§ 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
(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 noncorporate interests of, that 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 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 $50 million. A will exchange the factory and $30 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 considered 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 $90 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
§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.”

(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) 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,

(ii) 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) 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

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 × 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 × 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 B 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 × 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.