

whether the more than \$15 million size-of-transaction criterion of section 7A(a)(3) is met, the value of assets acquired in the ordinary course of business is never counted. Because proposed § 802.1 merely declares that certain acquisitions are and are not considered in the ordinary course of business under section 7A(c)(1), it does not appear necessary to list proposed § 802.1 separately in § 801.15(a). However, to eliminate possible confusion, proposed § 802.1 is listed in proposed § 801.15(a), along with 7A(c)(1), to make clear that assets exempted pursuant to § 802.1(a), (b) and (c)(1) are not deemed to be held as the result of an acquisition for aggregation purposes. Therefore, a acquisition of current supplies valued at \$8 million is not aggregated with later acquisitions from the same person to determine if a proposed acquisition would exceed the \$15 million size-of-transaction notification threshold, since the current supplies are exempt pursuant to section 7A(c)(1) and § 802.1(b).

The other proposed exemptions based on section 7A(c)(1) and other sections of the act, *e.g.*, section 7A(d)(2)(B), are listed separately in § 801.15 to make clear whether and under what circumstances the assets they describe must be aggregated pursuant to § 801.13. Proposed § 802.2, which would exempt acquisitions of new facilities, unproductive real property, office and residential property, hotels and motels, agricultural property, rental retail space and warehouses, is also listed in § 801.15(a), because § 802.2 sets no dollar limit on the amount of exempt assets that may be acquired without prior notification. Proposed § 802.4(a), which exempts acquisitions of voting securities of issuers holding assets whose purchase would be exempt under § 802.2, and proposed § 802.5, which exempts acquisitions of investment rental property by certain investors, also appear in proposed § 801.15(a).

Proposed § 802.3, which exempts acquisitions of carbon-based mineral reserves, and proposed § 802.4(b), which exempts acquisitions of voting securities of issuers holding exempt assets under § 802.3, appear in § 801.15(b). This provision requires parties to aggregate the value of otherwise exempt assets that are transferred in separate acquisitions. Section 801.15(b) provides that the aggregation rules of § 801.13 are to be applied if, as a result of a proposed subsequent transaction, the assets from that transaction and an earlier transaction will exceed a quantitative limitation on the exemption of assets of that kind. Thus the \$200 million carbon-

based mineral reserves limitation in § 802.3 which was not reached in an earlier acquisition may be exceeded by a subsequent acquisition of reserves.

Example 4 of § 801.15 amends the current Example 4, in which the acquiring person is purchasing two mines. The existing example does not indicate whether the mines contain carbon-based minerals. Based on the value of the mines stated in the example, proposed § 802.3 would exempt their acquisition, if they are carbon-based mineral reserves. To avoid possible confusion, the acquired assets have been changed to manufacturing plants.

#### List of Subjects in 16 CFR Parts 801 and 802

Antitrust.

#### Proposals

The Commission proposes to amend title 16, chapter I, subpart H, the Code of Federal Regulations as follows:

#### PART 801—COVERAGE RULES

1. The authority citation for part 801 continues to read as follows:

**Authority:** Sec. 7A(d), Clayton Act, 15 U.S.C. 18a(d), as added by sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390.

2. Section 801.15(a) (2) and (b) are revised to read as follows:

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

\* \* \* \* \*

(a) \* \* \*

(2) Sections 802.1, 802.2, 802.4(a), 802.5, 802.6(b)(1), 802.8, 802.31, 802.35, 802.50(a)(1), 802.51(a), 802.52, 802.53, 802.63, and 802.70;

(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(b), 802.50(a)(2), 802.50(b), 802.51(b) and 802.64 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

\* \* \* \* \*

3. Section 801.15, Example 4 is revised, and Example 5 is added to read as follows:

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

\* \* \* \* \*

*Examples:* \* \* \*

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 \$40 million. In the most recent year, sales in the United States attributable to the plants were \$15 million, 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 of \$12 million were attributable in the most recent year. Since under § 801.13(b)(2), as a result of the acquisition, "B" would hold all three plants of X, and the \$25 million limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this rule, "B" would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition of all three plants before acquiring the third plant.

5. "A" acquires \$100 million in coal rights 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 require aggregating the previously exempt acquisition of coal rights with the second acquisition. If the two acquisitions, when aggregated, exceed the \$200 million limitation on the exemption for carbon-based mineral reserves in § 802.3, "A" and "B" would 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 \$200 million, both acquisitions are exempt from the notification requirements.

#### PART 802—EXEMPTION RULES

1. The authority citation for part 802 continues to read as follows:

**Authority:** Sec. 7A(d), Clayton Act, 15 U.S.C. 18a(d), as added by sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390.

2. Section 802.1 is revised to read as follows:

#### § 802.1 Acquisitions of goods in the ordinary course of business.

Acquisitions of goods in the ordinary course of business are, pursuant to section 7A(c)(1), exempt from the notification requirements of the act. This section identifies certain acquisitions of goods that are exempt as transfers in the ordinary course of business. This section also identifies certain acquisitions of goods that are not in the ordinary course of business and, therefore, do not qualify for the exemption.

(a) *Operating unit.* An acquisition of all or substantially all the assets of an operating unit is not an acquisition in the ordinary course of business. An operating unit means assets that are operated by the acquired person as a business undertaking in a particular