

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