

## SUBCHAPTER H—RULES, REGULATIONS, STATEMENTS AND INTERPRETATIONS UNDER THE HART-SCOTT-RODINO ANTI-TRUST IMPROVEMENTS ACT OF 1976

### PART 801—COVERAGE RULES

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#### § 801.1 Definitions.

When used in the act and these rules—

(a)(1) *Person*. Except as provided in paragraphs (a) and (b) of § 801.12, the term *person* means an ultimate parent entity and all entities which it controls directly or indirectly.

*Examples:* 1. In the case of corporations, "person" encompasses the entire corporate structure, including all parent corporations, subsidiaries and divisions (whether consolidated or unconsolidated, and whether incorporated or unincorporated), and all related corporations under common control with any of the foregoing.

2. Corporations A and B are each directly controlled by the same foreign state. They

are not included within the same "person," although the corporations are under common control, because the foreign state which controls them is not an "entity" (see § 801.1(a)(2)). Corporations A and B\* are the ultimate parent entities within persons "A", and "B" which include any entities each may control.

3. Since a natural person is an entity (see § 801.1(a)(2)), a natural person and a corporation which he or she controls are part of the same "person." If that natural person controls two otherwise separate corporations, both corporations and the natural person are all part of the same "person."

4. See the example to § 801.2(a).

(2) *Entity*. The term *entity* means any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such; or any joint venture or other corporation which has not been formed but the acquisition of the voting securities or other interest in which, if already formed, would require notification under the act and these rules: *Provided, however,* That the term "entity" shall not include any foreign state, foreign government, or agency thereof (other than a corporation engaged in commerce), nor the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation engaged in commerce).

(3) *Ultimate parent entity*. The term *ultimate parent entity* means an entity which is not controlled by any other entity.

*Examples:* 1. If corporation A holds 100 percent of the stock of subsidiary B, and B holds 75 percent of the stock of its subsidiary C, corporation A is the ultimate parent entity,

\*Throughout the examples to the rules, persons are designated ("A", "B," etc.) with quotation marks, and entities are designated (A, B, etc.) without quotation marks.

since it controls subsidiary B directly and subsidiary C indirectly, and since it is the entity within the person which is not controlled by any other entity.

2. If corporation A is controlled by natural person D, natural person D is the ultimate parent entity.

3. P and Q are the ultimate parent entities within persons "P" and "Q." If P and Q each own 50 percent of the voting securities of R, then P and Q are both ultimate parents of R, and R is part of both persons "P" and "Q."

(b) *Control.* The term *control* (as used in the terms *control(s)*, *controlling*, *controlled by* and *under common control with*) means:

(1) *Either.* (i) Holding 50 percent or more of the outstanding voting securities of an issuer or

(ii) In the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or

(2) Having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

*Examples:* 1. Corporation A holds 100 percent of the stock of corporation B, 75 percent of the stock of corporation C, 50 percent of the stock of corporation D, and 30 percent of the stock of corporation E. Corporation A controls corporations B, C and D, but not corporation E. Corporation A is the ultimate parent entity of a person comprised of corporations A, B, C and D, and each of these corporations (but not corporation E) is "included within the person."

2. A statutory limited partnership agreement provides as follows: The general partner "A" is entitled to 50 percent of the partnership profits, "B" is entitled to 40 percent of the profits and "C" is entitled to 10 percent of the profits. Upon dissolution, "B" is entitled to 75 percent of the partnership assets and "C" is entitled to 25 percent of those assets. All limited and general partners are entitled to vote on the following matters: the dissolution of the partnership, the transfer of assets not in the ordinary course of business, any change in the nature of the business, and the removal of the general partner. The interest of each partner is evidenced by an ownership certificate that is transferable under the terms of the partnership agreement and is subject to the Securities Act of 1933. For purposes of these rules, control of this partnership is determined by

subparagraph (1)(ii) of this paragraph. Although partnership interests may be securities and have some voting rights attached to them, they do not entitle the owner of that interest to vote for a corporate "director" or "an individual exercising similar functions" as required by §801.1(f)(1) below. Thus control of a partnership is not determined on the basis of either subparagraph (1)(i) or (2) of this paragraph. Consequently, "A" is deemed to control the partnership because of its right to 50 percent of the partnership's profits. "B" is also deemed to control the partnership because it is entitled to 75 percent of the partnership's assets upon dissolution.

3. "A" is a nonprofit charitable foundation that has formed a partnership joint venture with "B," a nonprofit university, to establish C, a nonprofit hospital corporation that does not issue voting securities. Pursuant to its charter all surplus revenue from the hospital in excess of expenses and necessary capital investments is to be disbursed evenly to "A" and "B." In the event of dissolution of the hospital corporation, the assets of the hospital are to be contributed to a local charitable medical facility then in need of financial assistance. Notwithstanding the hospital's designation of its disbursement funds as surplus rather than profits to maintain its charitable image, "A" and "B" would each be deemed to control C, pursuant to §801.1(b)(1)(ii), because each is entitled to 50 percent of the excess of the hospital's revenues over expenditures.

4. "A" is entitled to 50 percent of the profits of partnership B and 50 percent of the profits of partnership C. B and C form a partnership E with "D" in which each entity has a right to one-third of the profits. When E acquires company X, "A" must report the transaction (assuming it is otherwise reportable). Pursuant to §801.1(b)(1)(ii), E is deemed to be controlled by "A," even though "A" ultimately will receive only one-third of the profits of E. Because B and C are considered as part of "A," the rules attribute all profits to which B and C are entitled (two-thirds of the profits of E in this example) to "A."

(c) *Hold.* (1) Subject to the provisions of paragraphs (c) (2) through (8) of this section, the term *hold* (as used in the terms *hold(s)*, *holding*, *holder* and *held*) means beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means.

*Example:* If a stockbroker has stock in "street name" for the account of a natural person, only the natural person (who has beneficial ownership) and not the stockbroker (which may have record title) "holds" that stock.

(2) The holdings of spouses and their minor children shall be holdings of each of them.

(3) Except for a common trust fund or collective investment fund within the meaning of 12 CFR 9.18(a) (both of which are hereafter referred to in this paragraph as “collective investment funds”), and any revocable trust or an irrevocable trust in which the settlor retains a reversionary interest in the corpus, a trust, including a pension trust, shall hold all assets and voting securities constituting the corpus of the trust.

*Example:* Under this paragraph the trust—and not the trustee—“holds” the voting securities and assets constituting the corpus of any irrevocable trust (in which the settlor retains no reversionary interest, and which is not a collective investment fund). Therefore, the trustee need not aggregate its holdings of any other assets or voting securities with the holdings of the trust for purposes of determining whether the requirements of the act apply to an acquisition by the trust. Similarly, the trustee, if making an acquisition for its own account, need not aggregate its holdings with those of any trusts for which it serves as trustee. (However, the trustee must aggregate any collective investment funds which it administers; see paragraph (c)(6) of this section.)

(4) The assets and voting securities constituting the corpus of a revocable trust or the corpus of an irrevocable trust in which the settlor(s) retain(s) a reversionary interest in the corpus shall be holdings of the settlor(s) of such trust.

(5) Except as provided in paragraph (c)(4) of this section, beneficiaries of a trust, including a pension trust or a collective investment fund, shall not hold any assets or voting securities constituting the corpus of such trust.

(6) A bank or trust company which administers one or more collective investment funds shall hold all assets and voting securities constituting the corpus of each such fund.

*Example:* Suppose A, a bank or trust company, administers collective investment funds W, X, Y and Z. Whenever person “A” is to make an acquisition, whether of not on behalf of one or more of the funds, it must aggregate the holdings of W, X, Y and Z in determining whether the requirements of the act apply to the acquisition.

(7) An insurance company shall hold all assets and voting securities held for the benefit of any general account of, or any separate account administered by, such company.

(8) A person holds all assets and voting securities held by the entities included within it; in addition to its own holding, an entity holds all assets and voting securities held by the entities which it controls directly or indirectly.

(d) *Affiliate.* An entity is an affiliate of a person if it is controlled, directly or indirectly, by the ultimate parent entity of such person.

(e)(1)(i) *United States person.* The term *United States person* means a person the ultimate parent entity of which—

(A) Is incorporated in the United States, is organized under the laws of the United States or has its principal offices within the United States; or

(B) If a natural person, either is a citizen of the United States or resides in the United States.

(ii) *United States issuer.* The term *United States issuer* means an issuer which is incorporated in the United States, is organized under the laws of the United States or has its principal offices within the United States.

(2)(i) *Foreign person.* The term *foreign person* means a person the ultimate parent entity of which—

(A) Is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States; or

(B) If a natural person, neither is a citizen of the United States nor resides in the United States.

(ii) *Foreign issuer.* The term *foreign issuer* means an issuer which is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States.

(f)(1) *Voting securities.* The term *voting securities* means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer, or, with respect to unincorporated entities, individuals exercising similar functions.

(2) *Convertible voting security.* The term *convertible voting security* means a

voting security which presently does not entitle its owner or holder to vote for directors of any entity.

(3) *Conversion*. The term *conversion* means the exercise of a right inherent in the ownership or holding of particular voting securities to exchange such securities for securities which presently entitle the owner or holder to vote for directors of the issuer or of any entity included within the same person as the issuer.

*Examples:* 1. The acquisition of convertible debentures which are convertible into common stock is an acquisition of "voting securities." However, § 802.31 exempts the acquisition of such securities from the requirements of the act, provided that they have no present voting rights.

2. Options and warrants are also "voting securities" for purposes of the act, because they can be exchanged for securities with present voting rights. Section 802.31 exempts the acquisition of options and warrants as well, since they do not themselves have present voting rights and hence are convertible voting securities. Notification may be required prior to exercising options and warrants, however.

3. Assume that X has issued preferred shares which presently entitle the holder to vote for directors of X, and that these shares are convertible into common shares of X. Because the preferred shares confer a present right to vote for directors of X, they are "voting securities." (See § 801.1(f)(1).) They are not "convertible voting securities," however, because the definition of that term excludes securities which confer a present right to vote for directors of any entity. (See § 801.1(f)(2).) Thus, an acquisition of these preferred shares issued by X would not be exempt as an acquisition of "convertible voting securities." (See § 802.31.) If the criteria in section 7A(a) are met, an acquisition of X's preferred shares would be subject to the reporting and waiting period requirements of the Act. Moreover, the conversion of these preferred shares into common shares of X would also be potentially reportable, since the holder would be exercising a right to exchange particular voting securities for different voting securities having a present right to vote for directors of the issuer. Because this exchange would be a "conversion," § 801.30 would apply. (See § 801.30(a)(6).)

(g)(1) *Tender offer*. The term *tender offer* means any offer to purchase voting securities which is a tender offer within the meaning of section 14 of the Securities Exchange Act of 1934, 15 U.S.C. 78n.

(2) *Cash tender offer*. The term *cash tender offer* means a tender offer in which cash is the only consideration offered to the holders of the voting securities to be acquired.

(3) *Non-cash tender offer*. The term *non-cash tender offer* means any tender offer which is not a cash tender offer.

(h) *Notification threshold*. The term "notification threshold" means:

(1) An aggregate total amount of voting securities of the acquired person valued at greater than \$50 million but less than \$100 million;

(2) An aggregate total amount of voting securities of the acquired person valued at \$100 million or greater but less than \$500 million;

(3) An aggregate total amount of voting securities of the acquired person valued at \$500 million or greater;

(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than \$1 billion; or

(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than \$50 million.

(i)(1) *Solely for the purpose of investment*. Voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.

*Example:* If a person holds stock "solely for the purpose of investment" and thereafter decides to influence or participate in management of the issuer of that stock, the stock is no longer held "solely for the purpose of investment."

(2) *Investment assets*. The term *investment assets* means cash, deposits in financial institutions, other money market instruments, and instruments evidencing government obligations.

(j) *Engaged in manufacturing*. A person is engaged in manufacturing if it produces and derives annual sales or revenues in excess of \$1 million from products within industries in Sectors 31-33 as coded by the North American Industrial Classification System (1997 Edition) published by the Executive Office of the President, Office of Management and Budget.

(k) *United States*. The term *United States* shall include the several States,

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the territories, possessions, and commonwealths of the United States, and the District of Columbia.

(l) *Commerce*. The term *commerce* shall have the meaning ascribed to that term in section 1 of the Clayton Act, 15 U.S.C. 12, or section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

(m) *The act*. References to “the act” refer to Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, and as amended by Pub. L. 106-553, 114 Stat. 2762. References to “Section 7A0” refer to subsections of Section 7A of the Clayton Act. References to “this section” refer to the section of these rules in which the term appears.

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### § 801.2 Acquiring and acquired persons.

(a) Any person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person, is an acquiring person.

*Example:* Assume that corporations A and B, which are each ultimate parent entities of their respective “persons,” created a joint venture, corporation V, and that each holds half of V’s shares. Therefore, A and B each control V (see § 801.1(b)), and V is included within two persons, “A” and “B.” Under this section, if V is to acquire corporation X, both “A” and “B” are acquiring persons.

(b) Except as provided in paragraphs (a) and (b) of § 801.12, the person(s) within which the entity whose assets or voting securities are being acquired is included, is an acquired person.

*Examples:* 1. Assume that person “Q” will acquire voting securities of corporation X held by “P” and that X is not included within person “P.” Under this section, the acquired person is the person within which X is included, and is not “P.”

2. In the example to paragraph (a) of this section, if V were to be acquired by X, then both “A” and “B” would be acquired persons.

(c) For purposes of the act and these rules, a person may be an acquiring person and an acquired person with re-

spect to separate acquisitions which comprise a single transaction.

(d)(1)(i) Mergers and consolidations are transactions subject to the act and shall be treated as acquisitions of voting securities.

(ii) In a merger, the person which, after consummation, will include the corporation in existence prior to consummation which is designated as the surviving corporation in the plan, agreement, or certificate of merger required to be filed with State authorities to effectuate the transaction shall be deemed to have made an acquisition of voting securities.

(2)(i) Any person party to a merger or consolidation is an acquiring person if, as a result of the transaction, such person will hold any assets or voting securities which it did not hold prior to the transaction.

(ii) Any person party to a merger or consolidation is an acquired person if, as a result of the transaction, the assets or voting securities of any entity included within such person will be held by any other person.

(iii) All persons party to a transaction as a result of which all parties will lose their separate pre-acquisition identities shall be both acquiring and acquired persons.

*Examples:* 1. Corporation A (the ultimate parent entity included within person “A”) proposes to acquire Y, a wholly-owned subsidiary of B (the ultimate parent entity included within person “B”). The transaction is to be carried out by merging Y into X, a wholly-owned subsidiary of A, with X surviving, and by distributing the assets of X to B, the only shareholder of Y. The assets of X consist solely of cash and the voting securities of C, an entity unrelated to “A” or “B”. Since X is designated the surviving corporation in the plan or agreement of merger or consolidation and since X will be included in “A” after consummation of the transaction, “A” will be deemed to have made an acquisition of voting securities. In this acquisition, “A” is an acquiring person because it will hold assets or voting securities it did not hold prior to the transaction, and “B” is an acquired person because the assets or the voting securities of an entity previously included within it will be held by A as a result of the acquisition. B will hold the cash and voting securities of C as a result of the transaction, but since § 801.21 applies, this acquisition is not reportable. “A” is therefore an acquiring person only, and “B” is an acquired person only. “B” may, however,