

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 assets 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