Federal Trade Commission

§ 801.15

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).

§ 801.14 Aggregate total amount of voting securities and assets.

For purposes of Section 7A(a)(2) and §801.1(b), 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 §801.19(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).

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

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

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

(1) Sections 7A(c)(1), (3), (5), (6), (7), (8), and (11)(B);
(2) Sections 802.1, 802.2, 802.5, 802.6(b)(1), 802.8, 802.30, 802.31, 802.35, 802.52, 802.53, 802.63, and 802.70 of this chapter;
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(b) Assets, non-corporate interests or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under Section 7A(c)(9) and §§802.3, 802.4, and 802.64 of this chapter unless the limitations contained in Section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held; and

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

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

Examples: 1. Assume that acquiring person “A” is simultaneously to acquire in excess of $50 million (as adjusted) of the convertible voting securities of X and less than $50 million (as adjusted) in value, would not qualify for the exemption for oil and gas reserves in §802.50(a)(2). Assume that “A” has acquired the convertible voting securities in 1975, before the act and rules went into effect. Since the rule applies to voting securities the acquisition of which would have been exempt had the act and rules been in effect, the result again would be identical. If the rules had been in effect in 1975, the acquisition of the convertible voting securities would have been exempt under §802.31.

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

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

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

5. “A” acquires producing oil reserves valued at $600 million from “B.” Two months later, “A” agrees to acquire oil and gas rights valued at $75 million from “B.” Paragraph (b) of this section and §801.13(b)(2) require aggregating the previously exempt acquisition of oil reserves with the second acquisition. If the two acquisitions, when aggregated, exceed the $500 million limitation on the exemption for oil and gas reserves in §802.3(a), “A” and “B” will be required to file notification for the latter acquisition, including within the filings the earlier acquisition. Since, in this example, the total value of the assets in the two acquisitions, when
aggregated, is less than $500 million, both acquisitions are exempt from the notification requirements. In determining whether the value of the assets in the two acquisitions exceeds $50 million, "A" need not determine the current fair market value of the oil reserves acquired in the first transaction, since these assets are now within the person of "A," is directed by §801.13(b)(2)(ii) to use the value of the oil reserves at the time of their prior acquisition in accordance with §801.10(b).

6. "X" acquired 55 percent of the voting securities of M, an entity controlled by "Z," six months ago and now proposes to acquire 50 percent of the voting stock of N, another entity controlled by "Z." M's assets consist of $150 million worth of producing coal reserves plus less than $50 million (as adjusted) worth of non-exempt assets and N's assets consist of a producing coal mine worth $100 million together with non-exempt assets with a fair market value of less than $50 million (as adjusted). "X"'s acquisition of the voting securities of M was exempt under §802.4(a) because M held exempt assets pursuant to §802.3(b) and less than $50 million (as adjusted) of non-exempt assets. Because "X"'s acquisition of the voting securities of M were exempt under §802.4(a) because M held exempt assets pursuant to §802.3(b) and less than $50 million (as adjusted) of non-exempt assets. Because "X"'s acquisition of M's non-exempt assets, including the value of those holdings of the issuer falls below the $200 million exemption for acquisitions is exempt. Here, the holdings of M and N now amounts to $140 million, and the value of N's assets remained unchanged. "A's" second acquisition would not be exempt. "A" is required to determine if the acquisition of the voting securities and any non-exempt assets held by any issuer whose voting securities it intends to acquire before each proposed acquisition (unless "A" already owns 50 percent or more of the voting securities of the issuer) to determine if the value of those holdings of the issuer falls below the limitation of the applicable exemption. Here, the holdings of M and N now exceed the $200 million exemption for acquisitions of coal reserves in §802.3 of this chapter, and thus do not qualify for the exemption of voting securities provided by §802.4(a) of this chapter.

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

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

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