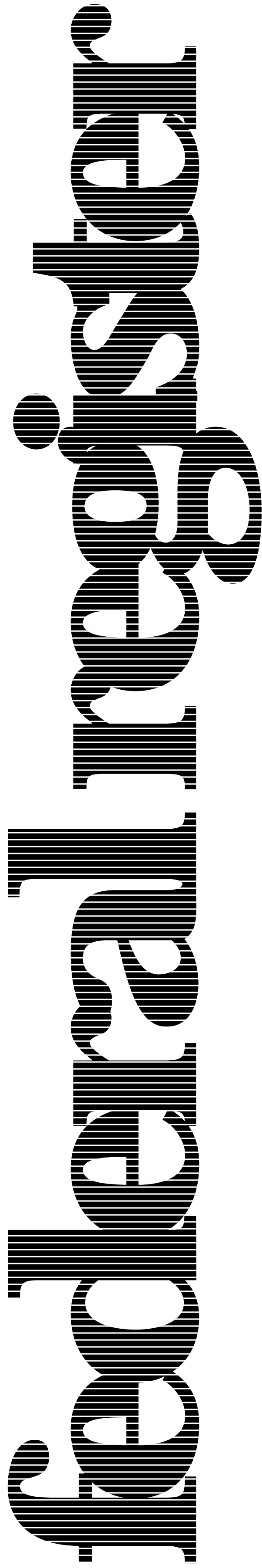

Friday
July 28, 1995

Part V

Federal Trade Commission

16 CFR Parts 801 and 802

Premerger Notification; Reporting and Waiting Period Requirements; Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 802

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice proposes amendments to the premerger notification rules that require the parties to certain mergers or acquisitions to file reports with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation.

This notice seeks comments on five proposed rules that would define or create exemptions to the requirements imposed by the act. These proposed rules have been developed to clarify the types of transactions that are in the ordinary course of business of the parties to the transaction and are exempt under section 7A(c)(1) of the Hart-Scott-Rodino-Act. They also provide several new exemptions under section 7A(d)(2)(B) for certain types of acquisitions of realty and carbon-based mineral reserves that appear unlikely to violate the antitrust laws. These proposed rules are designed to reduce the compliance burden on the business community by eliminating the application of the notification and waiting requirements to a significant number of transactions that, in most cases, are unlikely to violate the antitrust laws. They will also allow the enforcement agencies to focus their resources more effectively on those transactions that present the potential for competitive harm.

DATES: Comments must be received on or before September 29, 1995.

ADDRESSES: Written comments should be submitted to both (1) the Secretary, Federal Trade Commission, Room 136, Washington, DC 20580, and (2) the Assistant Attorney General, Antitrust Division, Department of Justice, Room 3214, Washington, DC 20530.

FOR FURTHER INFORMATION CONTACT: Melea R. Epps, Attorney, or John M. Sipple, Jr., Assistant Director, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

The proposed amendments to the Hart-Scott-Rodino premerger notification rules are designed to reduce the burden of reporting on the public. The Commission has determined that none of the proposed rules is a major rule, as that term is defined in Executive Order 12291. The amendments will not result in any of the following: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in the domestic market. None of the amendments expands the coverage of the premerger notification rules in a way that would affect small business. Therefore, pursuant to section 605(b) of the Administrative Procedure Act, 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Pub. L. 96–354 (September 19, 1980), the Federal Trade Commission has certified that these rules will not have a significant economic impact on a substantial number of small entities. Section 603 of the Administrative Procedure Act, 5 U.S.C. 603, requiring a final regulatory flexibility analysis of these rules, is therefore inapplicable.

Background

Section 7A of the Clayton Act (''the act''), 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires parties to certain acquisitions of assets or voting securities to give advance notice to the Federal Trade Commission (hereafter referred to as ''the Commission'') and the Assistant Attorney General of the Antitrust Division of the Department of Justice (hereafter referred to as ''the Assistant Attorney General''). The parties must then wait certain designated periods before the consummation of such acquisitions. The transactions to which the advance notice requirement is applicable and the length of the waiting period required are set out respectively in subsections (a) and (b) of section 7A. This amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions under the antitrust laws.

The legislative history suggests several purposes underlying the act. Congress wanted to ensure that certain acquisitions were subjected to meaningful scrutiny under the antitrust laws prior to consummation. To this end, Congress intended to eliminate the ''midnight merger'' which is negotiated in secret and announced just before, or sometimes only after, the closing takes place. Congress also provided an opportunity for the Commission or the Assistant Attorney General (who are sometimes hereafter referred to as the ''antitrust agencies'' or the ''enforcement agencies'') to seek a court order enjoining the completion of those transactions that either agency determines would present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy when a challenge by one of the enforcement agencies proved successful. Thus, the act requires that the antitrust agencies received prior notification of certain acquisitions, provides tools to facilitate a prompt, thorough investigation of the competitive implications of these acquisitions, and assures the enforcement agencies an opportunity to seek a preliminary injunction before the parties to an acquisition are legally free to consummate it. The problem of unscrambling the assets after the transaction has taken place is thereby reduced.

Subsection 7A(d)(1) of the act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, to require that the notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. Subsection 7A(d)(2) of the act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to (a) define the terms used in the act, (b) exempt from the act's notification and waiting period requirements additional classes of persons or transactions which are not likely to violate the antitrust laws, and (c) prescribe such other rules as may be necessary and appropriate to carry out the purposes of section 7A.

The Commission, with the concurrence of the Assistant Attorney General, promulgated implementing rules (''the rules'') and the Notification and Report Form (the ''Form'') and issued an accompanying Statement of

Basis and Purpose, all of which were published in the **Federal Register** of July 31, 1978, 43 FR 33451, and became effective on September 5, 1978.

The rules are divided into three parts which appear at 16 CFR parts 801, 802, and 803. Part 801 defines a number of the terms used in the act and rules, and explains which acquisitions are subject to the reporting and waiting period requirements. Part 802 contains a number of exemptions from these requirements. Part 803 explains the procedures for complying with the act. The Form, which is completed by persons required to file notification, is an appendix to part 803 of the rules.

Changes of a substantive nature have been made in the premerger notification rules or Form on ten occasions since they were first promulgated: 44 FR 66781 (November 21, 1979); 45 FR 14205 (March 5, 1980); 46 FR 38710 (July 29, 1981); 48 FR 34427 (July 29, 1983); 50 FR 38742 (September 24, 1985); 51 FR 10368 (March 28, 1986); 52 FR 7066 (March 6, 1987); 52 FR 20058 (May 29, 1987); 54 FR 21425 (May 18, 1989) and 55 FR 31371 (August 2, 1990).

The current set of proposed changes to the rules interprets the act and expands the current policies of the Commission's Premerger Notification Office regarding transactions in the ordinary course of business that are exempt from the notification and waiting requirements of the act. The proposals also include several new exemptions for acquisitions of certain types of real property assets and carbon-based mineral reserves. The Commission, as part of its ongoing review of the rules, invites interested persons to submit comments on these proposed rules and the Statement of Basis and Purpose.

Statement of Basis and Purpose for the Commission's Proposed Revisions to the Premerger Notification Rules

Proposed §§ 802.1, 802.2, 802.3, 802.4, and 802.5 describe certain types of acquisitions that would be exempt from the notification requirements of the act. They would replace and expand existing § 802.1, which describes certain applications of the exemption granted by section 7A(c)(1) of the act for acquisitions of goods or realty in the ordinary course of business. Proposed revisions to § 801.15 would define when the aggregation rules apply to acquisitions covered by these newly proposed rules.

In 1985, the Commission proposed three new provisions under part 802. Previously proposed § 802.1 would have addressed the statutory ''ordinary course of business'' exemption; previously proposed § 802.2 would have exempted certain acquisitions of unimproved land, office buildings and residential properties; and previously proposed § 802.3 would have exempted certain acquisitions of carbon-based mineral reserves.

In response to the 1985 notice of proposed rulemaking, the Commission received twenty comments that focused wholly or in part on the then proposed §§ 802.1, 802.2, and 802.3. The persons who commented are listed in the **Federal Register** of March 6, 1987, 52 FR 7066. The comments are available for public inspection in the Federal Trade Commission's Public Reference Room, Reference number 223.2.1–1–E and F.

On March 23, 1995, the Chairman of the Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice jointly announced eight initiatives for review of transactions under the act. One of the initiatives is a reduction in the number of filings received pursuant to the act. A draft of several revisions to the Hart-Scott-Rodino rules under consideration by the staff of the Commission's Premerger Notification Office (PNO) was made available to the public. Those revisions would eliminate the necessity to file premerger notification for certain transactions that are not likely to violate the antitrust laws. The draft reflected careful consideration by the staff of the comments received in response to the 1985 proposals, the experience of the PNO during the intervening years in its determinations of the reportability of a large number of transactions not specifically exempted by the act or the rules an the experience of the enforcement agencies in conducting their antitrust review of premerger filings.

Included in the March 23 draft was a series of questions to be considered in determining whether the revisions under consideration by the PNO effectively exempted transactions that were unlikely to violate the antitrust laws and facilitated uncomplicated application of the rules. In response to an invitation for comment, the staff of the Commission received extensive input from the private antitrust bar and worked closely with the Department of Justice to address the questions raised in the draft. As a result, the draft revisions were reformulated significantly to enhance their effectiveness in exempting classes of transactions that are unlikely to create competitive problems, while ensuring that the enforcement agencies continue to receive notification of classes of acquisitions that are more likely to present potential antitrust concerns. The Commission now formally proposes the following amendments to the premerger notification rules.

Criteria for the Rules. Section 7A(c)(1) of the act exempts ''acquisitions of goods or realty transferred in the ordinary course of business.'' Existing § 802.1(a) interprets this statutory language to apply the exemption to acquisitions of voting securities of entities holding only realty. Existing § 802.1(b) denies the exemption to the sale of goods or real property if they constitute ''all or substantially all of the assets of that entity or an operating division thereof'' unless the entity qualifies for the exemption under existing § 802.1(a) because its assets consist solely of real property and assets incidental to the ownership of real property.

The reportability of transfers in the ordinary course of business has long been a frequent source of questions from the public. Proposed § 802.1 represents interpretations of section 7A(c)(1) made by the PNO over the years, and it also broadens these interpretations to exempt additional classes of acquisitions that are unlikely to violate the antitrust laws.

Proposed § 802.1(a) preserves the concept of existing § 802.1(b) and makes the exemption unavailable for acquisitions of all or substantially all of the assets of an operating unit. Operating unit is defined as assets operated by the acquired person as a business undertaking in a particular area or for particular products or services. The sale of all or substantially all of the assets of a business is generally equivalent to the sale of a business enterprise. Although it is possible that the effects of selling capacity might be to enhance competition, it can also diminish competition, and each acquisition must be judged individually. The current and proposed rules therefore require generally that acquisitions that transfer the equivalent of a business remain subject to the prior notification obligations of the act.

Proposed § 802.1 also defines categories of acquisitions of goods that are deemed to be in the ordinary course of business and are therefore exempt from the notification requirements. Individual review of such transactions is typically unnecessary because selling goods is the essence of manufacturing, wholesaling, and retailing businesses. Sales in the ordinary course of business should not in any way diminish the capacity of the selling firm to compete.

Proposed § 802.1 provides that certain acquisitions of used durable goods qualify for exemption from the reporting requirements as transfers of goods in the ordinary course of business. These exemptions for specific types of acquisitions of used durable goods acknowledge that certain transfers of productive assets are made in the ordinary course to increase or upgrade capacity and to improve efficiencies. However, the ordinary course of business exemption generally will not reach other acquisitions involving productive capacity. The Commission invites comment regarding other types of transfers of productive assets, especially those not involving operating units, that may qualify for the ordinary course of business exemption.

Proposed § 802.2 (concerning real property assets) and proposed § 802.3 (concerning carbon-based mineral reserves and rights) are based, for the most part, on the Commission's authority in section 7A(d)(2)(B) of the act to exempt transactions that are unlikely to violate the antitrust laws. These proposals provide exemptions for certain acquisitions of assets that are usually abundant and are used in markets that are unconcentrated. These two factors make it unlikely that a transfer of these types of assets will have anticompetitive effects. It is thus not necessary to examine each individual transaction to determine if it will violate the antitrust laws.

To accommodate parties who choose to structure their transactions as acquisitions of voting securities rather than as acquisitions of the underlying assets, proposed § 802.4 exempts acquisitions of voting securities of issuers whose assets consist solely of the assets exempted by proposed §§ 802.2 and 802.3.

Proposed § 802.5 exempts acquisitions by certain investors of rental real property, the acquisition of which is not already exempted by § 802.2. Proposed § 802.5 is based on the use to which those buyers put the acquired assets. It would exempt institutional investors (as defined in § 802.64) and persons whose sole business is the acquisition or management of investment rental property from the requirements of the act when they are acquiring investment rental property assets. The Commission believes that, so long as the assets remain as investment rental property assets, the acquisition of these assets is unlikely to violate the antitrust laws.

Proposed §§ 802.1, 802.2, 802.3, 802.4 and 802.5 are based on the Commission's authority in section 7A(d)(2)(A) of the act to "define the terms used in (section 7A)" (with the concurrence of the Assistant Attorney General) and sections 7A(d)(2) (B) and (C) to "exempt * * * transactions which are not likely to violate the antitrust laws" and to "prescribe such other rules as may be necessary and appropriate to carry out the purposes of [section 7A]." However, the Commission reserves the right to investigate certain transactions exempted from the reporting requirements by the proposed rules if these transactions are characterized by factors that increase the likelihood that the consummation of the transactions may violate the antitrust laws.

The Commission is aware that even with the significant coverage of the proposed rules, the exempt status of many transactions will remain unaddressed. These proposed rules do not interpret or apply to the entire statutory exemption created by section 7A(c)(1); there remain categories of transactions involving goods and realty that are not expressly treated under the proposed rules. For example, certain acquisitions of credit card receivables and certain acquisitions of assets subject to a lease financing arrangement may qualify for exemption as transfers in the ordinary course of business. Persons who desire advice on the exempt status of any transfer of goods, realty or other assets may contact the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580, or phone (202) 326–3100.

I. Proposed Section 802.1: Acquisition of Goods in the Ordinary Course of Business

Section 7A(c)(1) of the act exempts "acquisitions of goods or realty transferred in the ordinary course of business." Proposed § 802.1 defines some acquisitions of assets that are in the ordinary course of business and other acquisitions that are not. This proposed section only covers transfers of goods. Transfers of realty are covered in proposed § 802.2.

Proposed § 802.1 defines four categories of acquisitions of goods: acquisitions of an operating unit, acquisitions of new goods, acquisitions of current supplies, and acquisitions of used durable goods. The proposed section states whether and under what circumstances each type of acquisition is exempt. These four categories of asset acquisitions are not comprehensive. As noted above, some asset acquisitions may not fit neatly into any of these defined categories.

Proposed § 802.1 has four paragraphs: Paragraph (a) denies the ordinary course of business exemption to any transfer of goods that is equivalent to the sale of a business. The next three paragraphs define acquisitions of goods that may be exempt. Paragraph (b) exempts the acquisition of new goods, and paragraph (c) exempts the acquisition of current supplies. Paragraph (d) defines certain transfers of used durable goods that are within the ordinary course of business. These include the following: acquisitions by or from bona fide dealers and resellers; transfers by an acquired person that has replaced the productive capacity of the assets being sold; and transfers by an acquired person that has outsourced an auxiliary function that was provided by the goods being sold.

In determining whether a given acquisition of goods is in the ordinary course of business and is therefore exempt under a provision of § 802.1, one should first determine if the goods constitute an operating unit. If the goods being sold make up an operating unit of the seller, the inquiry ends there, and the transaction is not exempt. If the goods do not constitute an operating unit, then they should be classified as either new goods, current supplies or used durable goods, and the appropriate provisions under § 802.1 should be applied.

The organization of § 802.1 is intended to make it easier to identify routine acquisitions that meet the criteria of section 7A(c)(1) for an exemption as an acquisition of goods transferred in the ordinary course of business. Sales of new goods and purchases of current supplies are frequent. The objective of the businesses covered by paragraphs (b) and (c) is to buy and sell such goods and supplies; thus such transactions meet the common meaning of transfers in the ordinary course of business. Exempting these transactions facilitates acquisitions of new goods that normally expand the supply of products or expand productive capacity and therefore do not tend to lessen competition. In contrast, acquisitions of entire businesses have greater potential to concentrate productive capacity and thereby may diminish competition.

A. *Operating Units.* Proposed § 802.1(a) excludes the acquisition of all or substantially all of the assets of an "operating unit" from the ordinary course of business exemption. An "operating unit" can be thought of as a collection of assets that has been operated as a business undertaking. The assets of an operating unit can include realty, current supplies and durable goods. Common examples of operating units include, but are not limited to,

regional divisions or company branches, international operations, a financial group, transportation operations, a factory or an oil processing facility. Factors important in determining whether a group of asset constitutes an operating unit include the extent to which the assets being sold are devoted to producing a certain product, or the extent to which such assets serve one or more specific geographic markets.

The proposal uses the term ''operating unit'' rather than the term ''operating division'' used in existing § 802.1(b). The latter term has created some uncertainty because some business entities use the term ''division'' in a manner that may not be consistent with this rule. For example, a business might use the term ''division'' to designate an unincorporated administrative segment of its enterprise, such as the ''East Coast Division'' or ''Tri-State Division.'' Such usage is designed to serve the needs of the business. The term ''operating unit'' has been proposed in order to make clear that the application of the rule is not dependent on the terminology used by a business.

The term ''operating unit'' is defined in the rule as ''assets that are operated by the acquired person as a business undertaking in a particular geographic area or for particular products and services, even though those assets may not be organized as a separate legal entity.'' Example 1 to § 802.1 illustrates a combination of assets that is considered to be an operating unit, the acquisition of which would be excluded from the ordinary course of business exemption. As further guidance in determining when a collection of assets constitutes an operating unit, the following factors are relevant: (1) Whether the seller is terminating a business function as a result of the sale, such as ceasing to sell in a geographic region or manufacture products for a particular business segment; (2) whether the industry perceives the assets as a separate unit; and (3) whether the sale of assets includes durable goods and the current supplies that are used in the operation of those durable goods.

The sale of an operating unit is one kind of transfer that the premerger notification program was intended to review and thus is not exempt under the ordinary course of business exemption. During review, the antitrust agencies consider whether, and to what extent, concentration of productive capacity may be increased by the sale of a business and whether competition will be adversely affected by the acquisition of a business.

B. *New Goods.* Proposed § 802.1(b) describes the type of acquisitions of goods that are most commonly referred to as acquisitions ''in the ordinary course of business.'' This paragraph exempts acquisitions of new goods that were produced by the seller for the purpose of sale or that were held by the seller solely for the purpose of resale.

Paragraph (b) of proposed § 802.1 focuses on the purpose for which the seller holds the new goods to determine if the transaction is in the ordinary course of business and is therefore exempt. The sales of new goods which the paragraph exempts are routine sales of inventory by manufacturers, wholesalers or retailers conducted in the ordinary course of business. As a general matter, there is no difficulty identifying the goods in the two circumstances in which this exemption applies. Goods that are ''produced'' mean goods not used by the seller to which he has added value through processing or manufacture and may include refurbished goods. ''New goods held at all times by the acquired person solely for resale'' means inventory held for sale that is not to be used by the seller or others prior to sale. When the seller uses goods that are held for sale, the exemption does not apply. The paragraph is specifically worded to deny this exemption to any sale of goods that were purchased for use, even if the goods are subsequently sold without being used.

The exemption set forth in paragraph (b) does not apply to any acquisition of new goods which are sold as part of a transaction that includes all or substantially all of the assets of an operating unit. This limitation on the exemption of new goods would apply even if all the assets transferred were new goods held solely for the purpose of resale. For example, if a marine supply wholesaler, which owned only an extensive inventory of hundreds of items from different manufacturers, sells its entire inventory to one person, the acquisition would not be exempt even though the sale is composed entirely of new goods. The sale of all of its inventory would be considered the sale of all or substantially all of its business since the primary assets of such a wholesaling business are inventory.

C. *Current Supplies.* Proposed § 802.1(c) described another category of asset acquisitions—the acquisition of ''current supplies''—that qualify for the ordinary course exemption. ''Current supplies'' is a new term to the rules and is described in subparagraphs (1), (2) and (3). Current supplies include goods bought for resale, raw materials, components, maintenance supplies and the like. Current supplies are purchased frequently and are either consumed in the daily conduct of business or incorporated into a final product. The proposal states that current supplies do not include used durable goods, which are discussed in proposed § 802.1(d).

The acquisition of current supplies is unlikely to create or extinguish a competitive entity and is therefore exempt unless acquired as part of an acquisition of an operating unit. Parties are permitted to claim the exemption even if the goods purchased are not new (so long as they are not used durable goods), so long as the acquired goods are to be held for resale, are to be consumed by the buyer, or are otherwise incorporated in the acquiring person's final product.

In applying paragraph (c), the focus is on the business of the acquiring person to determine if the exemption is available.

D. *Used Durable Goods.* Proposed § 802.1(d) provides that certain acquisitions of used durable goods qualify for the ordinary course of business exemption. The Commission recognizes that sales of used durable goods often meet a common sense definition of transfers of goods in the ordinary course of business and that not all used durable goods acquisitions have competitive significance. Sales of such used durable goods may be routine and considered by parties to be in the ordinary course of their businesses.

Sales of used durable goods may also facilitate the purchase of a new generation of equipment that will increase the productive capacity of a business. Therefore, paragraph (d) represents an attempt to identify certain categories of transfers of used durable goods that meet a common sense definition of ''ordinary course'' and appear unlikely to violate the antitrust laws: When goods are being acquired by or from persons holding the goods solely for resale; when the acquired person is replacing or upgrading the productive capacity provided by the goods being sold; and when the acquired person is outsourcing the auxiliary support functions performed by the goods being sold. Sales of used durable goods that diminish a company's productive capacity or sales of productive assets that result in a company's exit from a given product or geographic market are not included in the ordinary course of business exemption.

Proposed § 802.1(d) defines an acquisition of used durable goods as a transaction that is in the ordinary course of business if it meets specific criteria. The term ''used durable good'' is new to the rules currently in force. It is defined in proposed § 802.1(d) as a used good

which was ''designed to be used repeatedly and has a useful life greater than one year.''

An acquisition of used durable goods is exempt as within the ordinary course of business if two requirements are satisfied. The first requirement is that they must not be acquired as part of a transfer of an operating unit, defined in paragraph (a) as ''assets that are operated by the acquired person as a business undertaking in a particular geographic area or for particular products or services.'' This restriction prevents a company from using § 802.1(d) to transfer assets that result in the company's exit from a particular product line or regional market without first observing the reporting requirements.

The second requirement for exempting an acquisition of a used durable good is that any one of four criteria set forth in the proposed rule must be satisfied. The first criterion, that the acquiring person must hold the goods at all times solely for resale, and the second, that the acquired person must have held the goods at all times solely for resale, represent an exemption for dealers whose business is to purchase and sell used goods. The proposed exemption is unavailable if the person making the acquisition is in reality an intermediary for either the seller or another person who intends to use the goods (see Example 5 to § 802.1). This limitation attempts to forestall abuse of the dealer exemption by requiring notification in circumstances where there is any possibility that the dealer might be acting as a broker or an agent for an acquiring person or a third party. After considerable assessment of the necessity and applicability of this exemption, the Commission believes that the exemption should be included to allow dealers to make transfers within the ordinary course of their business without having to observe the reporting and waiting requirements. However, the Commission will closely monitor such transactions to ensure that the exemption is not being used as a ploy to circumvent the notification requirements of the act.

The third criterion recognizes that it is in the ordinary course of business for a company to replace or upgrade productive capacity and to sell the capacity it is replacing. Thus, an exemption is permitted for the sale of used durable goods if the productive capacity of these goods is replaced substantially or upgraded. Such replacements may result in an increase in the acquired person's productive capacity or manufacturing efficiencies. The proposed rule allows replacement of the used durable goods by acquisition or by lease. No minimum lease term is specified, however, in order for a transfer of the goods being replaced to be in the ordinary course of business, the replacement goods must be leased for a period that is substantially long enough to maintain or increase the company's current productive capacity. Such a period is industry specific and must be determined in good faith by the acquired person. Because this proposed provision requires that the productive capacity must be replaced substantially, the exemption is lost if the replacement goods result in more than a de minimis decease in the acquired person's capacity or an exit from a line of business or specific product or geographic market in which the acquired person currently operates.

The fourth criterion permits an exemption for sales of used durable goods if the acquired person is replacing an auxiliary support function that had been performed internally using the goods being sold by contracting with the purchaser or a third party to perform substantially similar functions. This provision essentially provides an exemption for the transfer of goods by persons that have elected to outsource certain of their auxiliary support functions. For example, a company may decide that it would be more cost effective to have a third party provide its data processing needs. To accomplish this objective, the company may enter into a contract with a third party for these services and sell all of the equipment it used internally to provide this function. Such transfers appear unlikely to pose any competitive concerns.

Auxiliary support functions include management, accounting, data processing, legal services, research and development, testing and warehousing. Although companies will sometimes outsource the manufacturing of some products they market, the sale of used durable goods that were used to produce those products does not qualify for exemption under this provision. Manufacturing, including the manufacturing of inputs for other products produced by the acquired person, is not an auxiliary function.

The exemption for the transfer of goods in connection with the outsourcing of auxiliary functions may include the sale of goods, such as machinery, that may constitute a discrete business unit. However, such a transfer does not constitute the acquisition of an operating unit unless the goods being sold are also used to derive revenues by providing services to entities not included within the acquired person. A company division that only provides auxiliary support services to the company's operating units is not itself an operating unit. A company unit that provides auxiliary services supports or benefits the company's operating units. For example, in a company containing a unit that only provides the company's internal data processing needs, that unit would be deemed to provide auxiliary support functions. However, if that unit derived revenues from providing data processing services to third parties, then the unit would be considered to be an operating unit. The distinction between an operating unit and a unit providing auxiliary support functions is, to some extent, industry specific.

The replacement and outsourcing exemptions both require that before the exemptions apply, the acquired person has already taken definitive steps to replace the goods being sold or obtain the auxiliary support functions that the goods being sold formerly provided. In addition, these steps must have been taken in good faith; this requirement prevents sham contracts that the acquired person cancels after transferring the productive capacity without observing the notification requirements and without replacing the capacity.

II. Proposed Section 802.2: Certain Acquisitions of Real Property Assets

Proposed § 802.2 identifies six categories of real property acquisitions that would be exempt from the reporting requirements of the act. It would exempt certain acquisitions of new facilities, unproductive real property, office and residential property, hotels and motels, agricultural property, and rental retail space and warehouses.

Some of these proposed provisions would create entirely new exemptions, and they result in part from an extensive review by the enforcement agencies of categories of real property acquisitions that appear ''not likely to violate the antitrust laws.'' Certain of the categories expand the exemption provided in current section 7A(c)(1) for acquisitions of realty in the ordinary course of business. For the most part, the types of real property assets that are included within this exemption are abundant, and their holdings are widely dispersed. Transfers of these categories of real property are generally small relative to the total amount of holdings, and entry into regional and local markets for these types of real property assets is usually easy.

The exemptions for new facilities, unproductive real property, office and residential property, hotels and motels,

agricultural property, rental retail space and warehouses state that any non-exempt assets that are being transferred as part of an acquisition of the exempt assets are separately subject to the requirements of the act and the rules. This approach to non-exempt portions of acquisitions is also used in § 802.3.

A. *New Facilities.* Proposed § 802.2(a) exempts the acquisition of new facilities, which may include real estate, equipment and assets incidental to the ownership of the new facility. The term ''new facility'' is new to the rules, and reflects the position of the PNO that transfers of ''turnkey'' facilities, i.e., new facilities capable of commencing operations immediately, are acquisitions of realty in the ordinary course of business and thus are exempt under 7A(c)(1). Although the provision is intended primarily to exempt turnkey facilities, it does not require that the facility be ready for immediate occupancy. The facility may need additional construction or outfitting at the time it is purchased and still qualify for the exemption.

The exemption applies only to new facilities that have not produced income. It also applies only if the acquired person has held the facility at all times solely for sale. The language of the exemption allows holders of the new facilities to be either builders of the facility (''constructed by the acquired person for sale'') or other persons, such as a creditor, who take possession of a new facility with the intention of selling it (''held at all times by the acquired person solely for resale''). These limitations prevent the sale by an acquired person of capacity constructed for the acquired person's use, as Example 1 to § 802.2 illustrates.

Proposed § 802.2(a) requires separate valuation of non-exempt assets being purchased in an acquisition of a new facility. If the value of the non-exempt assets exceed $15 million, and no other exemptions apply, then the purchase of these assets are subject to the notification requirements.

B. *Unproductive property.* Proposed § 802.2(b) exempts certain acquisitions of unproductive real property. The primary purpose of this exemption is to eliminate filing requirements for acquisitions of properties that have not generated a significant amount of income during a certain period of time. The exemption incorporates the concepts of undeveloped, non-income producing property, the acquisition of which is in the ordinary course of business, and abandoned property, which is no longer used to generate revenues.

Unproductive real property is real property that has not produced revenues of $5 million during the 36 months preceding the transaction and includes raw land, structures or other improvements and natural resources. Structures and improvements are additions to the real property that add value and include, for example, buildings, parking lots, recreational facilities (*e.g.,* golf courses), orchards and vineyards. Natural resources refers to any assets growing or appearing naturally on the land, such as timber and mineral deposits. Proposed § 802.2(b) excludes from the exemption acquisitions of manufacturing and non-manufacturing facilities that have not yet begun operations (turnkey facilities)—these are addressed in § 802.2(a)—as well as facilities that began operations within twelve months before the acquisition. Production machinery and equipment are not included in the definition of structures and improvements.

The revenue test will exempt most wilderness and rural land that is not used commercially and urban land that is vacant or contains structures that have generated a minimal amount of income during the most recent three-year period.

C. *Office and residential property.* Proposed § 802.2(c) exempts acquisitions of office and residential property. The definition of office or residential property has two components: (1) Real property, the acquisition of which is not exempt under any other provision of the act; and (2) real property used primarily for office or residential purposes. Although the proposed rule does not specify the meaning of ''primarily,'' it is contemplated that at least 75 percent of the space in the qualifying property, excluding common areas and parking facilities, is used for office or residential purposes. Under this definition, the total space being measured should consist of non-exempt property. Therefore, in determining whether a building is being used primarily for office or residential purposes, any portion of the building consisting of rental retail space, the acquisition of which is exempt under § 802.2(f), should be excluded from the determination. This proposal represents a broader exemption than the current PNO policy, which exempts office and residential property only if the value of the retail space being acquired in the same Standards Metropolitan Statistical Area does not exceed $15 million.

If the acquisition includes assets other than office or residential property, the acquisition of those assets is separately subject to the notification requirements. For example, if the acquiring person is also purchasing a factory for $20 million, the acquisition of the factory is separately subject to the reporting requirements. The proposed rule also specifies that if the purchaser is acquiring a business that is conducted on the office or residential property, the acquisition of the business, including the space in which the business is conducted, is subject to the notification requirements of the act. If the value of the business and the space in which the business is conducted exceeds $15 million, the acquisition is reportable.

The inclusion of ''assets incidental to the ownership of office and residential property'' is derived from the language of existing § 802.1. Although incidental assets may have value apart from the real property, they are often necessary for the continued and uninterrupted use of the property. Therefore, incidental assets are included in the description in proposed § 802.2(c) of office and residential property and are exempt assets.

D. *Hotels and motels.* Proposed § 802.2(d) exempts from the reporting requirements acquisitions of hotels and motels, except when these assets are to be acquired in connection with the acquisition of a ski resort or a casino or other gaming facility. The proposed exemption is based on the Commission's observation that acquisitions of hotels and motels, except for those excluded from the exemption, are unlikely to violate the antitrust laws. These types of assets are plentiful and widely held, and often they are owned by investor groups that hire management firms or national chains to operate the facilities. Even in local market entry appears to be relatively easy.

This exemption would include the acquisition by a national hotel chain of hotel assets of another hotel chain. However, if the acquisition includes assets other than hotels and motels, *e.g.,* the selling firm's trademark or its hotel management business, these assets must be separately valued to determine whether their acquisition is subject to the notification requirements.

E. *Agricultural property.* This section exempts acquisitions of agricultural property and associated assets integral to the agricultural business activities conducted on the property. Agricultural property that is intended to be covered by this exemption is real property that generally derives revenues under Major Groups 01 and 02 of the 1987 Standard Industrial Classification (SIC) Manual. Associated assets integral to the agricultural business activities

conducted on the property to be acquired include equipment, structures, (*e.g.*, barns used to house livestock and other animals), fertilizer, animal feed inventory (*e.g.*, livestock, poultry, crops, fruits, vegetables, milk, and eggs),

As described in the proposed rule, the exemption for the acquisition of agricultural property does not include processing facilities, even though revenues from processing facilities located on a farm may be reported under SIC codes starting with 01 or 02. If a dairy or poultry processing market is concentrated in a given local area, the transfer of in-house processing capacity may have a significant effect on the market. For this reason, the Commission believes that such transfers should be reviewed prior to consummation so the enforcement agencies can determine whether the proposed acquisition will affect competition adversely.

This exemption reflects the Commission's continuing efforts to develop exemptions for categories or acquisitions that are not likely to violate the antitrust laws. In the case of agricultural property exempted by § 802.2, there is an abundance of real property assets with widely dispersed ownership. Such acquisitions are unlikely to have adverse effects on competition.

F. *Rental retail space; warehouse.* Proposed § 802.2(f) exempts acquisitions of two other categories of real property, rental retail space and warehouses. Rental retail space includes structures that house retail establishments, such as shopping centers, strip smalls, and stand alone buildings. These types of assets are abundant and widely held by insurance companies, banks, other institutional investors and individual investors as investments and rental property. The Commission believes that acquisitions of these types of real property assets are unlikely to violate the antitrust laws.

However, the proposed rule provides that if the acquiring person is also acquiring a business that is conducted on the real property, the acquisition of that business, including the portion of the real property on which the business is conducted, is separately subject to the notification requirement of the act. For example, if any purchaser (including a department store chain) proposed to acquire from any seller (including another department store chain) several shopping centers and the stores of the seller located in the shopping centers, the acquisition of the stores including the portion of the shopping centers in which the stores were located, would be separately subject to the notification requirements. However, the acquisition of the portion of the shopping centers that housed other retail establishments would be exempt under this proposed rule. Example 8 illustrates that the exemption for the acquisition of warehouses is lost if warehouses are being acquired in connection with the acquisition of a wholesale distribution business.

The proposed rule also provides that if an acquisition of rental retail space or a warehouse includes other assets, those other assets are separately subject to the reporting requirements of the act.

III. Proposed Section 802.3: Acquisition of Carbon-Based Mineral Reserves

Proposed § 802.3 adds an exemption for certain acquisitions of carbon-based mineral reserves, whether such reserves are currently in production or have ever been in production. The Commission proposes to exempt acquisitions of carbon-based mineral reserves valued at $200 million or less.

This proposal is designed to exempt acquisitions of producing reserves. If the reserves being acquired are not yet producing, or are producing at a level below the income threshold in § 802.2(b), the acquisition may be exempted by § 802.2(b) as an acquisition of unproductive real property. If the reserves qualify as unproductive property, their acquisition is exempt, regardless of the value of the reserves. Producing reserves are governed by the valuation requirement of § 802.3 and are not exempt if their value exceeds $200 million.

The Commission's studies of the coal and oil and gas industries have shown that the value of the reserves in these industries are substantial compared with asset holdings in other industries. The holdings of reserves in these industries are widely dispersed, and individual acquisitions have had minimal effect on concentration. However, the Commission believes that an unlimited exemption for reserves in these industries is inappropriate, because the scale of the largest acquisitions of reserves warrants an examination of the potential effects on competition.

The $200 million threshold in proposed § 802.3 applies to reserves, rights to the reserves and associated exploration or production assets. The acquisition of these associated assets is not separately reportable because these assets generally have no competitive significance separate from the reserves. In many instances, producing reserves contain dedicated equipment that may have a market value exceeding $15 million but have no practical value absent the reserves. In addition, the wide availability of used equipment in the oil and gas and coal industries makes it unlikely that a servicer of oil fields or coal mines could purchase reserves to restrict supply of available equipment in a given region. Thus, the Commission believes that the inclusion of associated exploration and production assets is necessary to facilitate meaningful application of the exemption.

Associated exploration or production assets are defined in the current proposal to include equipment, machinery, fixtures and other assets that are integral to the exploration or production activities of the reserves. In the oil and gas industry, examples of associated exploration or production assets include proprietary or licensed geological and geophysical data, wells, pumps, compressors, easements, permits and rights of way. Excluded from these assets are flow and gathering pipelines, distribution pipelines, interests in pipelines, processing facilities and refineries. Acquisitions of these assets in certain local markets have, from time to time, raised competitive concerns prompting investigations by the enforcement agencies, and the Commission does not believe that such acquisitions as a class are not likely to violate the antitrust laws.

In the coal industry, associated production assets are facilities and equipment that are dedicated exclusively to production of the reserves being transferred. For example, in surface mining in the western U.S., such assets may consist of various load out facilities, including storage barns and railroad spurs, and heavy equipment such as draglines. Associated production assets would also include the long-term coal contracts and federal leases related to the reserves.

It has been suggested that any exemption for carbon-based mineral reserves be expanded to included all mineral reserves and renewable natural resources. The perceived need for such an exemption regarding non-producing reserves may be lessened by the inclusion in these proposals of § 802.2(b), which would exempt acquisitions of other such reserves that are either not yet producing or have generated revenues below the threshold amount. Regarding producing reserves, the Commission has not included these in § 802.3 because it does not have an adequate factual basis for determining that these categories of transactions should be exempt from the requirements of the act or subject to a threshold higher than the $15 million threshold that is identified in § 802.20.

IV. Proposed Section 802.4: Acquisitions of Voting Securities of Issuers Holding Only Real Property and Carbon-Based Mineral Reserves

Proposed § 802.4 is designed to exempt the acquisition of voting securities of certain real estate companies that hold real property assets the direct acquisition of which are exempt from the reporting requirements pursuant to proposed §§ 802.2 and 802.3. This provision derives in part from existing § 802.1(a) which exempts ''an acquisition of the voting securities of an entity whose assets consist solely of real property'' and related assets, if a direct acquisition of those real property and related assets would be exempt.

As the Commission stated when it promulgated existing § 802.1: (T)he applicability of (existing 802.1(a)) should not depend upon the form of the acquisition. At least from an antitrust standpoint, whether real estate is acquired directly or by acquiring voting securities would seem to make no difference * * *. 43 FR 33488, July 31, 1978.

Proposed § 802.4(a) retains this approach with regard to new facilities, unproductive real property, office and residential property, hotels and motels, agricultural property, rental retail space and warehouses. Proposed § 802.4(b) contains a comparable exemption for carbon-based mineral reserves.

V. Proposed Section 802.5: Acquisitions of Investment Rental Property Assets by Certain Investors

Proposed § 802.5 would exempt acquisitions of investment rental property by institutional investors (as defined by § 802.64 of the rules) and by persons whose sole business is the acquisition or management of investment rental property. This exemption is based in part on section 7A(c)(11) of the act which exempts ''acquisitions, solely for the purpose of investment, by a bank, bank association, trust company, investment company, or insurance company, of * * * (B) assets in the ordinary course of its business.'' It is designed to exempt most types of real property acquisitions typically made by institutional investors or real estate development and management companies that are not exempted by proposed § 802.2. The proposed rule supplements proposed § 802.2 by recognizing that there may be additional categories of assets that, when transferred to certain parties, are not likely to violate the antitrust laws.

Institutional investors, such as financial institutions, insurance companies, pensions plans and REITs, typically acquire for investment real property such as hotels and shopping centers. Acquisitions of these types of assets are exempt under § 802.2(d) and § 802.2(f)(1), respectively. Proposed § 802.5 is intended to exempt acquisitions of other types of real estate, such as industrial parks, that institutional investors and real estate development and management companies often purchase.

This exemption is applicable only to institutional investors or persons engaged solely in the business of acquiring or managing investment rental property. It applies only to acquisitions of real property that will be held by the purchaser solely for rental or investment purposes. Thus, the intent of the purchaser at the time of the acquisition must be considered to determine whether the exemption is available.

Acquisitions of real property by institutional investors and real estate development and management companies are typically made solely for investment. These investors play no active role in the business conducted on these properties and seek only to profit from their investment in the real estate. In order to reduce risk of loss in the value of the real estate they hold, purchasers of numerous properties generally do not concentrate their investments in a single geographic market. In many cases, these properties are purchased from persons who already maintain them as investment rental property. Given the size and unconcentrated nature of the real estate market, such acquisitions are not likely to violate the antitrust laws.

The requirement that real property, in order to come within the definition of ''investment rental property assets,'' be held solely for rental or investment purposes is designed to exclude from the exemption acquisitions of rental property that may reduce competition. In one such scenario, the acquiring person purchases property that is leased to a competitor of an entity within the same person as the institutional investor, and then chooses not to renew the competitor's lease in order to disadvantage the competitor. Since the purchaser intends to use its ownership of the property to disadvantage a competitor, the property will not be held solely for rental or investment purposes, and the § 802.5 exemption is not available. The requirement that property will be rented only to entities not included within the acquired person is also designed to assure that the exemption will not be available for any acquisition that is designed to achieve business objectives that are not related to the real estate market.

For some acquisitions, in order to determine prior to the acquisition whether the buyer's use requirement will be fulfilled post-acquisition, it may be necessary to examine the acquisition intent of the acquiring person, particularly if that investor is controlled by a person that also controls entities engaged in other businesses. The acquisition intent can be inferred from the context of the transaction and from actions by the acquiring person before the acquisition. Circumstances or conduct such as the following may be scrutinized separately or in combination to determine whether the acquiring person has an intent that is fully consistent with holding property solely as investment rental property assets: (1) The acquiring person undertook, prior to the acquisition, a study of the cost of converting the property for use by one of its businesses; (2) the property is to be converted for use by the acquiring person; (3) the property will be transferred to an entity within the acquiring person which would not qualify for an exemption under § 802.5; (4) prior to the acquisition, the property is being leased to or used by entities included within the acquiring person; (5) a portion of the acquired property is being leased at the time of the acquisition to a competitor of the acquiring person; and (6) the purchase price reflects the value of a business operated on the property rather than the investment rental value of the property.

The investment rental property exemption may apply to real property, such as office or residential property, hotels and motels, that is also exempt under proposed § 802.2. However, the important distinction between § 802.2 and § 802.5 is that § 802.2 exempts acquisitions of specific classes of assets by any acquiring person and does not incorporate the intent-based test of § 802.5. Proposed § 802.5 exempts any type of asset that can be classified as investment rental property, but it is available only to institutional investors and real estate development and management companies. In addition, the exemptions for acquisition of real property under § 802.2 apply even if the acquiring person occupies the property for any purpose; proposed § 802.5 permits the acquiring person to use the acquired investment rental property assets only to manage or operate real property.

VI. Aggregation Rules

Section 801.15 states that the aggregation rules of § 801.13 do not apply to specified classes of transactions. At present, transactions exempted by section 7A(c)(1) of the act fall within one of the classes listed. As a result of § 801.15(a), in determining

whether the more than $15 million size-of-transaction criterion of section 7A(a)(3) is met, the value of assets acquired in the ordinary course of business is never counted. Because proposed § 802.1 merely declares that certain acquisitions are and are not considered in the ordinary course of business under section 7A(c)(1), it does not appear necessary to list proposed § 802.1 separately in § 801.15(a). However, to eliminate possible confusion, proposed § 802.1 is listed in proposed § 801.15(a), along with 7A(c)(1), to make clear that assets exempted pursuant to § 802.1(a), (b) and (c)(1) are not deemed to be held as the result of an acquisition for aggregation purposes. Therefore, a acquisition of current supplies valued at $8 million is not aggregated with later acquisitions from the same person to determine if a proposed acquisition would exceed the $15 million size-of-transaction notification threshold, since the current supplies are exempt pursuant to section 7A(c)(1) and § 802.1(b).

The other proposed exemptions based on section 7A(c)(1) and other sections of the act, *e.g.,* section 7A(d)(2)(B), are listed separately in § 801.15 to make clear whether and under what circumstances the assets they describe must be aggregated pursuant to § 801.13. Proposed § 802.2, which would exempt acquisitions of new facilities, unproductive real property, office and residential property, hotels and motels, agricultural property, rental retail space and warehouses, is also listed in § 801.15(a), because § 802.2 sets no dollar limit on the amount of exempt assets that may be acquired without prior notification. Proposed § 802.4(a), which exempts acquisitions of voting securities of issuers holding assets whose purchase would be exempt under § 802.2, and proposed § 802.5, which exempts acquisitions of investment rental property by certain investors, also appear in proposed § 801.15(a).

Proposed § 802.3, which exempts acquisitions of carbon-based mineral reserves, and proposed § 802.4(b), which exempts acquisitions of voting securities of issuers holding exempt assets under § 802.3, appear in § 801.15(b). This provision requires parties to aggregate the value of otherwise exempt assets that are transferred in separate acquisitions. Section 801.15(b) provides that the aggregation rules of § 801.13 are to be applied if, as a result of a proposed subsequent transaction, the assets from that transaction and an earlier transaction will exceed a quantitative limitation on the exemption of assets of that kind. Thus the $200 million carbon-based mineral reserves limitation in § 802.3 which was not reached in an earlier acquisition may be exceeded by a subsequent acquisition of reserves.

Example 4 of § 801.15 amends the current Example 4, in which the acquiring person is purchasing two mines. The existing example does not indicate whether the mines contain carbon-based minerals. Based on the value of the mines stated in the example, proposed § 802.3 would exempt their acquisition, if they are carbon-based mineral reserves. To avoid possible confusion, the acquired assets have been changed to manufacturing plants.

List of Subjects in 16 CFR Parts 801 and 802

Antitrust.

Proposals

The Commission proposes to amend title 16, chapter I, subpart H, the Code of Federal Regulations as follows:

PART 801—COVERAGE RULES

1. The authority citation for part 801 continues to read as follows:

Authority: Sec. 7A(d), Clayton Act, 15 U.S.C. 18a(d), as added by sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390.

2. Section 801.15(a) (2) and (b) are revised to read as follows:

§ 801.15 Aggregation of voting securities and assets the acquisition of which was exempt.

* * * * *

(a) * * *

(2) Sections 802.1, 802.2, 802.4(a), 802.5, 802.6(b)(1), 802.8, 802.31, 802.35, 802.50(a)(1), 802.51(a), 802.52, 802.53, 802.63, and 802.70;

(b) 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 section 7A(c)(9) and §§ 802.3, 802.4(b), 802.50(a)(2), 802.50(b), 802.51(b) and 802.64 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

* * * * *

3. Section 801.15, Example 4 is revised, and Example 5 is added to read as follows:

§ 801.15 Aggregation of voting securities and assets the acquisition of which was exempt.

* * * * *

Examples: * * *

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 $40 million. In the most recent year, sales in the United States attributable to the plants were $15 million, 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 of $12 million 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, and the $25 million limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this rule, ''B'' would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition of all three plants before acquiring the third plant.

5. ''A'' acquires $100 million in coal rights 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 require aggregating the previously exempt acquisition of coal rights with the second acquisition. If the two acquisitions, when aggregated, exceed the $200 million limitation on the exemption for carbon-based mineral reserves in § 802.3, ''A'' and ''B'' would 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 aggregated, is less than $200 million, both acquisitions are exempt from the notification requirements.

PART 802—EXEMPTION RULES

1. The authority citation for part 802 continues to read as follows:

Authority: Sec. 7A(d), Clayton Act, 15 U.S.C. 18a(d), as added by sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390.

2. Section 802.1 is revised to read as follows:

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

Acquisitions of goods in the ordinary course of business are, pursuant to section 7A(c)(1), 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. An operating unit means assets that are operated by the acquired person as a business undertaking in a particular

geographic area 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 produced by the acquired person for sale, or of new goods held by the acquired person solely for resale, is in the ordinary course of business, except when 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 assets:

(1) Goods acquired for the purpose of resale (*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).

The term ''current supplies'' does not include used durable goods (see paragraph (d) of this section.

(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 by the acquiring person solely for resale; or

(2) The goods are acquired from an acquired person who acquired and has held the goods solely for resale; or

(3) The productive capacity of the goods being sold has been replaced substantially by the acquired person, by acquisition or lease, or the acquired person has in good faith executed a contract, agreement in principle or letter of intent to replace substantially, by acquisition or lease, the productive capacity of the goods being sold; or

(4) The goods have been used by the acquired person to provide auxiliary functions, such as management services, accounting, data processing, and legal services, that support its primary business functions, and the acquired person has in good faith executed a contract, agreement in principle or letter of intent to obtain substantially similar auxiliary functions as were provided by the goods being sold.

Examples: 1. Stereo Corporation, which manufacturers cassette and compact disc players, decides to sell all of the assets of its Customer Service Division to ''X'' for $16 million. This division repairs the company's products and products manufactured by others. The division's assets include a repair facility valued at $10 million and an inventory of replacement parts valued at $6 million. The combined assets constitute an operating unit of Stereo Corporation. Thus, no part of the acquisition is exempt as an acquisition in the ordinary course of business.

2. ''A,'' a manufacturer of airplane engines, agrees to pay $20 million to ''B,'' a manufacturer of airplane parts, for certain engine components to be used in the manufacture of the airplane engines. The acquisition is exempt under § 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, $25 million 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 as an acquisition of reserves of carbon-based minerals 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 $25 million a total of 10,000 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 § 802.1 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 § 802.1(c)(3). Although the transfer of orchards and vineyards is not exempt under § 802.1, the acquisition would be exempt under § 802.2 as an acquisition of agricultural property.

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 associated with the operation 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) *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) Unproductive real property is any real property, including raw land, structures or other improvements and natural resources, 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 manufacturing and non-manufacturing facilities that have not yet begun operation or manufacturing or non-manufacturing facilities that began operation within the twelve (12) months preceding the acquisition.

(c) *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 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, the acquisition of which is not exempt under another provision of the act, that is used primarily for office and residential purposes and 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.

(d) *Hotels and motels.* (1) An acquisition of a hotel or motel 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 shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(2) An acquisition of a hotel or motel that includes a casino, or a hotel or motel that is being acquired as part of the acquisition of a ski resort, shall be subject to the requirements of the act and these rules.

(e) *Agricultural property.* An acquisition of agricultural property and associated agricultural assets shall be exempt from the requirements of the act. Agricultural property is real property and assets that primarily generate revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs.

(1) Associated agricultural assets are assets integral to the agricultural business activities conducted on the property. Associate agricultural assets include, but are not limited to, inventory (*e.g.,* livestock, poultry, crops, fruit, vegetables, milk, eggs); equipment dedicated to the income-generating activities conducted on the real property; structures that house livestock and other animals raised on the real property; and fertilizer and animal feed. Associated agricultural assets do not include processing facilities, such as poultry slaughtering and processing facilities.

(2) If an acquisition of agricultural property includes processing facilities and other assets that are not associated agricultural assets, these facilities and assets are subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(f) *Retail rental space; warehouses.* An acquisition of retail rental space (including shopping centers) or warehouses shall be exempt from the requirements of the act, except when the retail rental space or warehouse is to be acquired in an acquisition of a business conducted on the real property. In an acquisition of 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 to ''B,'' another automobile manufacturer. This acquisition is not exempt as an acquisition of an new facility, even though the facility has not produced any income, since ''A'' did not construct the facility for sale. Also, the acquisition is not exempt as an acquisition of unproductive property since manufacturing facilities that have not yet begun operations are explicitly excluded from that exemption.

2. ''A'' proposes to acquire a $100 million tract of wilderness land from ''B.'' Copper deposits valued at $17 million and timber reserves valued at $20 million 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. ''A's'' acquisition of the wilderness land from ''B'' is exempt as an acquisition of unproductive real property because the property did not generate annual revenues exceeding $5 million during the thirty-six months preceding the acquisition. The copper deposits and timber reserves are by definition unproductive real property and, thus, are not separately subject to the notification requirements.

3. ''A'' proposes to purchase from ''B'' for $40 million 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 at $16 million 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 other assets other than the unproductive property is not exempt and is separately subject to the notification requirements of the act.

4. ''A'' proposes to purchase two downtown lots, Parcels 1 and 2, from ''B'' for $40 million. Parcel 1 contains no structures or improvements. A hotel is located on Parcel 2 and has generated $9 million in revenues during the past 3 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(d) as the acquisition of a hotel.

5. ''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(e). If, however, ''B'' has a poultry slaughtering and processing facility on his farm, ''A'' would be required to file notification for the acquisition of the processing facility if the higher of the acquisition price or the fair market value of the facility exceeds $15 million.

6. ''A'' proposes to purchase the prescription drug wholesale distribution business of ''B'' for $50 million. 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 in not exempt.

§ 802.3 Acquisitions of carbon-based mineral reserves.

(a) An acquisition of carbon-based mineral reserves (oil, natural gas, coal, shale or tar sands) or rights to carbon-based mineral reserves, whether such reserves are presently in production or have ever been in production, and associated exploration or production assets shall be exempt from the requirements of the act if the value of the carbon-based mineral 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 carbon-based mineral reserves, rights to carbon-based mineral reserves 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) Associated exploration or production assets means equipment, machinery, fixtures and other assets that are integral 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 any pipeline system or processing facility.

Example: 1. ''A'' proposes to purchase from ''B'' for $250 million gas reserves that are not yet in production and have not generated any income. ''A'' will also acquire from ''B'' for $180 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(b). The acquisition of the oil reserves and associated assets is exempt pursuant to § 802.3, since the acquisition price does not exceed the $200 million limitation.

2. ''A,'' an oil company, proposes to acquire oil reserves currently in production, several associated processing facilities and a gathering pipeline system for $180 million. The acquisition of the reserves is exempt. However, ''A'' must determine the value of the processing facilities and the gathering pipeline system, since these assets are excluded from the exemption in § 802.3 for transfers of associated exploration or production assets. If their value exceeds $15 million, and their acquisition is not otherwise exempt, ''A'' must file with respect to the transfer of the facilities and the pipeline system.

3. ''A,'' an oil company, proposes to acquire a coal mine and associated production assets for $90 million from ''B,'' an oil company. ''A'' will also purchase from ''B'' 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 the refinery is excluded 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 $15 million.

§ 802.4 Acquisitions of voting securities of issuers holding certain real property assets.

(a) An acquisition of voting securities of an issuer whose assets consist solely of assets whose purchase would be exempt from the requirements of the act pursuant to § 802.2 is exempt from the reporting requirements.

(b) An acquisition of voting securities of an issuer whose assets consist or will consist solely of assets whose purchase would be exempt from the requirements of the act pursuant to § 802.3 is exempt from the reporting requirements.

Example 1. ''A,'' a real estate investment company, proposes to purchase 100 percent of the voting securities of Company 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 hotel qualifies as a new facility under § 802.2(a), and is also exempt under § 802.2(d). Therefore, the acquisition of the voting securities of C is exempt pursuant to § 802.4(a).

§ 802.5 Acquisitions of investment rental property assets by certain investors.

(a) Acquisitions of investment rental property assets, or of voting securities of an entity the assets of which consist solely of investment rental property assets, by an institutional investor (as defined by § 802.64) or by any person whose sole business is the acquisition or management 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:

(1) Will be rented only to entities not included within the acquiring person; and

(2) Will be held solely for rental or investment purposes. Investment rental property assets include:

(i) Property currently rented,

(ii) Property held for rent but not currently rented,

(iii) Common areas on the property,

(iv) Assets incidental to the ownership of property, which may include cash, prepaid taxes or insurance, rental receivables and the like, and

(v) Space occupied by the acquiring person for the sole purpose of maintaining, managing, or supervising the operation of real property.

Example: 1. Insurance Company ''A'' proposes to acquire a hospital currently leased to and operated by ''B,'' a major for-profit hospital corporation. ''A'' intends to continue ''B's'' lease with the exception of one floor of the hospital, which ''A'' will lease to an independent radiology clinic which the hospital will use for its outpatient radiology needs. This acquisition is an exempt acquisition of investment rental property assets since ''A'' intends to rent the facility to the hospital and an independent clinic and, thus, is holding the hospital solely for rental and investment purposes.

By direction of the Commission.

Donald S. Clark,

Secretary.

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