

§ 801.14

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to acquire assets from an acquired person, and within the previous 180 days the acquiring person has

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

(ii) The previous acquisition (whether consummated or still contemplated) was not subject to the requirements of the Act; then for purposes of the size-of-transaction test of Section 7A(a)(2), both the acquiring and the acquired persons shall treat the assets that were the subject of the earlier letter of intent or agreement in principal as though they are being acquired as part of the present acquisition. The value of any assets which are subject to this paragraph is determined in accordance with § 801.10(b).

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

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

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

4. On day 1, A consummates an acquisition of assets of B valued at \$45 million. On day 60, A consummates a sale of the same assets to an unrelated third party. On day 120, A enters into an agreement to acquire additional assets of B valued at \$45 million. Because A

no longer holds the assets from the previous acquisition, no aggregation of the two asset acquisitions is required and A may acquire all of the additional assets without filing notification.

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

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

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

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

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

§ 801.14 Aggregate total amount of voting securities and assets.

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

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

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

Examples: 1. Acquiring person "A" previously acquired less than \$50 million (as adjusted) of the voting securities (not convertible voting securities) of corporation X. "A" now intends to acquire additional assets of X. Under paragraph (a) of this section, "A" looks to § 801.13(a) and determines that the voting securities are to be held "as a result of" the acquisition. Section 801.13(a) also provides that "A" must determine the present value of the previously acquired securities. Under paragraph (b) of this section, "A" looks to § 801.13(b)(1) and determines that the assets to be acquired will be held "as a result of" the acquisition, and are valued under § 801.10(b). Therefore, if the voting securities have a present value which when combined with the value of the assets would exceed \$50 million (as adjusted), the asset acquisition is subject to the requirements of the act since, as a result of it, "A" would hold an aggregate total amount of the voting securities and assets of "X" in excess of \$50 million (as adjusted).

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

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

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

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

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

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

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

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

(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, and 802.64 of this chapter unless the limitations contained in Section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held; and

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

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

Examples: 1. Assume that acquiring person "A" is simultaneously to acquire in excess of \$50 million (as adjusted) of the convertible voting securities of X and less than \$50 million (as adjusted) of the voting common stock of X. Although the acquisition of the convertible voting securities is exempt under § 802.31, since the overall value of the securities to be acquired is greater than \$50 million (as adjusted), "A" must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. Because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this section, "A"