiting period expires. During the pendency of the timing agreement, A and B terminate the merger agreement and A files a Form 8-K with the SEC announcing the termination of an agreement. A's premerger notification filing is deemed withdrawn on the date of the SEC filing as a result of that filing, even though the extended waiting period has expired and the parties are still within the one year period following that expiration under § 803.7(a). Note that had the extended waiting period expired and no timing agreement had been entered into, a filing with the SEC announcing the termination of the agreement would not result in the withdrawal of A's premerger notification filing.

7. A and B enter into a merger agreement and file premerger notification filings with the Agencies and Form 8-Ks with the SEC. The agencies complete their review and early termination of the initial 30-day waiting period is granted. Prior to the expiration of the one year period following the grant of early termination, A and B terminate the merger agreement and A files a Form 8-K with the SEC announcing the termination of an agreement. A's premerger notification filing is not deemed withdrawn as a result of the SEC filing because the initial 30-day premerger notification waiting period had been granted early termination. Therefore, the parties still have the full one year period prior to the expiration of the notification under § 803.7(a) to consummate the transaction should it be recommended.

[78 FR 41296, July 10, 2013, as amended at 83 FR 32771, July 16, 2018]

§ 803.20 Requests for additional information or documentary material.

(a)(1) *Persons and individuals subject to request.* Pursuant to section 7A(e)(1), the submission of additional information or documentary material relevant to the acquisition may be required from one or more persons required to file notification, and, with respect to each such person, from one or more entities included therein, or from one or more officers, directors, partners, agents, or employees thereof, if so required by the same request.

Example: A request for additional information may require a corporation and, in addition, a named officer or employee to provide certain information or documents, if both the corporation and the officer or employee are named in the same request. See subparagraph (b)(3) of this section.

(2) All the information and documentary material required to be submitted pursuant to a request under paragraph (a)(1) of this section shall be supplied to the Commission or to the Assistant Attorney General, whichever made such request, at such location as may be designated in the request, or, if no such location is designated, at the office designated in § 803.10(c). If such request is not fully complied with, a statement of reasons for noncompliance pursuant to § 803.3 shall be provided for each item or portion of such request which is not fully complied with.

(b)(1) *Who may require submission.* A request for additional information or documentary material with respect to an acquisition may be issued by the Federal Trade Commission or its designee, or by the Assistant Attorney General or his or her designee, but not by both to the same person, any entities included therein, or any officers, directors, partners, agents, or employees of that person.

(2) *When request effective.* A request for additional information or documentary material shall be effective—

(i) In the case of a written request, upon receipt of the request by the ultimate parent entity of the person to which the request is directed (or, if another entity included within the person filed notification pursuant to § 803.2(a), then by such entity), within the original 30-day (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides); or

(ii) In the case of a written request, upon notice of the issuance of such request to the person to which it is directed within the original 30-day (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides), provided that written confirmation of the request is emailed or

Federal Trade Commission**§ 803.20**

mailed to the person to which the request is directed within the original 30-day (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides). Notice to the person to which the request is directed may be given by email, telephone or in person. The person filing notification shall keep a designated individual reasonably available during normal business hours throughout the waiting period at the email or telephone number supplied in the Notification and Report Form. Notice of a request for additional information or documentary material need be given by email or telephone only to that individual or to the individual designated in accordance with paragraph (b)(2)(iii) of this section. The written confirmation of the request shall be emailed or mailed to the ultimate parent entity of the person filing notification, or if another entity within the person filed notification pursuant to § 803.2(a), then to such entity.

(iii) When the individual designated in accordance with paragraph (b)(2)(ii) of this section is not located in the United States, the person filing notification shall designate an additional individual located within the United States to be reasonably available during normal business hours throughout the waiting period through a telephone number supplied on the certification page of the Notification and Report Form. This individual shall be designated for the limited purpose of receiving notification of the issuance of requests for additional information or documentary material in accordance with the procedure described in paragraph (b)(2)(ii) of this section.

(3) *Requests to natural persons.* A request addressed to an individual, requiring that he or she submit additional information or documentary material, shall be transmitted to the person filing notification of which the individual is an ultimate parent entity, officer, director, partner, agent or employee, and shall be effective as to that individual when effective as to the person filing notification pursuant to paragraph (b)(2) of this section. A written copy of the request shall also be de-

livered to the individual by email, by hand, or by registered or certified mail at his or her home or business address.

Example: A designee of the Federal Trade Commission sends, by email, a written request for additional information to the CEO of corporation W, the ultimate parent entity within a person that filed notification. The request is effective under paragraph (b)(2)(i) of this section. If the email also addressed a request for documentary material to the Secretary of corporation W, a named individual, under this paragraph (b)(3), the request would likewise be effective as to the individual upon receipt of the email by corporation W. In the latter case, the Federal Trade Commission also would send a copy of the request to the Secretary of the corporation at his or her home or business address, or email.

(c) *Waiting period extended.* (1) During the time period when a request for additional information or documentary material remains outstanding to any person other than either:

(i) In the case of a tender offer, the person whose voting securities are sought to be acquired by the tender offeror (or any officer, director, partner, agent or employee thereof), or

(ii) In the case of an acquisition covered by 11 U.S.C. 363(b), the acquired person, the waiting period shall remain in effect, even though the waiting period would have expired (see § 803.10(b)) if no such request had been made.

(2) A request for additional information or documentary material to any person other than either:

(i) In the case of a tender offer, the person whose voting securities are being acquired pursuant to the tender offer (or any officer, director, partner, agent or employee thereof), or

(ii) In the case of an acquisition covered by 11 U.S.C. 363(b), the acquired person, shall in every instance extend the waiting period for a period of 30 (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 10) calendar days from the date of receipt (as determined under § 803.10) of the additional information or documentary material requested.

Example: Acquiring person "A" makes a non-cash tender offer for voting securities of corporation "X", and files notification. Under § 803.10, the waiting period begins upon filing by "A," and "X" must file within 15

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days thereafter (10 days if it were a cash tender offer). Assume that before the end of the waiting period, the Assistant Attorney General issues a request for additional information to "A" and "X." Since the transaction is a non-cash tender offer, the waiting period is extended for 30 days (10 days if it were a cash tender offer) beyond the date on which "A" responds. Note that under § 803.21, even though the waiting period is not affected by the second request to "X" or by "X" supplying the requested information, "X" is obliged to respond to the request within a reasonable time. Nevertheless, the Federal Trade Commission and Assistant Attorney General could, notwithstanding the pendency of the request for additional information, terminate the waiting period *sua sponte* pursuant to § 803.11(c).

(d)(1) *Identification of requests.* Every request for additional information or documentary material shall be clearly identified as such, whether communicated in person, by telephone or in writing, and shall clearly identify the person, entity or entities, or individual(s) to which it is addressed.

(2) *Request for clarification.* No request for clarification or amplification of a response to any item on the Notification and Report Form, whether communicated in person, by telephone or in writing, shall be considered a request for additional information or documentary material within the meaning of section 7A(e) and this section.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34441, July 29, 1983; 66 FR 8697, Feb. 1, 2001; 68 FR 2431, Jan. 17, 2003; 83 FR 32772, July 16, 2018]

§ 803.21 Additional information shall be supplied within reasonable time.

All additional information or documentary material requested pursuant to section 7A(e) and § 803.20 (or, if such request is not fully complied with, the information or documentary material submitted and a statement of the reasons for such noncompliance in accordance with § 803.3) shall be supplied within a reasonable time.

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§ 803.30 Formal and informal interpretations of requirements under the Act and the rules.

(a) The Commission staff may consider requests for formal or informal interpretations as to the obligations under the act and these rules of any party to an acquisition. A request for a formal interpretation shall be made in writing to the offices designated in § 803.10(c), and shall state: (1) all facts which the applicant believes to be material, (2) the reasons why the requirements of the act are or may be applicable and (3) the question(s) that the applicant wishes resolved. The Commission staff may, in its discretion, render a formal or informal response to any request, however made, or may decline to render such advice.

(b) In the sole discretion of the staff, any request for interpretation may be referred to the Commission.

(c) Formal interpretations by the Commission staff or by the Commission shall be rendered with the concurrence of the Assistant Attorney General or his or her designee.

(d) Any formal interpretation shall be without prejudice to the right of either the Commission or the Assistant Attorney General to rescind any such interpretation rendered pursuant to this section. In the event of such rescission, the party which requested the interpretation shall be so notified in writing.

(e) The Commission shall publish a summary of formal interpretations by the Commission, and any rescissions thereof, in the FEDERAL REGISTER.

§ 803.90 Separability.

If any provision of the rules in this subchapter (H) (including the Notification and Report Form) or the application of any such provision to any person or circumstances is held invalid, neither the other provisions of the rules nor the application of such provision to other persons or circumstances shall be affected thereby.

Federal Trade Commission

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APPENDIX A TO PART 803—NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

| | | | | | | | | | | | | | |
|--|--|---|--------------------------|--|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|---|--|---|--|
| 16 C.F.R. Part 803 - Appendix | | (Filing is <input type="checkbox"/> New <input type="checkbox"/> Amended) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | | | | |
| NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS | | | | | | | | | | | | | |
| TRANSACTION NUMBER ASSIGNED | | | | | | | | | | | | | |
| FEES INFORMATION (For Payer Only) | | | | | | | | | | | | | |
| AMOUNT PAID | | TAXPAYER IDENTIFICATION NUMBER _____ OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS _____ | | | | | | | | | | | |
| <input type="radio"/> \$0.00 <input type="radio"/> \$400,000.00 <input type="radio"/> \$30,000.00 <input type="radio"/> \$800,000.00 <input type="radio"/> \$100,000.00 <input type="radio"/> \$2,250,000.00 <input type="radio"/> \$250,000.00 <input type="radio"/> Specific Amount _____ | | NAME OF PAYER (if different from PERSON FILING) _____ WIRE TRANSFER <input type="checkbox"/> or CERTIFIED CHECK / MONEY ORDER <input type="checkbox"/> WIRE TRANSFER CONFIRMATION NO. _____ FROM (NAME OF INSTITUTION) _____ | | | | | | | | | | | |
| IS THIS A CORRECTIVE FILING? <input type="checkbox"/> YES <input type="checkbox"/> NO | | CASH TENDER OFFER? <input type="checkbox"/> YES <input type="checkbox"/> NO | | BANKRUPTCY? <input type="checkbox"/> YES <input type="checkbox"/> NO | | | | | | | | | |
| DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? <input type="checkbox"/> YES <input type="checkbox"/> NO (Grants of early termination are published in the Federal Register and on the FTC web site, www.ftc.gov) | | | | | | | | | | | | | |
| (voluntary) IS THIS ACQUISITION SUBJECT TO NON-US FILING REQUIREMENTS? <input type="checkbox"/> YES <input type="checkbox"/> NO IF YES, list jurisdictions: | | | | | | | | | | | | | |
| ITEM 1 NAME _____ HEADQUARTERS ADDRESS _____ ADDRESS LINE 2 _____ 1(a) PERSON FILING CITY, STATE, COUNTRY _____ ZIP CODE _____ WEB SITE _____ | | | | | | | | | | | | | |
| 1(b) PERSON FILING NOTIFICATION IS <input type="checkbox"/> an acquiring person <input type="checkbox"/> an acquired person <input type="checkbox"/> both 1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE THE PERSON FILING NOTIFICATION <input type="checkbox"/> Corporation <input type="checkbox"/> Unincorporated Entity <input type="checkbox"/> Natural Person <input type="checkbox"/> Other (Specify) _____ | | | | | | | | | | | | | |
| 1(d) DATA FURNISHED BY <input type="checkbox"/> calendar year <input type="checkbox"/> fiscal year (specify period): (month/year) to (month/year) | | | | | | | | | | | | | |
| 1(e) PUT AN "X" IN THE APPROPRIATE BOX BELOW AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION, IF DIFFERENT THAN THE ULTIMATE PARENT ENTITY <input type="checkbox"/> Not Applicable <input type="checkbox"/> This report is being filed on behalf of a foreign person pursuant to § 803.4. <input type="checkbox"/> This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a). | | | | | | | | | | | | | |
| 1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS, VOTING SECURITIES OR NON-CORPORATE INTERESTS ARE BEING ACQUIRED, IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a) NAME _____ ADDRESS _____ CITY, STATE, COUNTRY _____ ZIP CODE _____ | | | | | | | | | | | | | |
| PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS THAT THE UPE HOLDS DIRECTLY OR INDIRECTLY IN THE ACQUIRING OR ACQUIRED ENTITY IDENTIFIED IN ITEM 1(f) % _____ | | | | | | | | | | | | | |
| 1(g) IDENTIFICATION OF PERSONS TO CONTACT REGARDING THIS REPORT <table border="1" style="width: 50%; margin-right: 20px;"> <tr><td>CONTACT PERSON 1 FIRM NAME BUSINESS ADDRESS CITY, STATE, COUNTRY ZIP CODE</td></tr> <tr><td>TELEPHONE NUMBER FAX NUMBER E-MAIL ADDRESS</td></tr> </table> <table border="1" style="width: 50%;"> <tr><td>CONTACT PERSON 2 FIRM NAME BUSINESS ADDRESS CITY, STATE, COUNTRY ZIP CODE</td></tr> <tr><td>TELEPHONE NUMBER FAX NUMBER E-MAIL ADDRESS</td></tr> </table> | | | | | | | | | | CONTACT PERSON 1 FIRM NAME BUSINESS ADDRESS CITY, STATE, COUNTRY ZIP CODE | TELEPHONE NUMBER FAX NUMBER E-MAIL ADDRESS | CONTACT PERSON 2 FIRM NAME BUSINESS ADDRESS CITY, STATE, COUNTRY ZIP CODE | TELEPHONE NUMBER FAX NUMBER E-MAIL ADDRESS |
| CONTACT PERSON 1 FIRM NAME BUSINESS ADDRESS CITY, STATE, COUNTRY ZIP CODE | | | | | | | | | | | | | |
| TELEPHONE NUMBER FAX NUMBER E-MAIL ADDRESS | | | | | | | | | | | | | |
| CONTACT PERSON 2 FIRM NAME BUSINESS ADDRESS CITY, STATE, COUNTRY ZIP CODE | | | | | | | | | | | | | |
| TELEPHONE NUMBER FAX NUMBER E-MAIL ADDRESS | | | | | | | | | | | | | |
| 1(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS (See § 803.20(b)(2)(iii)) | | | | | | | | | | | | | |
| NAME _____ FIRM NAME _____ BUSINESS ADDRESS _____ CITY, STATE, COUNTRY _____ ZIP CODE _____ TELEPHONE NUMBER _____ FAX NUMBER _____ E-MAIL ADDRESS _____ | | | | | | | | | | | | | |

| | |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 2**2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS**

| NAME | NON-REPORTABLE |
|------|--------------------------|
| | <input type="checkbox"/> |

LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

| NAME | NON-REPORTABLE |
|------|--------------------------|
| | <input type="checkbox"/> |

2(b) THIS ACQUISITION IS (put an "X" in all the boxes that apply)

- an acquisition of assets
 a merger (see § 801.2)
 an acquisition subject to § 801.2 (e)
 a formation of a joint venture or other corporation or unincorporated entity (see § 801.40 or § 801.50)
 an acquisition subject to § 801.30 (specify type)
 a consolidation (see § 801.2)
 an acquisition of voting securities
 a secondary acquisition
 an acquisition subject to § 801.31
 an acquisition of non-corporate interests
 other (specify)

**2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED
(acquiring person only in an acquisition of voting securities)**

\$50 million (as adjusted) \$100 million (as adjusted) \$500 million (as adjusted) 25% (see instructions) (as adjusted) 50% N/A

| | | |
|--|--|--|
| 2(d)(i) VALUE OF VOTING SECURITIES ALREADY HELD (\$MM) \$ | (v) VALUE OF NON-CORPORATE INTERESTS ALREADY HELD (\$MM) \$ | |
| (ii) PERCENTAGE OF VOTING SECURITIES ALREADY HELD % | (vi) PERCENTAGE OF NON-CORPORATE INTERESTS ALREADY HELD % | |
| (iii) TOTAL VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM) \$ | (vii) TOTAL VALUE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM) \$ | (ix) VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM) \$ |
| (iv) TOTAL PERCENTAGE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION % | (viii) TOTAL PERCENTAGE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION % | (x) AGGREGATE TOTAL VALUE (\$MM) \$ |

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| | |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 3**3(a) DESCRIPTION OF ACQUISITION**

| | |
|---------------------|--------------------|
| ACQUIRING UPE(S) | ACQUIRED UPE(S) |
| NAME | NAME |
| ADDRESS | ADDRESS |
| ADDRESS LINE 2 | ADDRESS LINE 2 |
| CITY, STATE | CITY, STATE |
| ZIP CODE, COUNTRY | ZIP CODE, COUNTRY |
| ACQUIRING ENTITY(S) | ACQUIRED ENTITY(S) |
| NAME | NAME |
| ADDRESS | ADDRESS |
| ADDRESS LINE 2 | ADDRESS LINE 2 |
| CITY, STATE | CITY, STATE |
| ZIP CODE, COUNTRY | ZIP CODE, COUNTRY |

TRANSACTION DESCRIPTION

3(b) SUBMIT A COPY OF THE MOST RECENT VERSION OF THE CONTRACT OR AGREEMENT (or letter of intent to merge or acquire)*(IF SUBMITTING PAPER, DO NOT ATTACH THE DOCUMENT TO THIS PAGE)*

ATTACHMENT NUMBER

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| | |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 4

PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (See *Item by Item Instructions*). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

| | | |
|--|-------------------------------|--------------------------|
| 4(a) ENTITIES WITHIN THE PERSON FILING NOTIFICATION THAT FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION | <input type="checkbox"/> None | CENTRAL INDEX KEY NUMBER |
|--|-------------------------------|--------------------------|

| | | |
|--|-------------------------------|-----------------------------------|
| 4(b) ANNUAL REPORTS AND ANNUAL AUDIT REPORTS | <input type="checkbox"/> None | ATTACHMENT OR REFERENCE NUMBER |
|--|-------------------------------|-----------------------------------|

| | | |
|--|-------------------------------|-----------------------------------|
| 4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS | <input type="checkbox"/> None | ATTACHMENT OR REFERENCE NUMBER |
|--|-------------------------------|-----------------------------------|

| | | |
|---------------------------|-------------------------------|-----------------------------------|
| 4(d) ADDITIONAL DOCUMENTS | <input type="checkbox"/> None | ATTACHMENT OR REFERENCE NUMBER |
|---------------------------|-------------------------------|-----------------------------------|

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| | |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 5**5(a) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY CODE AND BY MANUFACTURED PRODUCT CODE**

Check None at the bottom of the page and provide explanation if you are not reporting revenue

| 6-DIGIT INDUSTRY CODE AND/OR 10-DIGIT PRODUCT CODE | DESCRIPTION | YEAR | TOTAL DOLLAR REVENUES (\$MM) |
|--|-------------|------|---------------------------------|
|--|-------------|------|---------------------------------|

Attachment

 OverlapNONE (PROVIDE EXPLANATION)

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| | |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

| | |
|---|--|
| 5(b) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY | <input checked="" type="checkbox"/> Not Applicable |
|---|--|

5(b)(i) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY HAS AGREED TO MAKE
Attachment:

5(b)(ii) DESCRIPTION OF CONSIDERATION THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL RECEIVE
Attachment:

5(b)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL ENGAGE
Attachment:

5(b)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 10-DIGIT PRODUCT CODE (manufactured)
Attachment:

| CODE | DESCRIPTION |
|------|-------------|
| | |

Federal Trade Commission**Pt. 803, App. A**

| | |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 6**6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION**

Attachment:

| NAME | CITY | STATE | COUNTRY |
|------|------|-------|---------|
| | | | |

6(b) HOLDERS OF PERSON FILING NOTIFICATION

Attachment:

| ISSUER/ UNINCORPORATED ENTITY | SHAREHOLDER/ INTEREST HOLDER | HQ ADDRESS | % HELD |
|----------------------------------|---------------------------------|------------|--------|
| | | | |

6(c)(i) HOLDINGS OF PERSON FILING NOTIFICATION

Attachment:

| UPE OF FILING PERSON | ISSUER/ UNINCORPORATED ENTITY | % HELD |
|----------------------|----------------------------------|--------|
| | | |

6(c)(ii) HOLDINGS OF ASSOCIATES (ACQUIRING PERSON ONLY)

Attachment:

| TOP LEVEL ASSOCIATE | ISSUER/ UNINCORPORATED ENTITY | % HELD |
|---------------------|----------------------------------|--------|
| | | |

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| | |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 7

OVERLAP DOLLAR REVENUES

7(a) 6-DIGIT NAICS INDUSTRY CODE AND DESCRIPTION

 None

| CODE | DESCRIPTION | PERSON / ASSOCIATE / BOTH |
|------|-------------|---------------------------|
| | | |

7(b)(i) LIST THE NAME OF EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

| UPE OF OTHER FILING PERSON | ENTITY THAT OVERLAPS (IF DIFFERENT) |
|----------------------------|-------------------------------------|
| | |

7(b)(ii) LIST THE NAME OF EACH ASSOCIATE OF THE ACQUIRING PERSON THAT ALSO DERIVED DOLLAR REVENUES
(ACQUIRING PERSON ONLY)

| TOP LEVEL ASSOCIATE | ENTITY THAT OVERLAPS (IF DIFFERENT) |
|---------------------|-------------------------------------|
| | |

7(c) GEOGRAPHIC MARKET INFORMATION FOR EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

| CODE | GEOGRAPHIC MARKET INFORMATION |
|------|-------------------------------|
| | |

7(d) GEOGRAPHIC MARKET INFORMATION FOR ASSOCIATES OF THE ACQUIRING PERSON
(ACQUIRING PERSON ONLY)

| CODE | GEOGRAPHIC MARKET INFORMATION |
|------|-------------------------------|
| | |

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| | |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 8

PRIOR ACQUISITIONS (ACQUIRING PERSON ONLY)

| | |
|-------------------|--|
| NAICS Code | |
| Acquired Entity | |
| Former HQ Address | |
| Acquisition Type | <input type="checkbox"/> Securities <input type="checkbox"/> Assets <input type="checkbox"/> Non Corporate Interests Date of Acquisition: |
| Notes | |

CERTIFICATION

This **NOTIFICATION AND REPORT FORM**, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

| | |
|-----------------------------|-------|
| NAME (Please print or type) | TITLE |
| SIGNATURE | DATE |

Subscribed and sworn to before me at the

City of _____, State of _____
this _____ day of _____, the year _____
Signature _____

[SEAL]

My Commission expires _____

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| | |
|--|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
| 16 C.F.R. Part 803 - Appendix NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS | |
| Approved by OMB 3084-0005 | |

Attach the Affidavit required by § 803.5 to the Form.

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. §18a. The maximum daily civil penalty amount is listed in 16 C.F.R. §1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office, Federal Trade Commission, 400 7th St. SW, Room #5301, Washington, DC 20024
and
Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. That number is 3084-0005, which also appears above.

Privacy Act Statement - Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

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| NAME OF PERSON FILING NOTIFICATION | DATE |
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ENDNOTES

| ENDNOTE NUMBER | PERTAINING TO | ENDNOTE TEXT |
|----------------|---------------|--------------|
| | | |

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| NAME OF PERSON FILING NOTIFICATION | DATE |
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ATTACHMENTS

AttachTotal:

| ATTACHMENT NUMBER | ATTACHMENT DESCRIPTION | |
|----------------------|------------------------|--|
| | DESCRIPTION | |
| | | |
| | | |
| ATTACHED TO ITEM | | |

Federal Trade Commission

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APPENDIX B TO PART 803—INSTRUCTIONS TO THE NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM for Certain Mergers and Acquisitions

INSTRUCTIONS

OMB: 3084-0005

GENERAL

The Notification and Report Form ("the Form") is required to be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules"). These instructions specify the information that must be provided in response to the items on the Form.

Information

The central office for information and assistance concerning the Form and the Rules is:

Premerger Notification Office
Federal Trade Commission, Room #5301
400 7th Street, S.W.
Washington, D.C. 20024
Phone: (202) 326-3100
E-mail: HSRhelp@ftc.gov

Copies of the Form, Instructions and Rules as well as information to assist in completing the Form are available at the [PNO website](#).

Definitions

The definitions used in this Form are set forth in the Rules. See [Statute, Rules and Formal Interpretations](#) for copies of the Hart-Scott-Rodino Act ("the Act"), the Rules, and the Federal Register Notices issuing the Rules and Rule amendments ("Statements of Basis and Purpose").

The term "documentary attachments" refers only to materials submitted in response to Item 3(b), Item 4 and to submissions pursuant to § 803.1(b) of the Rules.

The terms "person filing" or "filing person" mean the ultimate parent entity ("UPE"). (See § 801.1(a)(3)). The terms are used herein interchangeably.

Filing

Parties should file the completed Form, together with all documentary attachments, with the Premerger Notification Office ("PNO") of the Federal Trade Commission ("FTC") and the Premerger Unit of the Antitrust Division of the Department of Justice ("DOJ") (together, "the Agencies"). Filers have the option of submitting a DVD filing or a paper filing. Filings should be submitted to:

Premerger Notification Office
Federal Trade Commission, Room #5301
400 7th Street, S.W.
Washington, D.C. 20024

and

Department of Justice
Antitrust Division
Premerger and Division Statistics Unit
450 Fifth Street, N.W., Suite 1100
Washington, D.C. 20530

If one or both delivery sites are unavailable, the Agencies may announce alternate sites for delivery through the media and, if possible, at the [PNO website](#).

If submitting a DVD filing

- Provide the FTC with:

TWO (2) DVDs, each containing the Form, affidavit, certification and all documentary attachments, along with the original hard copies of the cover letter, certification and affidavit.

- Provide DOJ with:

TWO (2) DVDs containing the same content as above, along with THREE (3) hard copies of the cover letter.

The Form must be a searchable PDF document. All other files must be in searchable PDF or MS Excel spreadsheet format and saved in color, if applicable. This includes the affidavit and certification.

Label each DVD with the name of the person filing, the name of a contact person and that person's phone number. Leave space on the DVD for the Agencies to write the assigned transaction number and date of receipt.

If the DVD or files contain viruses, passwords, or are not readable, the filing will not be accepted and the waiting period will not start.

For further instructions on DVD filing and specific DVD requirements, go to [HSR Resources](#) on the [PNO website](#).

If submitting a paper filing

- Provide the FTC with:

ONE (1) original and ONE (1) copy of the Form, certification page and affidavit, along with an original cover letter and ONE (1) set of documentary attachments.

- Provide DOJ with:

TWO (2) copies of the Form, certification page and affidavit, along with THREE (3) copies of the cover letter, and ONE (1) set of documentary attachments.

Affidavits

Affidavit(s) are required by § 803.5 and must attest to the good faith of the persons filing to complete the transaction. Affidavits must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquiring or acquired person, the affidavit must still attest to the good faith of the UPE.

In non-§ 801.30 transactions, the affidavit(s) (submitted by both persons filing) must attest that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attest to the good faith intention of the person filing notification to complete the transaction. (See § 803.5(b)).

In § 801.30 transactions, the affidavit (submitted only by the acquiring person) must attest:

- that the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice, as described below, from the acquiring person;
- in the case of a tender offer, that the intention to make the tender offer has been publicly announced; and

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- 3) the good faith intention of the person filing notification to complete the transaction.

Acquiring persons in § 801.30 transactions are required to submit a copy of the notice received by the acquired person pursuant to § 803.5(a)(3) along with the filing. This notice must include:

- 1) the identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity;
- 2) the specific notification threshold that the acquiring person intends to meet or exceed in an acquisition of voting securities;
- 3) the fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act;
- 4) the anticipated date of receipt of such notification by the Agencies; and
- 5) the fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act. (See § 803.5(a)).

Responses

Enter the name of the person filing notification in Item 1(a) on page 1 of the Form, and enter the same name and the date on which the Form is completed at the top of each page of the Form.

If there is insufficient room on the Form for a response to a particular item, attach "additional pages" behind that item on the Form. Filers must submit a complete set of additional pages within each copy of the Form.

Each additional page should identify, at the top of the page, the name of the person filing notification, the date on which the Form is completed and the item to which it is addressed.

Voluntary submissions pursuant to § 803.1(b) should be identified as V-1, V-2, etc.

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation "est." to any item where data are estimated.

All financial information should be expressed in millions of dollars rounded to the nearest one-tenth of a million dollars.

Limited Response

The acquired person should limit its response in Items 5-7:

- 1) in the case of an acquisition of assets, to the assets being acquired;
- 2) in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such acquired entities; and
- 3) in the case of an acquisition of non-corporate interests, to the unincorporated entity(s) whose non-corporate interests are being acquired and all entities controlled by such acquired entities.

Separate responses may be required where a person is both acquiring and acquired. (See § 803.2(b)).

Information need not be supplied regarding assets, voting securities or non-corporate interests currently being acquired

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when their acquisition is exempt under the Act or Rules. (See § 803.2(c)).

Year

All references to "year" refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

North American Industry Classification System (NAICS) and North American Product Classification System (NAPCS) Data
The Form requests "dollar revenues" for non-manufactured and manufactured products with respect to operations conducted within the United States, and for products manufactured outside of the United States and sold into the United States. (See § 803.2(d)). Filing persons must submit data by 6-digit NAICS code to reflect both non-manufacturing and manufacturing dollar revenues. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), filing persons must also submit data by 10-digit NAPCS code. (See Item 5 below).

In reporting information by 6-digit NAICS code, refer to the *North American Industry Classification System - United States, 2017* published by the Executive Office of the President, Office of Management and Budget.

In reporting information by 10-digit NAPCS code, refer to the concordance tables between 2012 product codes and 2017 NAPCS-based product codes published by the Bureau of the Census.

Information regarding NAICS and NAPCS is available at www.census.gov. This site also provides assistance in choosing the proper code(s) for reporting in Item 5 of the Form.

Thresholds

Filing fee and notification thresholds are adjusted annually pursuant to 15 U.S.C. § 18A(a)(2)(A) based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). The current threshold values can be found at [Current Filing Thresholds](#).

END OF GENERAL SECTION

[Online Style Sheet for the Form](#)

[Online Tips for the Form](#)

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THE FORM - ITEM BY ITEM

Fee Information

The fee for filing the Form is based on the aggregate total value of assets, voting securities and controlling non-corporate interests to be held as a result of the acquisition. Beginning fiscal year 2024, the fee tiers will adjust by the change in the gross national product and the fees may increase as a result of changes to the consumer price index, as provided in 15 U.S.C. 18(a) statutory note.

For current thresholds and fee information, see the [PNO website](#).

Amount Paid

Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges.

Payer Identification

Provide the payer's name and 9-digit Taxpayer Identification Number (TIN). If the payer is a natural person with no TIN, provide the natural person's social security number.

Method of Payment

The preferred method of payment is by electronic wire transfer (EWT). For EWT payments, provide the EWT confirmation number and the name of the financial institution from which the EWT is being sent. If the EWT confirmation number is not available at the time of filing, provide this information to the PNO within two business days of filing.

In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the [PNO website](#) on the [Filing Fee Information](#) page.

There are now specific, limited criteria for paying by certified check. Please see the [Filing Fee Information](#) page for details.

Corrective Filings

Put an X in the appropriate box to indicate whether the notification is a corrective filing (i.e., an acquisition that has already taken place without filing, in violation of the statute). See [Procedures for Submitting Post-Consummation Filings](#) for more information on how to proceed in the case of a corrective filing.

Cash Tender Offer

Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

Bankruptcy

Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or by a debtor-in-possession for a transaction that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. § 363).

Early Termination

Put an X in the "yes" box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register, as required by 15 U.S.C. § 18A(b)(2), and on the [PNO website](#). Note that if either party in any transaction requests early termination, it may be granted and published.

Transactions Subject to International Antitrust Notification

If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority. Response to this item is voluntary.

Index of Hyperlinks in these Instructions:

[PNO website](#): <https://www.ftc.gov/enforcement/premerger-notification-program>

[Statute, Rules and Formal Interpretations](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-formal-interpretations>

[HSR Resources](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources>

[Current Filing Thresholds](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds>

[Online Style Sheet for the Form](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions/style-sheet>

[Online Tips for the Form](#):
https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_tip_sheet_1.0.5.pdf

[Filing Fee Information](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information>

[Procedures for Submitting Post-Consummation Filings](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations>

[Online Tips for Item 4\(c\)](#):
<https://www.ftc.gov/sites/default/files/attachments/hsr-resources/4ctipsheet.pdf>

[Online Tips for Item 4\(d\)](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d>

[Online Tips for Item 5](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5>

[Online Tips for Item 6](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-6-hsr-form>

[Online Tips for Item 7](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-7-hsr-form>

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| ITEM 1 | ITEM 2 |
|--|--|
| Item 1(a) Provide the name, headquarters address and website (if one exists) of the person filing notification. The name of the person filing is the name of the UPE. (See § 801.1(a)(3)). | Item 2(a) Provide the names of all UPEs of acquiring and acquired persons that are parties to the transaction, whether or not they are required to file notification. If a person is not required to file, check the non-reportable box. |
| Item 1(b) Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2). | Item 2(b) Put an X in all the boxes that apply to the transaction. |
| Item 1(c) Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, unincorporated entity, natural person, or other (specify). (See § 801.1). | Item 2(c) This item should only be completed by the acquiring person where voting securities are being acquired. If more than voting securities are being acquired, respond to this item only regarding voting securities. Put an X in the box to indicate the highest applicable threshold for which notification is being filed: \$50 million (as adjusted), \$100 million (as adjusted), \$500 million (as adjusted), 25% (if the value of voting securities to be held is greater than \$1 billion, as adjusted), or 50%. (See § 801.1(h)). |
| Item 1(d) Put an X in the appropriate box to indicate whether data furnished in Item 5 is by calendar year or fiscal year. If fiscal year, specify the time period. | Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities. For instance, an acquisition of 100% of the voting securities of an issuer, valued in excess of \$500 million (as adjusted) would cross the 50% notification threshold, not the \$500 million (as adjusted) threshold. |
| Item 1(e) Put an X in the appropriate box to indicate if the Form is being filed on behalf of the UPE by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if the Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the filing person named in Item 1(a) of the Form. | Item 2(d) Provide the requested information on assets, voting securities and non-corporate interests. If a combination of assets, voting securities and/or non-corporate interests are being acquired and allocation is not possible, note such information in an endnote. |
| Item 1(f) For the <u>acquiring person</u> , if an entity other than the UPE listed in Item 1(a) is making the acquisition, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held directly or indirectly by the person named in Item 1(a) above. | For determining percentage of voting securities, evaluate total voting power per § 801.12. |
| For the <u>acquired person</u> , if the assets, voting securities or non-corporate interests of an entity other than the UPE listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held directly or indirectly by the person named in Item 1(a) above. | For determining percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(ii). |
| Item 1(g) Provide the name and title, firm name, address, telephone number, and e-mail address of the primary and secondary individuals to contact regarding the Form. <u>A second contact person is required.</u> (See § 803.20(b)(2)(ii)). | Item 2(d)(i) State the value of voting securities already held. (See § 801.10). |
| Item 1(h) Foreign filing persons must provide the name, firm name, address, telephone number, and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii)). | Item 2(d)(ii) State the percentage of voting securities already held. (See § 801.12). |
| Note: The Form has fields for fax numbers in Item 1. Providing fax numbers is no longer necessary. The fields will be deleted during the next update of the HSR Form. | Item 2(d)(iii) State the total value of voting securities to be held as a result of the acquisition. (See § 801.10). |
| END OF ITEM 1 | Item 2(d)(iv) State the total percentage of voting securities to be held as a result of the acquisition. (See § 801.12). |
| | Item 2(d)(v) State the value of non-corporate interests already held. (See § 801.10). |
| | Item 2(d)(vi) State the percentage of non-corporate interests already held. (See § 801.1(b)(1)(ii)). |
| | Item 2(d)(vii) State the total value of non-corporate interests to be held as a result of the acquisition. (See § 801.10). |

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| ITEM 2 cont. | ITEM 3 |
|---|--|
| Item 2(d)(viii) State the total percentage of non-corporate interests to be held as a result of the acquisition. (See §§ 801.10 and 801.1(b)(1)(ii)). | Item 3(a) At the top of Item 3(a), list the name and mailing address of each acquiring and acquired person, and acquiring and acquired entity, whether or not required to file notification. It is not necessary to list every subsidiary wholly-owned owned by an acquired entity. |
| Item 2(d)(ix) State the value of assets to be held as a result of the acquisition. (See § 801.10). | In the Transaction Description section, briefly describe the transaction, indicating whether assets, voting securities or non-corporate interests (or some combination) are to be acquired. Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise a business operation. Also, indicate what consideration will be received by each party and the scheduled consummation date of the transaction. |
| Item 2(d)(x) State the aggregate total value of assets, voting securities and non-corporate interests of the acquired person to be held as a result of the acquisition. (See §§ 801.10, 801.12, 801.13 and 801.14). | If any attached transaction documents use coded names to refer to the parties, please provide an index identifying the codes. |

END OF ITEM 2

| Most Common Mistakes When Completing the HSR Form | |
|--|--|
| <ul style="list-style-type: none">▪ Noncompliant affidavit▪ Missing contact information in Item 1(g)▪ Failure to describe target in Item 3(a)▪ Incomplete privilege log▪ Failure to properly identify authors and recipients of Item 4c/4d documents▪ Failure to properly round revenues in Item 5 to nearest tenth of a million and failure to list in ascending order▪ Failure to provide required geographic information (e.g., state, county, and city or town) in Item 7(c)(iv)(b)▪ Failure to provide the total number of states and territories in response to Item 7(c) | |

If there are additional filings, such as shareholder backside filings, associated with the transaction, identify those. Also, identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

Item 3(b)
Furnish copies of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities or non-corporate interests are to be acquired. Also furnish agreements not to compete and other agreements between the parties. Do not submit schedules and the like unless they contain agreements not to compete, other agreements between the parties, or other important terms of the transaction. For purposes of Item 3(b), responsive documents must be submitted; identifying an internet address or providing a link is not sufficient.

Documents that constitute the agreement(s) (e.g., a Letter of Intent, Merger Agreement, Purchase and Sale Agreement) must be executed, while agreements not to compete may be provided in draft form if that is the most recent version.

If parties are filing on an executed Letter of Intent, they may also submit a draft of the definitive agreement, if one exists.

Note that transactions subject to S 801.30 and bankruptcies under 11 U.S.C. § 363 do not require an executed agreement or letter of intent. For bankruptcies, provide the order from the bankruptcy court.

END OF ITEM 3

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ITEM 4

Item 4(a)

Provide the names of all entities within the person filing notification, including the UPE, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity.

Item 4(b)

Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the person filing notification.

The acquiring person should also provide the most recent reports of the acquiring entity(s) and any controlled entity whose dollar revenues contribute to an overlap reported in Item 7.

The acquired person should also provide the most recent reports of the acquired entity(s).

Natural persons need only provide the most recent reports for the highest level entity(s) they control. Do not provide personal balance sheets or tax returns.

If the most recent reports do not show sales or assets sufficient to meet the size of person test, and the size of person test is relevant given the size of the transaction, the filing person must stipulate in Item 4(b) that it meets the test.

Note that the person filing notification may incorporate a document by reference to an internet address directly linking to the document. (See § 803.2(e)).

Items 4(c) and 4(d)

For each document responsive to Items 4(c) and 4(d), provide the:

- 1) document's title;
- 2) date of preparation; and
- 3) name and title of each individual who prepared the document.

If a specific date is not available, indicate the month and year the document was prepared.

If a large group of people prepared the document, list all the authors and their titles, identifying the principal authors.

Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. If a third party prepared the document, the date of preparation and the name of the third party will suffice.

Numbering

Number each document provided in response to Items 4(c) and 4(d). Number 4(c) documents 4(c)-1, 4(c)-2, 4(c)-3, etc. Likewise, number 4(d) documents 4(d)-1, 4(d)-2, 4(d)-3, etc., regardless of the three sub-categories within Item 4(d). If providing only one document, identify it as 4(c)-1 or 4(d)-1.

When submitting a document responsive to both 4(c) and 4(d), list it only once, under 4(c) or 4(d). If a document is responsive to both 4(c) and 4(d), do not cross-reference.

Privilege

Note that if the filing person withholds or redacts portions of any document responsive to Items 4(c) and 4(d) based on a claim of privilege, the person must provide a statement of reasons for non-compliance (a "privilege log") detailing the claim of privilege for each withheld or redacted document. (See § 803.3(d)).

For each document, include the:

- 1) title of the document;
- 2) its author;
- 3) author's title/position;
- 4) addressee;
- 5) addressee's title/position;
- 6) date;
- 7) subject matter;
- 8) all recipients of the original and any copies;
- 9) recipients' titles/positions;
- 10) document's present location; and
- 11) who has control over it.

Additionally, the filing person must state the factual basis supporting the privilege claim in sufficient detail to enable staff to assess the validity of the claim for each document without disclosing the protected information.

If a privileged document was circulated to a group, such as the Board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested. If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

When creating a privilege log, use a separate numbering system for withheld documents, such as P-1, P-2, etc. Redacted documents should also be listed in a separate log that complies with § 803.3(d).

Item 4(c)

Provide all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

Item 4(d)

Item 4(d)(i)
Provide all Confidential Information Memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) that specifically relate to the sale of the acquired entity(s)

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ITEM 4 cont.

or assets. If no such Confidential Information Memorandum exists, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(ii)

Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors ("third party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(iii)

Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item.

END OF ITEM 4

Tip for Item 4

If there is insufficient room on the Form for a response, attach "additional pages" behind that item on the Form. (See Responses on page II).

[Online Tips for Item 4\(c\)](#)

[Online Tips for Item 4\(d\)](#)

ITEMS 5 THROUGH 7

Limited response for acquired person. For Items 5 through 7, the acquired person should limit its response in the case of an acquisition of:

- 1) assets, to the assets to be acquired;
- 2) voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer; and/or
- 3) non-corporate interests, to the unincorporated entity(s) being acquired and all entities controlled by such unincorporated entity(s).

A person filing as both acquiring and acquired persons may be required to provide a separate response to Items 5 through 7 in each capacity so that it can properly limit its response as an acquired person. (See §§ 803.2(b) and (c)).

ITEM 5

This item requests information regarding dollar revenues. (See NAICS and NAPCS Data section on page II). All persons must submit all dollar revenues at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), filers must also submit revenue by 10-digit NAPCS code. Concordance tables between 2012 10-digit NAICS codes and 10-digit 2017 NAPCS codes are available at: <https://www.census.gov/programs-surveys/economic-census/guidance/understanding-napcs.html>.

List all NAICS and NAPCS codes in ascending order.

Acquiring persons filing notification should include the total dollar revenues for all entities included within the person filing notification at the time the Form is prepared. Acquired persons filing notification should include the total dollar revenues for all entities included within the acquired entity at the time the Form is prepared. If no dollar revenues are reported, check the "None" box and provide a brief explanation.

Item 5(a)

Provide 6-digit NAICS industry data concerning the aggregate U.S. operations of the person filing notification for the most recent year in all NAICS Sectors in which the person engaged. If the dollar revenues for a non-manufacturing NAICS code totaled less than one million dollars in the most recent year, that code may be omitted from Item 5(a).

Additionally, provide 10-digit NAPCS product code data for each product code within all manufacturing NAICS Sectors (31-33) in which the person engaged in the U.S., including dollar revenues for each product manufactured outside the U.S. but sold into the U.S. Sales of any manufactured product should be reported in a manufacturing code, even if sold through a separate warehouse or retail establishment.

If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS codes and 10-digit NAPCS codes may be provided.

Check the Overlap box for every 6-digit manufacturing and non-manufacturing NAICS code and every 10-digit NAPCS code in which both parties to the transaction generate dollar revenues.

| ITEM 5 cont. | ITEM 6 |
|--|---|
| <p>Item 5(b) Complete only if the acquisition is the formation of a joint venture corporation or unincorporated entity. (See §§ 801.40 and 801.50). If the acquisition is not the formation of a joint venture, check the "Not Applicable" box.</p> <p>Item 5(b)(i) List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.</p> <p>Item 5(b)(ii) Describe fully the consideration that each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).</p> <p>Item 5(b)(iii) Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including its principal types of products or activities, and the geographic areas in which it will do business.</p> <p>Item 5(b)(iv) Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues. If the joint venture corporation or unincorporated entity will be engaged in manufacturing, also specify each 10-digit NAPCS product code in which it will derive dollar revenues.</p> | <p>An acquired person does not complete Item 6 if the transaction involves only the acquisition of assets. If the transaction involves a mix of assets along with voting securities and/or non-corporate interests, the acquired person must complete Item 6 as related to the voting securities and non-corporate interests.</p> <p>Item 6(a) Subsidiaries of filing person. List the name, city and state/country of all U.S. entities, and all foreign entities that have sales in or into the U.S., that are included within the person filing notification. Entities with total assets of less than \$10 million may be omitted. Alternatively, the filing person may report all entities within it.</p> <p>Item 6(b) Minority shareholders. For the acquired entity(s) and for the acquiring entity(s) and its UPE or, in the case of natural persons, the top-level corporate or unincorporated entity(s) within that UPE, list the name and headquarters mailing address of each shareholder that holds 5% or more but less than 50% of the outstanding voting securities or non-corporate interests of the entity, and the percentage of voting securities or non-corporate interests held by that person. (See § 801.1(c))</p> <p>For limited partnerships, only the general partner(s), regardless of percentage held, should be listed.</p> <p>Item 6(c) Minority holdings. Item 6(c) requires the disclosure of holdings of 5% or more but less than 50%, of any entity(s) that derives dollar revenues in any 6-digit NAICS code reported by the other person filing notification. Holdings in those entities that have total assets of less than \$10 million may be omitted.</p> <p>The acquiring person may rely on its regularly prepared financials that list its investments, and those of its associates that list their investments, to respond to Items 6(c)(i) and (ii), provided the financials are no more than three months old.</p> <p>If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. In responding to Items 6(c)(i) and 6(c)(ii), it is permissible for the acquiring person to list all entities in which it or its associate(s) holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings in those entities that have total assets of less than \$10 million may be omitted.</p> <p>Item 6(c)(i) Minority holdings of filing person. If the person filing notification holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity, list the issuer and percentage of voting securities held, or in the case of an unincorporated entity, list the unincorporated entity and the percentage of non-corporate interests held.</p> <p>The acquiring person should limit its response, based on its knowledge or belief, to entities that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year.</p> <p>The acquired person should limit its response, based on its knowledge or belief, to entities that derive dollar revenues in the</p> |

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ITEM 6 cont.

same 6-digit NAICS industry code as the acquiring person.

Item 6(c)(ii)

Minority holdings of associates.

This item should only be completed by the acquiring person. Based on the knowledge or belief of the acquiring person, for each associate (see § 801.1(d)(2)) of the acquiring person holding:

- 1) 5% or more but less than 50% of the voting securities or non-corporate interests of the acquired entity(s); and/or
- 2) 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year;

list the associate, the issuer or unincorporated entity and the percentage held.

END OF ITEM 6

Tip for Item 6(c)

Remember, if NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed.

[Online Tips for Item 6](#)

ITEM 7

If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate (see § 801.1(d)(2)) of the acquiring person, derived any amount of dollar revenues (even if omitted from Item 5) in the most recent year from operations:

- 1) in industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived any amount of dollar revenues in the most recent year; or
- 2) in which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the acquired entity is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture.

Also, if the acquiring person reports an associate overlap only, the acquired person does not need to respond to Item 7.

Item 7(a)

Industry Code Overlap Information

Provide the 6-digit NAICS industry code and description for the industry, and indicate whether the overlap is from the person, an associate or both.

Item 7(b)

Item 7(b)(i)

If the UPE of the other person(s) filing notification derived dollar revenues in the same 6-digit industry code(s) listed in Item 7(a), list the name of that UPE and the name of the entity(s) within that UPE that actually derived those dollar revenues, if different from the entity(s) listed in Item 3(a).

Item 7(b)(ii)

This item should only be completed by the acquiring person.

List the name of each associate of the acquiring person that also derived dollar revenues through a controlled operating company(s) in the 6-digit industry and, if different, the name of the entity(s) that actually derived those dollar revenues.

Item 7(c)

Geographic Market Information

Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Note that except in the case of those NAICS industries in the Sectors and Subsectors mentioned in Item 7(c)(iv)(b), the person filing notification may respond with the word "national" if business is conducted in all 50 states.

Item 7(c)(i)

NAICS Sectors 31-33

For each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a), list the relevant geographic information in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the person filing notification are sold without a significant change in their form (whether they are sold by the person filing notification or by others to whom such products have been sold or resold). Except for industries covered

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ITEM 7 cont.

by Item 7(c)(iv)(b), the relevant geographic information is all states or, if desired, portions thereof.

Item 7(c)(ii)

NAICS Sector 42

For each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a), list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

Item 7(c)(iii)

NAICS Industry Group 5241

For each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a), list the state(s) in which the person filing notification is licensed to write insurance.

Item 7(c)(iv)(a)

Other NAICS Sectors

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 11 agriculture, forestry, fishing and hunting
- 21 mining
- 22 utilities
- 23 construction
- 48-49 transportation and warehousing
- 511 publishing industries
- 515 broadcasting
- 517 telecommunications
- 71 arts, entertainment and recreation

Item 7(c)(iv)(b)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, provide the address, arranged by state, county and city or town, of each establishment from which dollar revenues were derived in the most recent year by the person filing notification.

- 32512 nonmetallic mineral mining and quarrying
- 32732 industrial gases
- 32733 concrete
- 44-45 concrete products
- 44-45 retail trade, except 442 (furniture and home furnishings stores), and 443 (electronics and appliance stores)
- 512 motion picture and sound recording industries
- 521 monetary authorities - central bank
- 522 credit intermediation and related activities
- 532 rental and leasing services
- 62 health care and social assistance
- 72 accommodations and food services, except 7212 (recreational vehicle parks and recreational camps), and 7213 (rooming and boarding houses)
- 811 repair and maintenance, except 8114 (personal and household goods repair and maintenance)
- 812 personal and laundry services

Item 7(c)(iv)(c)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 442 furniture and home furnishings stores
- 443 electronics and appliance stores
- 516 internet publishing & broadcasting
- 518 internet service providers
- 519 other information services
- 523 securities, commodity contracts and other financial investments and related activities
- 5242 insurance agencies and brokerages, and other insurance related activities
- 525 funds, trusts and other financial vehicles
- 53 real estate and rental and leasing
- 54 professional, scientific and technical services
- 55 management of companies and enterprises
- 56 administrative and support and waste management and remediation services
- 61 educational services
- 7212 recreational vehicle parks and recreational camps
- 7213 rooming and boarding houses
- 813 religious, grantmaking, civic, professional, and similar organizations
- 8114 personal and household goods repair and maintenance

Item 7(d)

This item should only be completed by the acquiring person. Use the geographic markets listed in Items 7(c)(i) through 7(c)(iv) to respond to this item, providing the information for associates of the acquiring person. Provide separate responses for each associate of the acquiring person and, if different, the controlled operating company(s) that actually derived the dollar revenues.

END OF ITEM 7

Online Tips for Item 7

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| ITEM 8 | CERTIFICATION |
|---|--|
| <p>This item should only be completed by the acquiring person. Determine each 6-digit NAICS industry code listed in Item 7(a), in which the acquiring person derived dollar revenues of \$1 million or more in the most recent year and in which either:</p> <ol style="list-style-type: none">1) the acquired entity derived dollar revenues of \$1 million or more in the recent year (or in the case of the formation of a joint venture corporation or unincorporated entity, the joint venture corporation or unincorporated entity reasonably can be expected to derive dollar revenues of \$1 million or more); or2) in the case of acquired assets, to which dollar revenues of \$1 million or more were attributable in the most recent year. <p>For each such 6-digit NAICS industry code, list all acquisitions of entities or assets deriving dollar revenues in that 6-digit NAICS industry code made by the acquiring person in the five years prior to the date of the instant filing, even if the transaction was non-reportable. List only acquisitions of 50% or more of the voting securities of an issuer or 50% or more of non-corporate interests of an unincorporated entity that had annual net sales or total assets greater than \$10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.</p> <p>This item pertains only to acquisitions of U.S. entities/assets and foreign entities/assets with sales in or into the U.S., i.e., with dollar revenues that would be reported in Item 5.</p> <p>For each such acquisition, supply:</p> <ol style="list-style-type: none">1) the 6-digit NAICS industry code (by number and description) identified above in which the acquired entity derived dollar revenues;2) the name of the entity from which the assets, voting securities or non-corporate interests were acquired;3) the headquarters address of that entity prior to the acquisition;4) whether assets, voting securities or non-corporate interests were acquired; and5) the consummation date of the acquisition. | <p>See § 803.6 for requirements.</p> <p>The certification must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury.</p> |
| PRIVACY ACT STATEMENT | |
| | <p>Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. § 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day.</p> <p>We also may be unable to process the Form unless you provide all of the requested information.</p> |

DISCLOSURE NOTICE

Public reporting burden for this report estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission, Room #5301
400 7th Street, S.W.
Washington, D.C. 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The operative OMB control number, 3084-0005, appears within the Notification and Report Form and these Instructions.

END OF FORM INSTRUCTIONS