

802.4  
803.9

**Verne, B. Michael**

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**From:** Verne, B. Michael  
**Sent:** Tuesday, September 25, 2012 3:59 PM  
**To:** [REDACTED]  
**Cc:** Walsh, Kathryn  
**Subject:** RE: quick hsr question

It is based on the statutory language that bases the fee on the "value of voting securities held as a result of the acquisition". You can use 802.4 to analyze whether the underlying non-exempt assets are valued at less than \$68.2 million (which in your case they are not) in which case the acquisition of Target's voting securities would be completely non-reportable. Once you have determined under 802.4 that the acquisition of the top level entity is not exempt, you are deemed to hold all of the voting securities of Target, valued at the total acquisition price. See the interplay between 802.4 and the size of transaction in the following link.

[http://www.ftc.gov/bc/hsr/802\\_4tipsheet.shtm](http://www.ftc.gov/bc/hsr/802_4tipsheet.shtm)

Also see the discussion for 803.9 in the following link to the 2003 SBP where one of the comments is advocating that the filing fee for acquisitions of foreign issuers or assets should be based only on the US component of the acquisition, and our response on why we believed that was in conflict with the statute.

<http://www.ftc.gov/os/fedreg/2003/january/030117premergnotification.pdf>

*Bm*  
9/25/12

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**From:** [REDACTED]  
**Sent:** Tuesday, September 25, 2012 3:47 PM  
**To:** Verne, B. Michael  
**Subject:** Re: quick hsr question

Thanks. Is there a reason behind this, it seems not what the underlying statutes say (re exempt businesses/assets can't be "held" by a buyer, and 802.4 allows a look thru so as to eliminate this seeming distinction without a difference). Thanks again. -- [REDACTED]

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[REDACTED]

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**From:** Verne, B. Michael [mailto:MVERNE@ftc.gov]  
**Sent:** Tuesday, September 25, 2012 03:28 PM  
**To:** [REDACTED]  
**Cc:** Walsh, Kathryn <kwalsh@ftc.gov>  
**Subject:** RE: quick hsr question

That would be true if Buyer was purchasing the subsidiaries directly. Here, you say that Buyer is purchasing Target, so the value for purposes of determining the filing fee is based on the full acquisition price that is being paid for Target.

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**From:** [REDACTED]  
**Sent:** Tuesday, September 25, 2012 3:10 PM  
**To:** Verne, B. Michael  
**Subject:** quick hsr question

Hi Mike –

Quick HSR question that I hope you can help with soon as you have a chance.

Buyer is purchasing Target, which own subsidiaries, some of which are U.S. issuers and some of which are foreign issuers. The foreign issuers hold foreign assets and do not have, in the aggregate, sales in or into the U.S. of at least \$68.2 million. Therefore, they are excludable under Section 802.50. The fair market value of the U.S. subsidiaries is over \$68.2 million, so a filing is required. The question is what is the appropriate filing fee basis. Our analysis is as follows:

In the relevant statutory section setting filing fees, it says that the fees are set based on the transaction size as "determined under section 7A(a)(2)." 18 USC 7A(a)(2) defines the "size of transaction," and is further clarified in the regulations.

In particular, 16 CFR § 801.15 states that:

"Notwithstanding §801.13, for purposes of determining the aggregate total amount of voting securities, non-corporate interests and assets of the acquired person held by the acquiring person under Section 7A(a)(2) and §801.1(h), none of the following will be held as a result of an acquisition:

[ . . . ]  
(d) Assets or voting securities the acquisition of which . . . is exempt, under §§802.50(a), 802.51(a), 802.51(b) of this chapter unless the limitations, in aggregate for §§802.50(a), 802.51(a), 802.51(b) , 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."

Here, because the Target's foreign assets are excludable under 16 CFR § 802.50(a), based on the above-quoted language from Section 801.15, the foreign assets are not "held" as the result of the acquisition. Therefore, they would not count toward calculating the size of transaction or the filing fee.

This interpretation is further supported by 16 CFR 803.9 Example 5, which provides the following:

"A" contracts to acquire all of the assets of "B" for in excess of \$500 million (as adjusted). The assets include hotels, office buildings, and rental retail property, all of which are exempted by §802.2. Section 802.2 directs that these assets are exempt from the requirements of the act and that reporting requirements for the transaction should be determined by analyzing the remainder of the acquisition as if it were a separate transaction. Furthermore, §801.15(a)(2) states that those exempt assets are never held as a result of the acquisition. Accordingly, the aggregate amount of the transaction is in excess of \$100 million (as adjusted), but less than \$500 million (as adjusted). "A" will be liable for a filing fee of \$125,000, rather than \$280,000, because the value of the transaction is not less than \$100 million (as adjusted) but less than \$500 million (as adjusted). Note, however, that "A" must include an attachment in its Notification and Report Form setting out both the in excess of \$500 million (as adjusted) total purchase price and the basis for its determination that the aggregate total amount of the acquisition under the rules is between \$100 million (as adjusted) and \$500 million (as adjusted) rather than in excess of \$500 million (as adjusted), in accordance with the Instructions to the Form.

This example makes clear that assets that are excludable are not included in the filing fee calculation. Likewise here, the excludable assets under 802.50 would not count toward the calculation of the filing fee, so the appropriate size of transaction upon which the fee should be based is the value of the U.S. assets being acquired and "held," not counting the foreign excluded assets.

Do you agree?