

lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, within the 45 or fewer calendar days which are prior to the consummation of the acquisition but not earlier than the day prior to the execution of the contract, agreement in principle or letter of intent to merge or acquire.

(iii) When the security was not traded within the period specified by this paragraph, the last closing quotation or closing bid price preceding such period shall be used. If such closing quotations are available in more than one market, the person filing notification may select any such quotation.

(2) *Acquisition price.* The acquisition price shall include the value of all consideration for such voting securities or assets to be acquired.

(3) *Fair market value.* The fair market value shall be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if unincorporated, by officials exercising similar functions; or by an entity delegated that function by such board or officials. Such determination must be made as of any day within 60 calendar days prior to the filing of the notification required by the act, or, if such notification has not been filed, within 60 calendar days prior to the consummation of the acquisition.

Example: Corporation A, the ultimate parent entity in person "A," contracts to acquire assets of corporation B, and the contract provides that the acquisition price is not to be determined until after the acquisition is effected. Under paragraph (b) of this section, for purposes of the act, the value of the assets is to be the fair market value of the assets. Under paragraph (c)(3), the board of directors of corporation A must in good faith determine the fair market value. That determination will control for 60 days whether "A" and "B" must observe the requirements of the act; that is, "A" and "B" must either file notification or consummate the acquisition within that time. If "A" and "B" neither file nor consummate within 60 days, the parties would no longer be entitled to rely on the determination of fair market value, and, if in doubt about whether required to observe the requirements of the act, would have to make a second determination of fair market value.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8688, Feb. 1, 2001]

§ 801.11 Annual net sales and total assets.

(a) The annual net sales and total assets of a person shall include all net sales and all assets held, whether foreign or domestic, except as provided in paragraphs (d) and (e) of this section.

(b) Except for the total assets of a joint venture or other corporation at the time of its formation which shall be determined pursuant to § 801.40(d) the annual net sales and total assets of a person shall be as stated on the financial statements specified in paragraph (c) of this section: *Provided:*

(1) That the annual net sales and total assets of each entity included within such person are consolidated therein. If the annual net sales and total assets of any entity included within the person are not consolidated in such statements, the annual net sales and total assets of the person filing notification shall be recomputed to include the nonduplicative annual net sales and nonduplicative total assets of each such entity; and

(2) That such statements, and any re-statements pursuant to paragraph (b)(1) of this section (insofar as possible), have been prepared in accordance with the accounting principles normally used by such person, and are of a date not more than 15 months prior to the date of filing of the notification required by the act, or the date of consummation of the acquisition.

Example: Person "A" is composed of entity A, subsidiaries B1 and B2 which A controls, subsidiaries C1 and C2 which B1 controls, and subsidiary C3 which B2 controls. Suppose that A's most recent financial statement consolidates the annual net sales and total assets of B1, C1, and C2, but not B2 or C3. In order to determine whether person "A" meets the criteria of Section 7A(a)(2)(B), as either an acquiring or an acquired person, A must recompute its annual net sales and total assets to reflect consolidation of the nonduplicative annual net sales and nonduplicative total assets of B2 and C3.

(c) Subject to the provisions of paragraph (b) of this section:

(1) The annual net sales of a person shall be as stated on the last regularly prepared annual statement of income and expense of that person; and

(2) The total assets of a person shall be as stated on the last regularly prepared balance sheet of that person.

Example: Suppose "A" sells assets to "B" on January 1. "A's" next regularly prepared balance sheet, dated February 1, reflects that sale. On March 1, "A" proposes to sell more assets to "B." "A's" total assets on March 1 are "A's" total assets as stated on its February 1 balance sheet.

(d) No assets of any natural person or of any estate of a deceased natural person, other than investment assets, voting securities and other income-producing property, shall be included in determining the total assets of a person.

(e) Subject to the limitations of paragraph (d) of this section, the total assets of:

(1) An acquiring person that does not have the regularly prepared balance sheet described in paragraph (c)(2) of this section shall be, for acquisitions of each acquired person:

(i) All assets held by the acquiring person at the time of the acquisition,

(ii) Less all cash that will be used by the acquiring person as consideration in an acquisition of assets from, or in an acquisition of voting securities issued by, that acquired person (or an entity within that acquired person) and less all cash that will be used for expenses incidental to the acquisition, and less all securities of the acquired person (or an entity within that acquired person); and

(2) An acquired person that does not have the regularly prepared balance sheet described in paragraph (c)(2) of this section shall be either

(i) All assets held by the acquired person at the time of the acquisition, or

(ii) Where applicable, its assets as determined in accordance with § 801.40(d).

Examples: For examples 1-4, assume that A is a newly-formed company which is not controlled by any other entity. Assume also that A has no sales and does not have the balance sheet described in paragraph (c)(2) of this section.

1. A will borrow \$105 million in cash and will purchase assets from B for \$100 million. In order to establish whether A's acquisition of B's assets is reportable, A's total assets are determined by subtracting the \$100 million that it will use to acquire B's assets from the \$105 million that A will have at the

time of the acquisition. Therefore, A has total assets of \$5 million and does not meet any size-of-person test of Section 7A(a)(2).

2. Assume that A will acquire assets from B and that, at the time it acquires B's assets, A will have \$85 million in cash and a factory valued at \$60 million. A will exchange the factory and \$80 million cash for B's assets. To determine A's total assets, A should subtract from the \$85 million cash the \$80 million that will be used to acquire assets from B and add the remainder to the value of the factory. Thus, A has total assets of \$65 million. Even though A will use the factory as part of the consideration for the acquisition, the value of the factory must still be included in A's total assets. Note that A and B may also have to report the acquisition by B of A's non-cash assets (i.e., the factory). For that acquisition, the value of the cash A will use to buy B's assets is not excluded from A's total assets. Thus, in the acquisition by B, A's total assets are \$145 million.

3. Assume that company A will make a \$150 million acquisition and that it must pay a loan origination fee of \$5 million. A borrows \$161 million. A does not meet the size-of-person test in Section 7A(a)(2) because its total assets are less than \$10 million. \$150 million is excluded because it will be consideration for the acquisition and \$5 million is excluded because it is an expense incidental to the acquisition. Therefore, A is only a \$6 million person. Note that if A were making an acquisition valued at over \$200 million, the acquisition would be reportable without regard to the sizes of the persons involved.

4. Assume that "A" borrows \$165 million to acquire \$100 million of assets from "B" and \$60 million of voting securities of "C." To determine its size for purposes of its acquisition from "B," "A" subtracts the \$100 million that it will use for that acquisition. Therefore, A has total assets of \$65 million for purposes of its acquisition from "B." To determine its size with respect to its acquisition from "C," "A" subtracts the \$60 million that will be paid for "C's" voting securities. Thus, for purposes of its acquisition from "C," "A" has total assets of \$105 million. In the first acquisition "A" meets the \$10 million size-of-person test and in the second acquisition "A" meets the \$100 million size-of-person test of Section 7A(a)(2).

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§ 801.12 Calculating percentage of voting securities.

(a) *Voting securities.* Whenever the act or these rules require calculation of the percentage of voting securities to be held or acquired, the issuer whose voting securities are being acquired