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MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

A PROFESSIONAL LIMITED LIABILITY COMPANY
1225 NINETEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036

TELEPHONE (202) 429-5575
(202) 785-0600
FAX (202) 331-1118
(202) 785-1234

SIDNEY T. MILLER (1864-1940)
GEORGE L. CANFIELD (1866-1928)
LEWIS H. PADDOCK (1866-1935)
FERRIS D. STONE (1882-1945)

INCORPORATING THE PRACTICE OF
MILLER & HOLBROOKE

MATTHEW C. AMES
(202) 457-5961

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May 10, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in IB Docket 95-59

Dear Mr. Secretary:

Pursuant to 47 C.F.R. § 1.1206, the Building Owners and Managers Association, International ("BOMA"), the International Council of Shopping Centers ("ICSC"), the National Apartment Association ("NAA"), the National Realty Committee ("NRC"), the National Association of Real Estate Investment Trusts ("NAREIT"), the National Multi Housing Council ("NHMC"), and the American Seniors Housing Association ("ASHA") (jointly, the "Real Estate Associations") through undersigned counsel, submit this original and one copy of a letter disclosing a written and oral ex parte presentation in the above-captioned proceeding.

On May 10, 1996, the following individuals met with certain members of the Commission staff on behalf of the Real Estate Associations: Gerard Lavery Lederer of BOMA; James N. Arbury of NAA, NHMC and ASHA; Steven Wechsler, Roger Platt and Edward Desmond of NRC; Regina Brown and Edward C. Maeder of ICSC; Thayne Needles of NAREIT; and Nicholas P. Miller, William R. Malone, and Matthew C. Ames of Miller, Canfield, Paddock and Stone, P.L.C.

The Commission staff members present were: Jacqualine Spindler, Larry Walke and Randi Albert of the Cable Services Bureau; Rosalee Chiara of the International Bureau; and Mary Beth Murphy, Sonja Rifken and Suzanne Tetreault of the Office of the General Counsel.

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The meeting dealt with the concerns of the real estate industry concerning proposals for granting telecommunications providers mandatory access to privately-owned real estate and preemption of private contractual arrangements governing the placement of telecommunications facilities, including matters set forth in the attached written presentation of the Real Estate Associations.

Following the meeting with the staff, the above-named individuals also met with Ms. Meredith Jones, Chief of the Cable Services Bureau, and discussed the same topics.

Copies of the attached written presentation were given to the all of the Commission staff named above, including Ms. Jones. Commission staff members were also given a compilation of formal comments previously filed with the Commission by the Real Estate Associations. The written presentation refers to certain rules recently adopted by the Federal Trade Commission; for your convenience, a copy is enclosed.

Please contact the undersigned with any questions.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By Matthew C. Ames

Enclosures

cc: Meredith Jones, Esq.
Jacqualine Spindler, Esq.
Larry Walke, Esq.
Randi Albert, Esq.
Rosalee Chiara, Esq.
Mary Beth Murphy, Esq.
Sonja Rifken, Esq.
Suzanne Tetreault, Esq.

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May 10, 1996

THE REAL ESTATE INDUSTRY OPPOSES MANDATORY ACCESS TO PROPERTY ON LEGAL AND POLICY GROUNDS

The owners and managers of multi tenant residential and commercial properties[1] have demonstrated in their comments that mandating access to private property in the various ways proposed by MM Docket 92-260 (Cable wiring); CS Docket 95-184 (Inside wiring); IB Docket 95-59 (Satellite antennas); and CS Docket 96-83 (Receiving antennas) is unnecessary and would prove counterproductive.

I. Commission Action Would Unnecessarily Interfere With the Existing Free Market.

The real estate industry is highly fragmented, dynamic and competitive.

- According to the SBA, 99% of apartment building operators and 96% of commercial building operators are small businesses.

- Of the five largest owners of real estate in Chicago, none controls more than 3% of the market.

- The 50 largest companies own or manage only 12% of residential properties in the United States.

- The Federal Trade Commission has completely exempted acquisitions of office, residential and rental retail property from the Hart-Scott-Rodino premerger notification rules because those assets "are abundant and their holdings are generally unconcentrated." 61 Fed. Reg. 13669 (Mar. 28, 1996); 16 C.F.R. § 802.

This high level of fragmentation means that no individual real estate owner has any significant degree of market power. Because of the resulting competition, building operators must respond to the needs of tenants and residents by accommodating requests for service.

- The remarkable growth of the CAP industry demonstrates the real estate industry's responsiveness. Between 1994 and 1995, for example, TCG increased the number of buildings it served by 250%. The attached charts further illustrate this point.

Historically, the telecommunications market was dominated by monopoly providers. Commission regulation defined the limits and many of the terms of the relationships between building owners and service providers. This is changing. The market is now in transition to a competitive structure with a multiplicity of providers in which these responsibilities are handled by contracts.

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[1] Represented in these four dockets by the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management ("IREM"), the International Council of Shopping Centers ("ICSC"), the National Apartment Association ("NAA"), the National Multi Housing Council ("NHMC"), the National Realty Committee ("NRC"), and the National Association of Real Estate Investment Trusts ("NAREIT") and in the individual comments of some 220 entities engaged in real estate ownership and management.

II. The Property Rights Protected by the Fifth Amendment Are Necessary to the Functioning of the Free Market.

There are sound policy reasons for preserving the control of building operators over their property.

- o A property owner must have the right to enter into a contract with any person who has access -- actual or virtual -- to the building. This is the only way to rationally manage the asset and to protect the persons and property of all involved.

- o For example, suppose Provider A disrupts service to Provider B's customers in a building, but neither has an agreement with the building owner. Subscribers would face loss of service and the building owner would be unable to protect their interests. Indeed, the owner might find itself liable to the tenant for violation of a lease covenant or to B for not ensuring access, even though it had no knowledge of or control over the cause of the problem.

- o The DBS and MMDS dockets raise the same issues: if tenants and third parties can place antennas and run wires at will, the property owner cannot protect itself, tenants or third parties from potential injury -- and might face liability itself.

- o Service providers do not have the absolute right to serve all potential customers -- they will always be constrained by technical, physical and geographic factors. The choices of potential subscribers also are limited by these same factors.

- o Finally, building owners are and will remain responsible for code compliance by their buildings.

III. The Commission Cannot Constitutionally Take Private Property, and Congress Did Not Authorize It To Do So.

Placement of antennas and related facilities is clearly and unavoidably a physical invasion. The courts do not apply a balancing test in such cases. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); GTE Northwest, Inc. v. Public Utility Commission of Oregon, 321 Or. 458 (1995).

Some commenters have presented proposals for mandating access that claim to avoid any Fifth Amendment problems. They do not.

- o MFS claims it only needs access to the wiring, not the building -- but MFS will still want to physically interconnect its lines, probably at an access point in the building.

- o Bell Atlantic claims the Commission can simply forbid carriers from agreeing to pay for access -- but this amounts to a taking, since property owners will be forced by the market to give access, but will not be able to obtain compensation from users. See City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893).

The Anti-Deficiency Act forbids the Commission from effecting any taking because Congress has not appropriated funds to compensate property owners. 31 U.S.C. § 1341. Section 207 must be read as so limited. The Commission's statutory authority with respect to inside wiring and cable wiring is limited by Sections 201, 220 and 624(i).

Attachments
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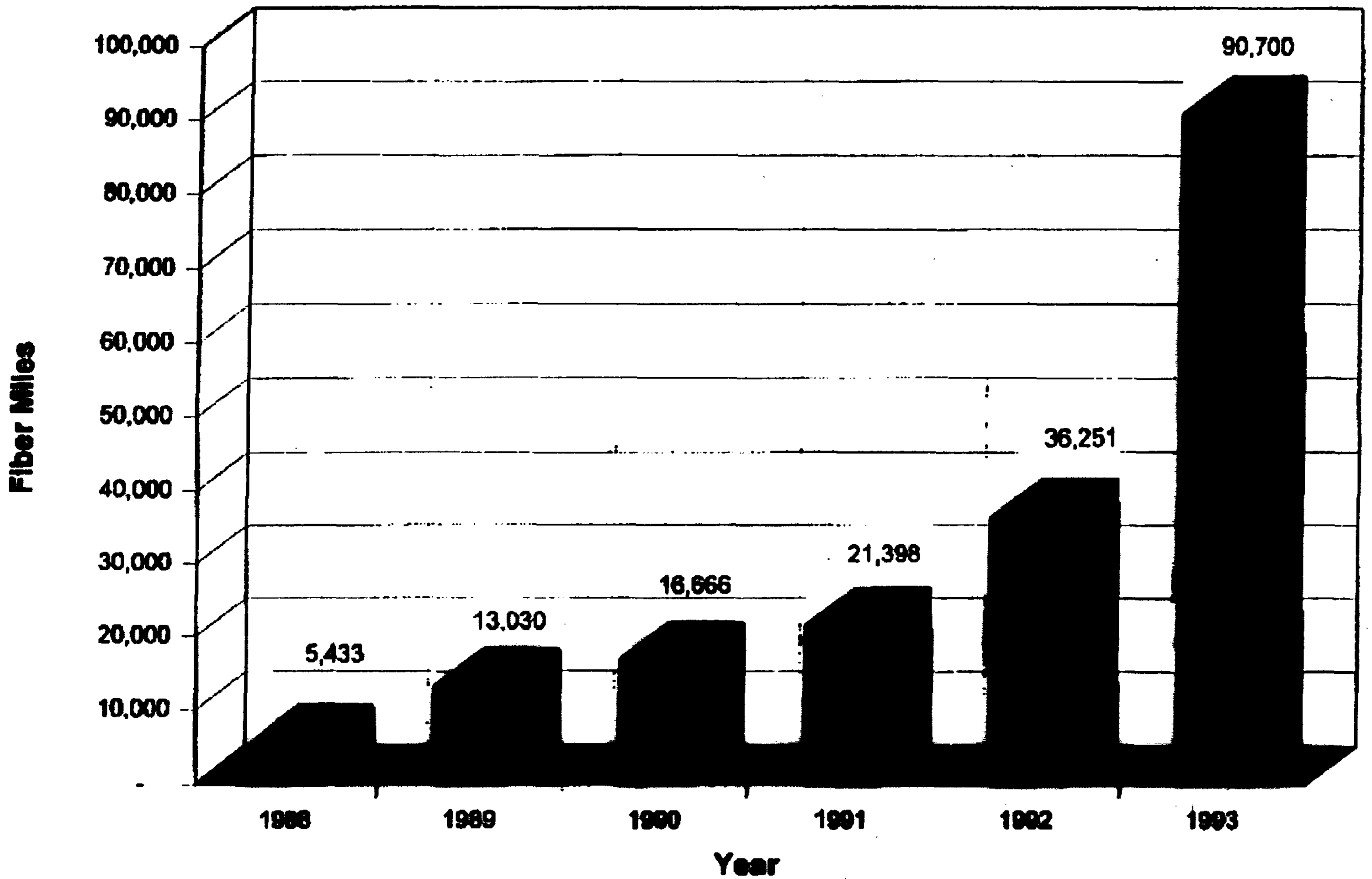
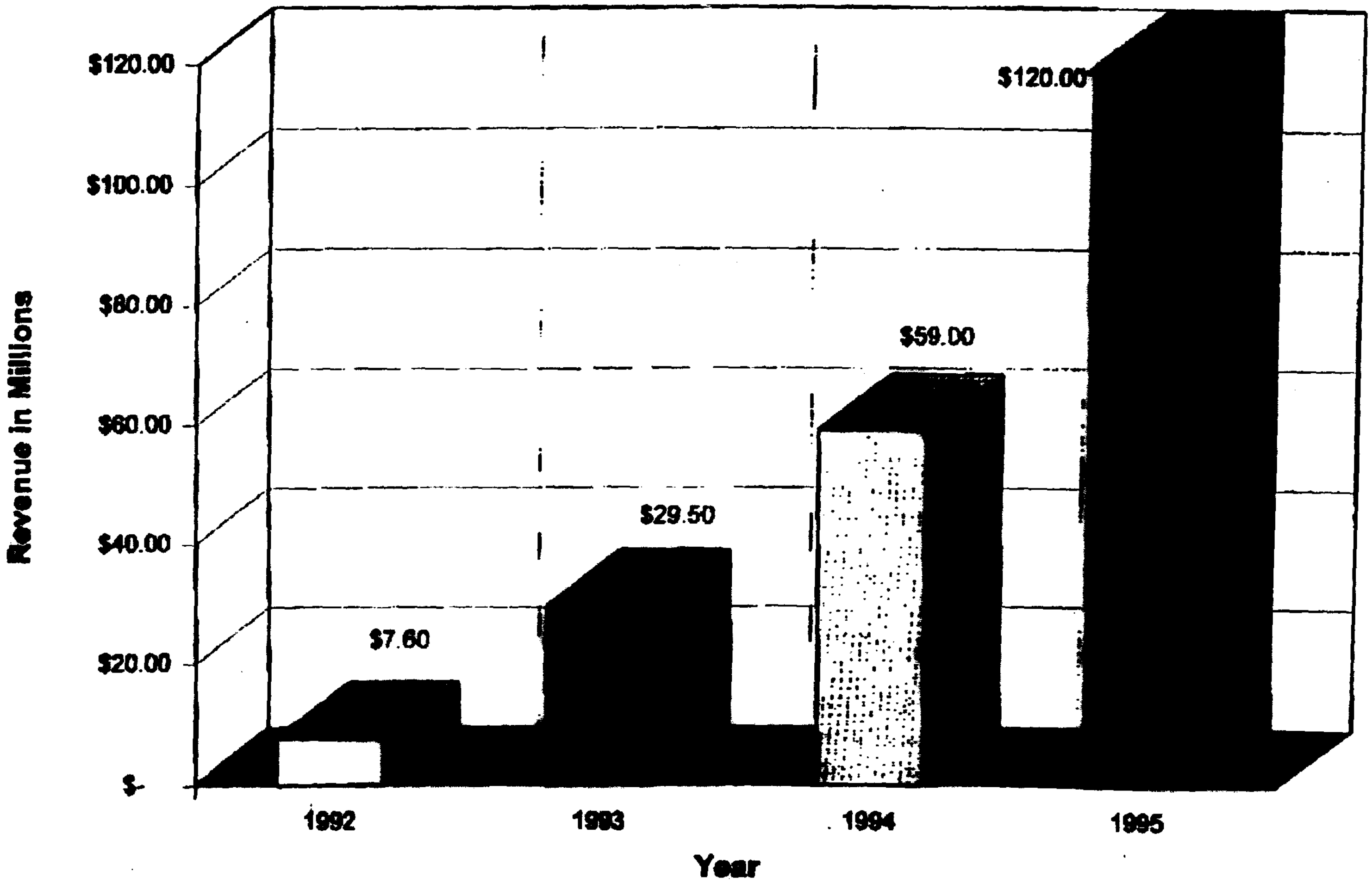
Teleport Communications Group (TCG)
Fiber Deployment



Source: FCC Fiber Deployment Update 1993

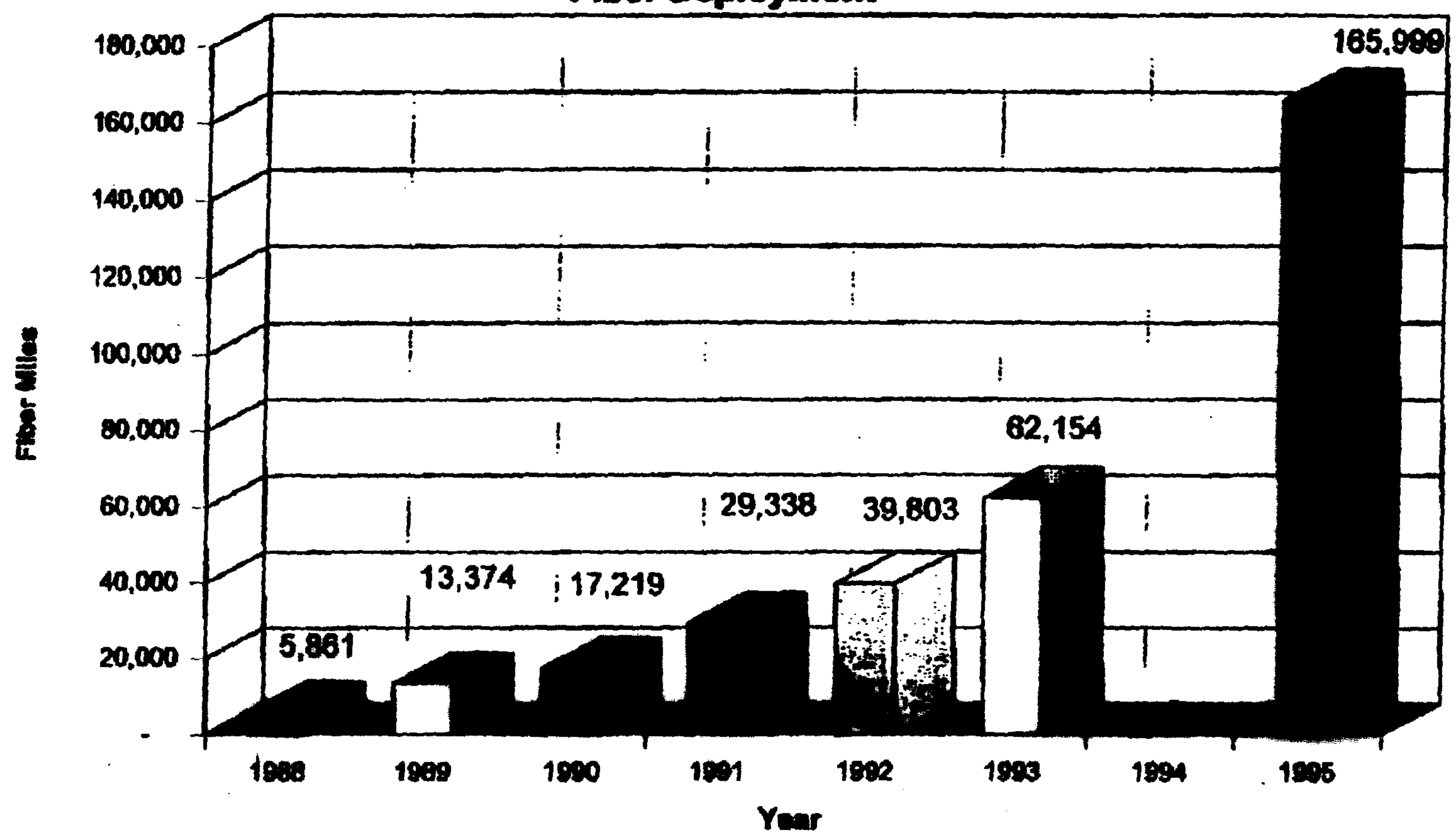
IntelCom Group Inc. (ICG)
Total Revenue



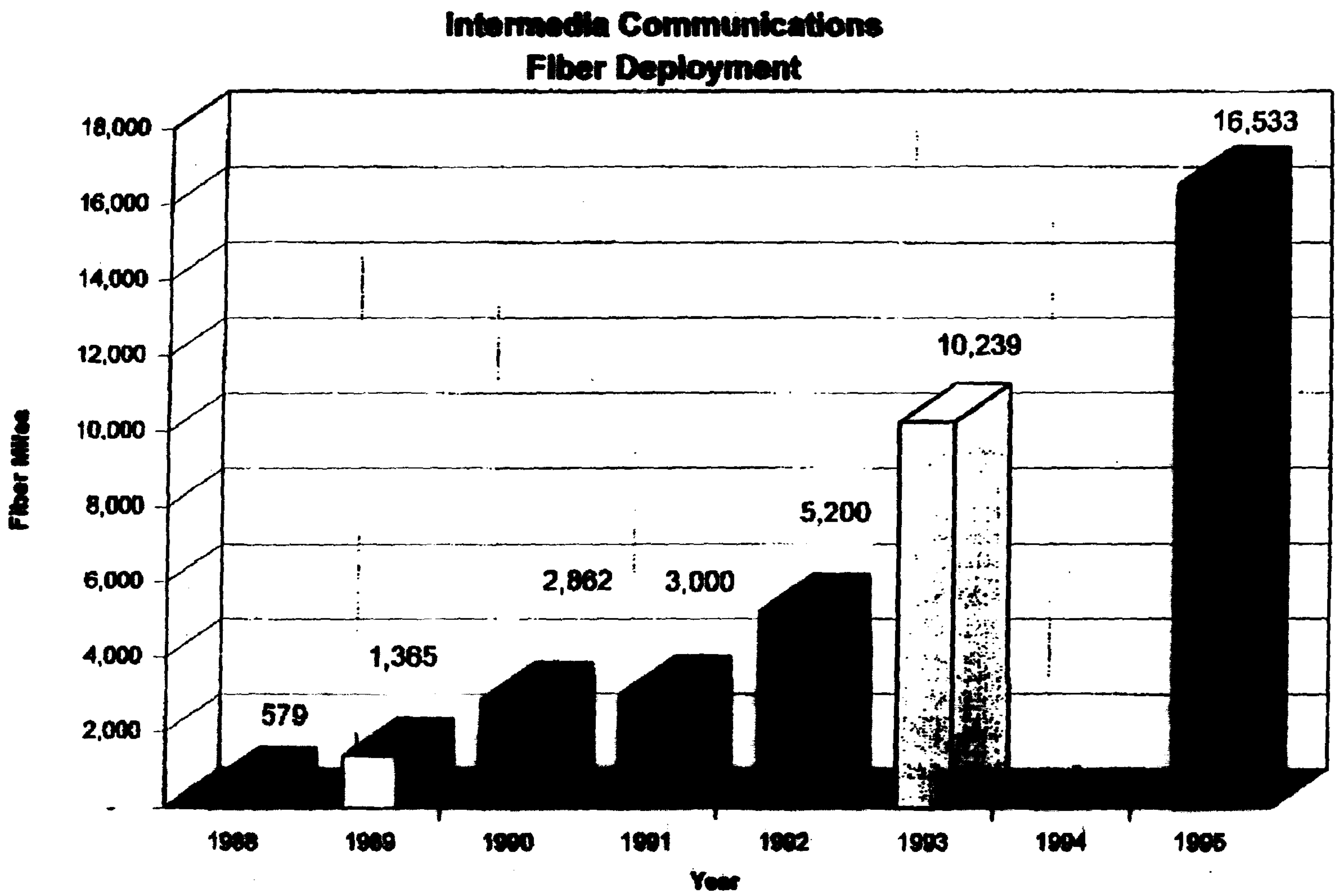
Source: Telecom Publishing Group, *Local Competition Report*

*Projected Revenue for 1995 Fiscal Year

Metropolitan Fiber Systems (MFS) Fiber Deployment



Source 1988-1993: FCC Fiber Deployment Update 1993
Source 1994: Data Unavailable
Source 1995: Telecom Publishing Group, Local Competition Report, February 5, 1996



Source 1988-1994: FCC Deployment Update 1993
Source 1994: Data Unavailable
Source 1995: Telecom Publishing Group, Local Competition Report, February 5, 1996

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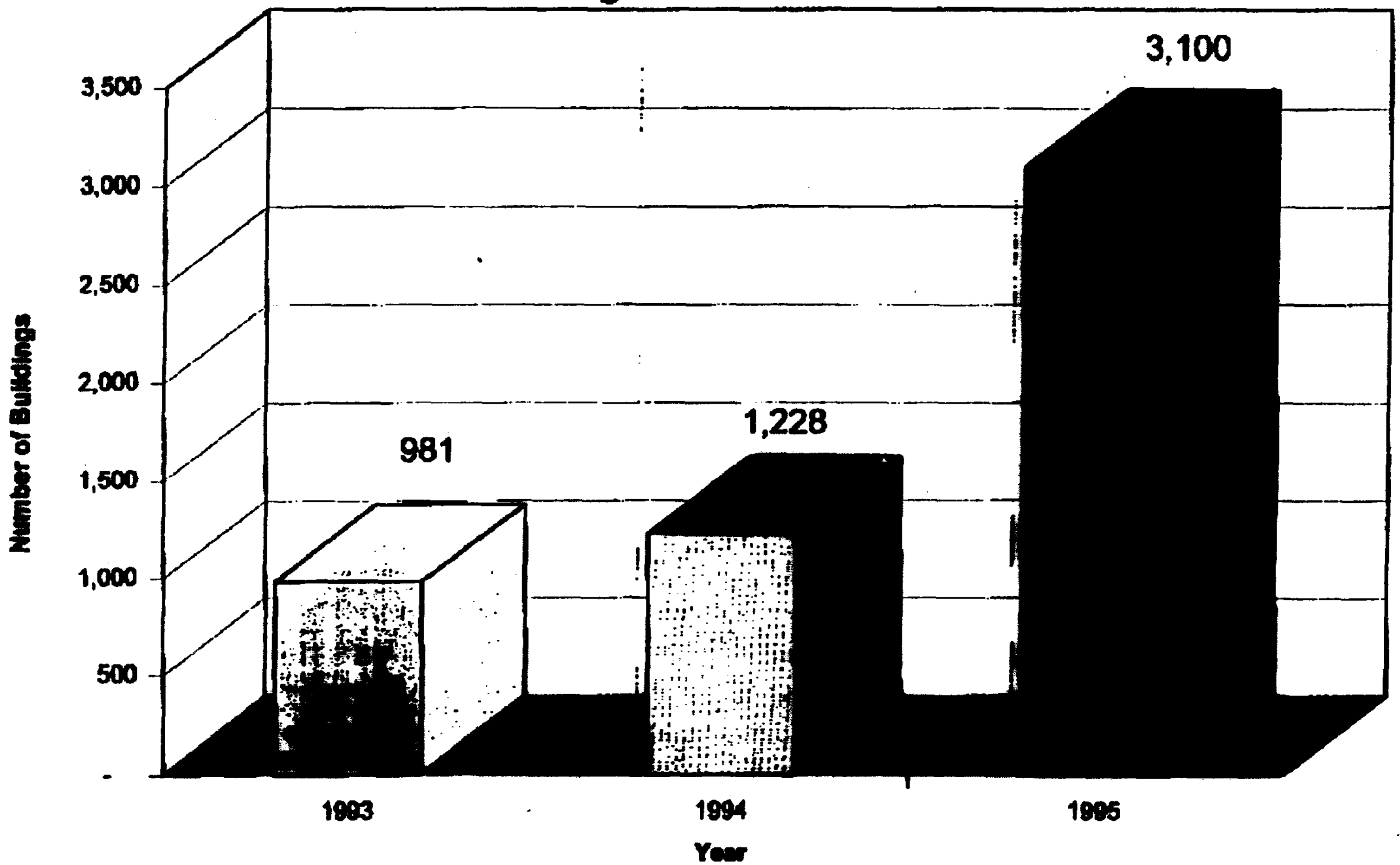
Teleport Communications Group (TCG)
Buildings in TCG Network



Source 1993-1994: Telecom Publishing Group, Local Competition and Regulation: 1994
Source 1995: Telecom Publishing Group, Local Competition Report, February 5, 1996

Copies may be inspected at the Federal Trade Commission, Public Reference Room, Room 130, Sixth Street and Pennsylvania Ave., NW, Washington, DC, or at the Office of the Federal Register, 800 North Capital St., NW, suite 700, Washington, DC.

(1) * * *

(2) For loose-fill cellulose, the tests must be done at the settled density determined under paragraph 8 of ASTM C 739–91, "Standard Specification for Cellulosic Fiber (Wood-Base) Loose-Fill Thermal Insulation." This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of the test procedure may be obtained from the American Society of Testing and Materials, 1916 Race Street, Philadelphia, PA 19103. Copies may be inspected at the Federal Trade Commission, Public Reference Room, Room 130, Sixth Street and Pennsylvania Ave., NW, Washington, DC, or at the Office of the Federal Register, 800 North Capital St., NW, suite 700, Washington, DC.

* * * * *

(b) Aluminum foil systems with more than one sheet must be tested with ASTM C 236–89 (Reapproved 1993) or ASTM C 976–90, which are incorporated by reference in paragraph (a) of this section. The tests must be done at a mean temperature of 75° Fahrenheit, with a temperature differential of 30° Fahrenheit.

* * * * *

(d) For insulation materials with foil facings, you must test the R-value of the material alone (excluding any air spaces) under the methods listed in paragraph (a) of this section. You can also determine the R-value of the material in conjunction with an air space. You can use one of two methods to do this:

(1) You can test the system, with its air space, under ASTM C 236–89 (Reapproved 1993) or ASTM C 976–90, which are incorporated by reference in paragraph (a) of this section. If you do this, you must follow the rules in paragraph (a) of this section on temperature, aging and settled density.

* * * * *

3. Section 460.10 is revised to read as follows:

§ 460.10 How statements must be made.

All statements called for by this regulation must be made clearly and conspicuously. Among other things, you must follow the Commission's enforcement policy statement for clear and conspicuous disclosures in foreign language advertising and sales materials, 16 CFR 14.9.

4. The "Appendix to Part 460—Enforcement Policy Statement for Foreign Language Advertising" is removed.

5. A new Appendix is added, to read as follows:

Appendix to Part 460—Exemptions

Section 18(g)(2) of the Federal Trade Commission Act, 15 U.S.C. 57a(g)(2), authorizes the Commission to exempt a person or class of persons from all or part of a trade regulation rule if the Commission finds that application of the rule is not necessary to prevent the unfair or deceptive acts or practices to which the rule relates. In response to petitions from industry representatives, the Commission has granted exemptions from specific requirements of 16 CFR Part 460 to certain classes of sellers. Some of these exemptions are conditioned upon the performance of alternative actions. The exemptions are limited to specific sections of Part 460. All other requirements of Part 460 apply to these sellers. The exemptions are summarized below. For an explanation of the scope and application of the exemptions, see the formal Commission decisions in the **Federal Register** cited at the end of each exemption.

(a) Manufacturers of perlite insulation products that have an inverse relationship between R-value and density or weight per square foot are exempted from the requirements in sections 460.12(b)(2) and 460.13(c)(1) that they disclose minimum weight per square foot for R-values listed on labels and fact sheets. This exemption is conditioned upon the alternative disclosure in labels and fact sheets of the maximum weight per square foot for each R-value required to be listed. 46 FR 22179 (1981).

(b) Manufacturers of rigid, flat-roof insulation products used in flat, built-up roofs are exempted from the requirements in section 460.12 that they label these home insulation products. 46 FR 22180 (1981).

(c) New home sellers are exempted from:

(1) the requirement in section 460.18(a) that they disclose the type and thickness of the insulation when they make a representation in an advertisement or other promotional material about the R-value of the insulation in a new home;

(2) the requirement that they disclose in an advertisement or other promotional material the R-value explanatory statement specified in section 460.18(a) or the savings explanatory statement specified in section 460.19(b), conditioned upon the new home sellers alternatively disclosing the appropriate explanatory statement in the sales contract along with the disclosures required by section 460.16;

(3) the requirement that they make the disclosures specified in section 460.19(c) if they claim that insulation, along with other products in a new home, will cut fuel bills or fuel use; and

(4) the requirement that they include the reference to fact sheets when they must disclose the R-value explanatory statement or the savings claim explanatory statement under sections 460.18(a) or 460.19(b), respectively.

The exemptions for new home sellers also apply to home insulation sellers other than new home sellers when they participate with a new home seller to advertise and promote the sale of new homes, provided that the primary thrust of the advertisement or other promotional material is the promotion of new homes, and not the promotion of the insulation product. 48 FR 31192 (1983).

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 96–7528 Filed 3–27–96; 8:45 am]

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16 CFR Parts 801 and 802

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Commission amends the premerger notification rules that require the parties to certain mergers or acquisitions to file reports with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation.

These amendments consist of five rules that define or create exemptions to the requirements imposed by the Hart-Scott-Rodino Act. These rules clarify the types of transactions that are in the ordinary course of business of the parties to the transaction and are exempt under section 7A(c)(1) of the Hart-Scott-Rodino Act. They also provide several new exemptions under section 7A(d)(2)(B) for certain types of acquisitions of realty and carbon-based mineral reserves that are not likely to violate the antitrust laws. These rules are designed to reduce the compliance burden on the business community by eliminating the application of the notification and waiting requirements to a significant number of transactions that are unlikely to violate the antitrust laws. They will also allow the enforcement agencies to focus their resources more effectively on those transactions that present the potential for competitive harm.

EFFECTIVE DATE: April 29, 1996.

FOR FURTHER INFORMATION CONTACT: John M. Sipple, Jr., Assistant Director, or Melea R. Epps, Attorney, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

These amendments to the Hart-Scott-Rodino premerger notification rules are designed to reduce the burden of reporting on the public. The Commission has determined that none of the rules is a major rule, as that term is defined in Executive Order 12291. The amendments will not result in any of the following: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in the domestic market. None of the amendments expands the coverage of the premerger notification rules in a way that would affect small business. Therefore, pursuant to § 605(b) of the Administrative Procedure Act, 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Pub. L. 96–354 (September 19, 1980), the Federal Trade Commission has certified that these rules will not have a significant economic impact on a substantial number of small entities. Section 603 of the Administrative Procedure Act, 5 U.S.C. 603, requiring a final regulatory flexibility analysis of these rules, is therefore inapplicable.

Background

Section 7A of the Clayton Act ("the act"), 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires parties to certain acquisitions of assets or voting securities to give advance notice to the Federal Trade Commission (hereafter referred to as "the Commission") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to as "the Assistant Attorney General"). The parties must then wait certain designated periods before the consummation of such acquisitions. The transactions to which the advance notice requirement is applicable and the length of the waiting period required are set out respectively in subsections (a) and (b) of section 7A. This amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions under the antitrust laws.

The legislative history suggests several purposes underlying the act. Congress wanted to ensure that certain acquisitions were subjected to meaningful scrutiny under the antitrust laws prior to consummation. To this end, Congress intended to eliminate the "midnight merger" that is negotiated in secret and announced just before, or sometimes only after, the closing takes place. Congress also provided an opportunity for the Commission or the Assistant Attorney General (who are sometimes hereafter referred to as the "antitrust agencies" or the "enforcement agencies") to seek a court order enjoining the completion of those transactions that either agency has reason to believe would present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy when a challenge by one of the enforcement agencies proved successful. Thus, the act requires that the antitrust agencies receive prior notification of certain acquisitions, provides tools to facilitate a prompt, thorough investigation of the competitive implications of these acquisitions, and assures the enforcement agencies an opportunity to seek a preliminary injunction before the parties to an acquisition are legally free to consummate it. The problem of unscrambling the assets after the transaction has taken place is thereby reduced.

Subsection 7A(d)(1) of the act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General and in accordance with 5 U.S.C. 553, to require that the notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. Subsection 7A(d)(2) of the act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General and in accordance with 5 U.S.C. 553, the authority to (a) define the terms used in the act, (b) exempt from the act's notification and waiting period requirements additional classes of persons or transactions which are not likely to violate the antitrust laws, and (c) prescribe such other rules as may be necessary and appropriate to carry out the purposes of section 7A.

The Commission, with the concurrence of the Assistant Attorney General, promulgated implementing rules ("the rules") and the Notification and Report Form (the "Form") and issued an accompanying Statement of Basis and Purpose, all of which were published in the **Federal Register** of July 31, 1978, 43 FR 33451, and became effective on September 5, 1978.

The rules are divided into three parts which appear at 16 CFR Parts 801, 802, and 803. Part 801 defines a number of the terms used in the act and rules, and explains which acquisitions are subject to the reporting and waiting period requirements. Part 802 contains a number of exemptions from these requirements. Part 803 explains the procedures for complying with the act. The Form, which is completed by persons required to file notification, is an appendix to Part 803 of the rules.

Changes of a substantive nature have been made to the premerger notification rules or Form on eleven occasions since they were first promulgated: 44 FR 66781 (November 21, 1979); 45 FR 14205 (March 5, 1980); 46 FR 38710 (July 29, 1981); 48 FR 34427 (July 29, 1983); 50 FR 38742 (September 24, 1985); 51 FR 10368 (March 28, 1986); 52 FR 7066 (March 6, 1987); 52 FR 20058 (May 29, 1987); 54 FR 21425 (May 18, 1989); 55 FR 31371 (August 2, 1990); and 60 FR 40704 (August 9, 1995). The current amendments interpret the act and expand the current policies of the Commission's Premerger Notification Office regarding transactions in the ordinary course of business that are exempt from the notification and waiting requirements of the act. They also include several new exemptions for acquisitions of certain types of real property assets and carbon-based mineral reserves.

Comments

These amendments reflect extensive analysis of comments received in response to the notice of proposed rulemaking published by the Federal Trade Commission, in consultation with the Assistant Attorney General, in the **Federal Register** of July 28, 1995, 60 FR 38930. The notice contained the current amendments in a proposed form and provided 60 days for interested persons to submit comments on the proposed rules. During the 60-day period 29 comments were received. In addition, three new comments and one supplemental comment were received after the expiration of the comment period. The commenters are identified below.

Number of comment	Commenter	Date of comment
1	American Council of Life Insurance.	9/7/95
2	Heller Ehrman White & McAuliffe.	9/15/95
3	Pillsbury, Madison & Sutro on behalf of Chevron Corporation.	9/26/95
4	The Perkin-Elmer Corporation.	9/21/95
5	Atlantic Richfield Company.	9/27/95
6	Pillsbury, Madison & Sutro.	9/25/95
7	General Motors Corporation.	9/28/95
8	Boult, Cummings, Conners & Berry.	9/28/95
9	Section of Antitrust Law of the American Bar Association.	9/29/95
10	Federal Express	9/28/95
11	Ford Motor Company	9/28/95
12	BellSouth Corporation ...	9/28/95
13	Equipment Leasing Association of America.	9/29/95
14	Ronald A. Bloch of McDermott, Will & Emery.	9/29/95
15	Arter & Hadden on behalf of Kennecott Corporation.	9/29/95
16	U.S. Chamber of Commerce.	9/29/95
16A	U.S. Chamber of Commerce (Supplemental Comments).	11/9/95
17	Rinehart & Associates, Investment Forestry.	9/28/95
18	Timberland Investment Services, LLC.	9/28/95
19	O'Melveny & Myers on behalf of Marriott International, Inc..	9/29/95
20	American Hospital Association.	9/29/95
21	Weil, Gotschal & Manges.	9/29/95
22	Latham & Watkins	9/29/95
23	International Council of Shopping Centers.	9/29/95
24	Colorado Oil & Gas Association.	9/29/95
25	ITT Corporation	9/27/95
26	American Hotel & Motel Corporation.	9/29/95
27	American Transport Association of America.	9/29/95
28	National Independent Energy Producers.	9/29/95
29	Latham & Watkins on behalf of Host Marriott Corporation.	10/6/95
30	Forest Investment Associates.	9/28/95
31	National Association of Real Estate Investment Trusts.	11/2/95
32	Association of Private Pension and Welfare Plans.	2/1/96

The commenters generally favored the adoption of the exemptions but also advocated the expansion of certain of the proposals to include exemptions for other types of transactions which, they argued, raise few competitive concerns. The final amendments contain revisions to the proposed rule that address certain commenters' concerns and exclude from the reporting requirements additional transactions that the Commission and the Assistant Attorney General found were unlikely to violate the antitrust laws. A few of the comments contained suggestions that were outside the scope of the proposed rulemaking; these suggestions may be considered by the Commission in future rulemaking efforts.

Statement of Basis and Purpose for the Commission's Revisions to the Premerger Notification Rules

Authority: The Federal Trade Commission, with the concurrence of the Assistant Attorney General, promulgates these amendments to the premerger notification rules pursuant to section 7A(d) of the Clayton Act, 15 U.S.C. 18a(d), as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390.

The five amendments to the premerger notification rules—§§ 802.1, 802.2, 802.3, 802.4, and 802.5—describe certain types of acquisitions that are exempt or are not exempt from the notification requirements of the act. They replace and expand existing § 802.1, which describes certain applications of the exemption granted by section 7A(c)(1) of the act for acquisitions of goods or realty transferred in the ordinary course of business. Revisions to § 801.15 define when the aggregation rules apply to acquisitions covered by these rules.

Criteria for the Rules. Section 7A(c)(1) of the act exempts "acquisitions of goods or realty transferred in the ordinary course of business." Existing § 802.1(a) interprets this statutory language to apply the exemption to acquisitions of voting securities of entities holding only realty. Existing § 802.1(b) denies the exemption to the sale of goods or real property of an entity if they constitute "all or substantially all of the assets of that entity or an operating division thereof" unless the entity qualifies for the exemption under existing § 802.1(a) because its assets consist solely of real property and assets incidental to the ownership of real property.

The reportability of transfers in the ordinary course of business has long been a frequent source of questions from the public to the Premerger Notification Office. Amended § 802.1 represents interpretations of section 7A(c)(1) made by the Premerger Notification Office over the years, and it also broadens these interpretations to exempt additional classes of acquisitions of goods that qualify as transfers in the ordinary course of business and thus are unlikely to violate the antitrust laws.

Amended § 802.1(a) preserves the concept of existing § 802.1(b) and makes the exemption unavailable for acquisitions of all or substantially all of the assets of an operating unit. Operating unit is defined as "assets that are operated by the acquired person as a business undertaking in a particular location or for particular products or services." The sale of all or substantially all of the assets of a business undertaking is generally equivalent to the sale of a business. Amended § 802.1(a) recognizes that acquisitions that transfer the equivalent of a business are not in the ordinary course and thus are not exempt from the prior notification obligations of the act.

Amended § 802.1 also defines categories of acquisitions of goods that are deemed to be in the ordinary course of business and are therefore exempt from the notification requirements. Individual review of transactions such as typical acquisitions of new goods and current supplies is generally unnecessary because buying and selling goods is the essence of manufacturing, wholesaling, and retailing businesses. Sales in the ordinary course of business should not in any way diminish the capacity of the selling firm to compete.

Amended § 802.1 provides that certain acquisitions of used durable goods qualify for exemption from the reporting requirements as transfers of goods in the ordinary course of business. These exemptions for specific types of acquisitions of used durable goods acknowledge that certain transfers of productive assets that are not the sale of an operating unit are made in the ordinary course of business. For example, an equipment leasing company may be acquiring used durable goods as current supplies, or the seller may be replacing these assets to increase or upgrade capacity and to improve efficiencies. However, many used durable goods acquisitions involving productive assets are not within the ordinary course of business and thus are not exempt under § 802.1.

New §§ 802.2 (concerning real property assets) and 802.3 (concerning carbon-based mineral reserves) are based on the Commission's authority in section 7A(d)(2)(B) of the act to exempt transactions that are unlikely to violate the antitrust laws. These sections provide exemptions for certain acquisitions of assets that are abundant and are used in markets that are generally unconcentrated. These two factors make it unlikely that a transfer of these types of assets will have anticompetitive effects. It is thus not necessary to examine each individual transaction to determine if it will violate the antitrust laws.

To accommodate parties who choose to structure their transactions as acquisitions of voting securities rather than as acquisitions of the underlying assets, new § 802.4 exempts acquisitions of voting securities of issuers holding assets of two types: (1) assets, the direct acquisition of which is exempted by section 7A(c)(2) of the act or §§ 802.2, 802.3 or 802.5 of the rules, and (2) assets, the direct acquisition of which is not exempt by section 7A(c)(2) of the act or §§ 802.2, 802.3 or 802.5 of the rules, that are valued at $15 million or less. The exemption for the acquisition of the voting securities of an issuer holding assets, the acquisition of which is exempt under section 7A(c)(2)—bonds, mortgages, deeds of trust and other obligations that are not voting securities—is designed to provide the same treatment for the direct acquisition of such assets (a transaction which is already exempt from the reporting requirements) and the acquisition of the voting securities of an issuer holding these assets.

New § 802.5 exempts acquisitions of investment rental property assets, the acquisition of which is not already exempted by § 802.2. Section 802.5 is based on the use to which buyers will put the acquired assets. The Commission believes that the acquisition of investment rental property assets—defined in § 802.5(b) as real property that, except for limited circumstances, will be rented only to entities not included within the acquiring person and will be held solely for rental or investment purposes—is unlikely to violate the antitrust laws.

Sections 802.1 through 802.5 are based on the Commission's authority in section 7A(d)(2)(A) of the act to "define the terms used in [section 7A]" and sections 7A(d)(2) (B) and (C) to "exempt . . . transactions which are not likely to violate the antitrust laws" and to "prescribe such other rules as may be necessary and appropriate to carry out the purposes of [section 7A]." These exemptions, of course, relate only to premerger reporting, and transactions exempted from the reporting requirements by the new rules remain subject to the antitrust laws.

The Commission is aware that even with the significant coverage of the new rules, the exempt status of many transactions will remain unaddressed. These rules do not and are not intended to interpret or apply to the entire statutory exemption created by section 7A(c)(1). For example, certain acquisitions of credit card receivables may qualify for exemption as transfers in the ordinary course of business. Persons who desire advice on the exempt status of any transfer of goods, realty or other assets may contact the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580, or phone (202) 326-3100.

I. Section 802.1: Acquisitions of Goods and Realty in the Ordinary Course of Business

Section 7A(c)(1) of the act exempts "acquisitions of goods or realty transferred in the ordinary course of business." Amended § 802.1 provides that an acquisition of all the assets of an operating unit is not an acquisition in the ordinary course of business. It also defines certain acquisitions of goods that are in the ordinary course of business and therefore exempt from the reporting requirements. This section primarily covers exemptions for certain acquisitions of goods. Exemptions for the acquisition of certain types of realty are set out in new § 802.2. The realty exemptions are not subject to the exclusion for acquisitions of an operating unit.

Amended § 802.1 defines four categories of acquisitions of goods: acquisitions of an operating unit, acquisitions of new goods, acquisitions of current supplies, and acquisitions of used durable goods. The section states whether and under what circumstances each type of acquisition is exempt. These four categories of asset acquisitions are not comprehensive. As noted above, some asset acquisitions may not fit neatly into any of these defined categories.

Amended § 802.1 has four paragraphs: Paragraph (a) denies the ordinary course of business exemption to any transfer of goods and realty that is equivalent to the sale of a business. The next three paragraphs define acquisitions of goods that may be exempt. Paragraph (b) exempts the acquisition of new goods, and paragraph (c) exempts the acquisition of current supplies. Paragraph (d) defines certain transfers of used durable goods that are within the ordinary course of business. These include: (1) transfers to and from bona fide dealers, resellers or lessors; (2) transfers by an acquired person that has replaced the productive capacity of the assets being sold; and (3) transfers by an acquired person that has outsourced the management and administrative support services provided by the goods being sold.

In determining whether a given acquisition of goods and realty is in the ordinary course of business and is therefore exempt under a provision of amended § 802.1, one must first determine if the assets are substantially all of the assets of an operating unit. If the assets being sold comprise all or substantially all of the assets of an operating unit of the seller, the inquiry ends there, and the acquisition is not exempt as a transfer of goods or realty in the ordinary course of business. If the assets do not constitute all or substantially all of the assets of an operating unit, then the goods should be classified as either new goods, current supplies or used durable goods.

The organization of § 802.1 is intended to make it easier to identify routine acquisitions that meet the criteria of section 7A(c)(1) for an exemption as an acquisition of goods transferred in the ordinary course of business. Sales of new goods and purchases of current supplies are frequent. The objective of the businesses covered by paragraphs (b) and (c) is to buy, sell or lease such goods and supplies; thus such transactions meet the common meaning of transfers in the ordinary course of business. Exempting these transactions facilitates acquisitions of new goods that normally expand the supply of products or expand productive capacity and therefore do not tend to lessen competition. In contrast, acquisitions of entire operating units are not within the common meaning of "ordinary course" and have the potential to concentrate productive capacity and thereby diminish competition.

Proposed § 802.1 addressed only exemptions for acquisitions of goods in the ordinary course of business. Acquisitions of realty in the ordinary course of business are also exempted, pursuant to section 7A(c)(1) of the act. Section 802.2 covers certain exemptions for acquisitions of realty, and it is possible that acquisitions of realty other than those identified in § 802.2 are transfers of real property in the ordinary course of business that are exempt. Language added to § 802.1 concerning realty makes the provision consistent with the exemption provided in section 7A(c)(1).

A. *Operating Unit.* Amended § 802.1(a) excludes from the ordinary course of business exemption any acquisition of all or substantially all of the assets of an "operating unit." As defined by the amended provision, an operating unit is a collection of assets that has been operated as a business undertaking and that may include goods, realty and other types of property. Amended § 802.1(a) also indicates that operating units are not necessarily separate legal entities. A determination of which groups of assets constitute an operating unit within a company will vary significantly among businesses, because the manner in which businesses are organized is company-specific. Thus, examples of operating units include, but are not limited to, regional divisions, company branches, international operations, a hospital, a retail store, a factory or a processing facility.

The definition of operating unit indicates that the assets that comprise the unit are operated "in a particular location or for particular products or services." Proposed § 802.1(a) defined an operating unit as assets operated "in a particular geographic area or for particular products or services." The word "location" was substituted for "geographic area" since a single location of a company's business, *i.e.*, a manufacturing plant, a retail store, a funeral home, constitutes an operating unit. Each location of a company's operations is viewed as a separate business undertaking, and the purchase of all of the assets of one of a company's stores or production facilities is not a transaction within the ordinary course of business. Because amended § 802.1(a) no longer uses the term "geographic area," the determination of which of the seller's operations comprise an operating unit is no longer dependent in part upon whether certain locations are sufficiently proximate to comprise a business undertaking in a particular geographic area. Example 1 to § 802.1 illustrates that an operating unit consists of one grocery store within a company's chain of stores.

A key factor in determining whether a group of assets being sold constitutes an operating unit is whether the seller, as a result of the sale, will cease to sell particular products or provide particular services from a specific location or will exit the business of selling particular products or providing particular services. The operating unit definition specifically excludes references to relevant product markets and relevant geographic markets. Thus, a section 7 antitrust analysis is unnecessary and inappropriate in determining whether assets being sold comprise an operating unit for purposes of determining whether notification is required.

Another probative factor in determining whether a group of assets constitutes an operating unit is whether the seller derived third party revenues from the use of the assets. In certain cases, this factor may distinguish an operating unit from a set of assets that have been used solely to provide management and administrative support services, such as in-house accounting or billing services, that generate no third party revenues directly but support the seller's business operations.

Amended § 802.1(a) uses the term "operating unit" rather than the term "operating division" used in existing § 802.1(b). The latter term has created some uncertainty because certain business entities use the term "division" in a manner that may not be consistent with this rule. For example, a business might use the term "division" to designate an unincorporated administrative segment of its enterprise, such as the "East Coast Division" or the "Tri-State Division," that provides support functions to the business" manufacturing activities. Such usage is designed to serve the needs of the business. The term "operating unit" has been adopted in order to make clear that the application of the rule is not dependent on the terminology used by a business.

Comment 11 suggested that § 802.1(a) be revised to focus on whether the seller is exiting a line of business or a geographic area. However, the wording of amended § 802.1(a) makes no explicit reference to the seller's exit from a line of business or geographic area. As discussed above, this provision no longer emphasizes the operation of a business undertaking in a particular geographic area; instead, the focus is on the location of a specific business undertaking. Also, while the seller's exit from a business segment can be a major indication that certain assets constitute an operating unit, it is not that only possible indication. The extent to which the assets are used to generate third party revenues is also an important factor and may determine that a group of assets comprises an operating unit, even though there may be disagreement as to whether the seller is actually exiting a business segment. For example, the sale of revenue generating assets at a specific location can be the sale of an operating unit even if the seller is continuing in that line of business at other locations.

Comment 11 also suggested that the operating unit should be defined as assets operated by the acquired person as a business undertaking including all similar products or services offered by the acquired person, or all operations in a geographic area. Interpretation of the terminology "similar products or services" could require a complicated analysis of the seller's products to determine whether the assets being sold were used to manufacture those products of the seller that were sufficiently different from the seller's other products to deem that an operating unit was being transferred. Thus, the suggested language was not adopted in order to avoid the necessity of such an analysis.

B. *New Goods.* Amended § 802.1(b) describes the type of acquisitions of goods that are most commonly referred to as acquisitions "in the ordinary course of business." This paragraph exempts acquisitions of new goods, which are typically routine sales of inventory by manufacturers, wholesalers or retailers conducted in the ordinary course of business.

Proposed § 802.1(b) exempted acquisitions of new goods "produced by the acquired person for sale, or * * * held by the acquired person solely for resale." The proposed rule did not exempt any acquisitions of goods from a seller that purchased or produced the goods for his own use but decided to sell the goods without using them. This language was eliminated from amended § 802.1(b) in order to simplify the rule. Further, the change addresses a concern raised by Comment 21 that the proposed rule would not exempt acquisitions of new equipment from companies that ordered the equipment for their own use but discovered before or upon delivery that they could not use the equipment. The Commission has concluded that such sales should be exempt because sales of new equipment that are not part of the sale of an operating unit are not likely to raise an antitrust concern, even though the equipment may have been purchased by the seller for use. As a result of the deletion of this language, the rule no longer focuses on the purpose for which the acquired person holds the new goods. The exemption is also available for acquisitions of goods that the seller in good faith considers to be new, even though he may have used the goods for demonstration purposes, customer trials or other purposes that are incidental to the sale of the goods. The term "new" implies that the goods have not been used to generate income.

Comments 9, 13 and 21 suggested that an exemption be included for acquisitions of new goods produced or held for lease. Amended § 802.1(b) adopts this suggestion by exempting acquisitions of new goods regardless of the purpose for which the goods were produced or acquired. As a result, an equipment leasing company that sells new inventory that it has been unable to lease may avail itself of the exemption as long as the inventory of new goods does not constitute an operating unit of the company.

The exemption set forth in paragraph (b) does not apply to any acquisition of new goods which are sold as part of a transaction that includes all or substantially all of the assets of an operating unit. This limitation on the exemption of new goods would apply even if all the assets transferred were new goods held solely for the purpose of resale. For example, if a marine supply wholesaler purchased the entire inventory of another marine supply wholesaler which owned only an extensive inventory of hundreds of items from different manufacturers, the acquisition would not be exempt, even though the sale is composed entirely of new goods. The sale of all of its inventory would be considered the sale of all or substantially all of its business since the primary assets of such a wholesaling business are inventory.

C. *Current Supplies*. Amended § 802.1(c) describes another category of asset acquisitions—the acquisition of "current supplies"—that qualifies for the ordinary course exemption. "Current supplies" is a new term to the rules and is described in subparagraphs (1), (2) and (3). Current supplies include goods bought solely for the purpose of resale or leasing to an entity not included within the acquiring person, raw materials, components, maintenance supplies and the like. Current supplies are generally purchased frequently and are used for inventory by the purchaser, consumed in the daily conduct of business or incorporated into a final product. Current supplies may also consist of used durable goods, discussed in new § 802.1(d), which, for example, may be purchased as inventory by equipment leasing companies or used equipment dealers. However, acquisitions of current supplies are not in the ordinary course of business if they are acquired as part of an acquisition of all or substantially all the assets of an operating unit.

In proposed § 802.1(c), the term "current supplies" explicitly excluded used durable goods. Amended § 802.1(c) now redefines "current supplies" to eliminate this exclusion, as suggested by Comments 9 and 21. Although "used durable goods" are addressed explicitly in § 802.1(d), the Commission recognizes that used assets, as well as new assets, may meet the definition of "current supplies" in § 802.1(c). Parties are permitted to claim the exemption even if the goods purchased are not new, so long as the acquired goods are to be held for third-party resale or lease, are to be consumed by the buyer, or are otherwise incorporated in the acquiring person's final product.

Amended § 802.1(c)(1) includes additional language to make clear that the exemption does not apply unless the goods being acquired will be resold or leased to an entity that is not within the acquiring person. The addition prevents a buyer from claiming the exemption for the acquisition from a competitor of used productive equipment which the buyer in turn resells or leases to a subsidiary.

The used durable goods provision, § 802.1(d), contains a provision exempting the acquisition of the category of goods described in proposed § 802.1(c)(1) as goods acquired for the purpose of resale or leasing. The language of amended § 802.1(c)(1) has been changed largely to mirror the language of the comparable provision in the used durable goods exemption, § 802.1(d)(1). Read together, the amended provisions exempt, with certain exceptions, acquisition of new goods and used durable and non-durable goods that are acquired and held solely for the purpose of resale or leasing to entities not within the acquiring person.

Amended § 802.1(c) also adds goods acquired for lease to the categories of assets comprising current supplies. These changes, also suggested in Comments 9 and 21, make the exemption available for inventory purchases of equipment by leasing companies.

The acquisition of current supplies is unlikely to create or extinguish a competitive entity and is therefore exempt unless acquired as part of an acquisition of an operating unit. In applying paragraph (c), the focus is on the business of the acquiring person to determine if the exemption is available.

D. *Used Durable Goods*. Amended § 802.1(d) provides that certain acquisitions of used durable goods qualify for the ordinary course of business exemption. The term "used durable good" is new to the rules currently in force. It is defined as a used good which was "designed to be used repeatedly and has a useful life greater than one year." The Commission recognizes that sales of used durable goods often meet a common sense definition of transfers of goods in the ordinary course of business and that some categories of used durable goods acquisitions lack competitive significance. Sales of such used durable goods may be routine and considered by parties to be in the ordinary course of their businesses. Sales of used durable goods may also facilitate the purchase of a new generation of equipment that will increase the productive capacity of a business.

Paragraph (d) represents an attempt to identify certain categories of transfers of used durable goods that meet a common sense definition of "ordinary course" and appear unlikely to violate the antitrust laws: (1) when the goods are being acquired and held solely for the purpose of resale or leasing to an entity not within the acquired person; (2) when the goods are being acquired from an acquired person holding the goods solely for resale or leasing to an entity not within the acquired person; (3) when the acquired person is replacing or upgrading the productive capacity provided by the goods being sold; and (4) when the acquired person is outsourcing the management and administrative support services provided by the goods being sold.

An acquisition of used durable goods is exempt as within the ordinary course of business if two requirements are satisfied. The first requirement is that they must not be acquired as part of an acquisition of an operating unit as defined in § 802.1(a). Thus, if the used durable goods constitute, or are being acquired as part of a group of assets that constitute, a business undertaking in a particular location or for particular products or services, the ordinary course exemption does not apply.

The second requirement for exempting an acquisition of a used durable good is that any one of four criteria set forth in the amended rule must be satisfied. The first criterion, that the goods must be acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person (*i.e.*, current supplies as the term is used in § 802.1(c)(1)), and the second, that the acquired person must have held the goods at all times solely for resale or leasing to an entity not within the acquired person, represent an exemption for dealers whose business is to purchase and sell used goods and for equipment leasing companies which buy used goods for leasing purposes. After considerable assessment of the necessity and applicability of § 802.1(d)(1) and (2), the Commission believes that the exemption should be included to allow dealers to make transfers within the ordinary course of their business, in good faith transactions conducted on their own behalf, without having to observe the reporting and waiting requirements. However, the Commission will closely monitor such transactions to ensure that the exemption is not being used as a ploy by two or more parties acting in concert to circumvent the notification requirements of the act.

Comment 9 recommended that proposed § 802.1(d)(1) and (2) apply even when the acquiring person is an intermediary, since dealers often search for used equipment at the request of the ultimate buyer. The Commission declines to adopt this recommendation, which would permit potentially anticompetitive transfers of used equipment to occur without a reporting requirement if the dealer brokers the transaction for the seller or the ultimate buyer. Thus, the exemption is unavailable if the person making the acquisition is in reality an intermediary for either the seller or another person who intends to hold the goods (see Example 6 to § 802.1). This limitation attempts to forestall abuse of the dealer exemption by requiring notification in circumstances where the dealer is acting as a broker or an agent for a purchaser or a seller. In these instances, the dealer generally does not take beneficial ownership of the goods and thus is not actually acquiring the goods. The true parties to the acquisition—the seller and the person that will have beneficial ownership of the goods as a result of the acquisition—should be subject to the notification requirements.

In proposed § 802.1(d), the first criterion, (d)(1), limited the exemption to purchases of goods acquired and held solely for resale, and the second criterion, (d)(2), exempted acquisitions of goods purchased from a seller who had acquired and held the goods solely for resale. Amended § 802.1(d) exempts acquisitions of goods acquired and held solely for the purpose of resale or leasing and acquisitions of goods from a seller who had acquired and held the goods solely for resale or leasing. The provision now exempts inventory purchases and sales by leasing companies of used durable goods that they have leased or held for lease to third parties, as long as the goods are not being purchased or sold as part of the transfer of an operating unit. Such transactions are within the ordinary course of business of leasing companies, which typically acquire goods for leasing and sell goods which they have held for leasing. The revisions address concerns raised in Comments 6, 11, 13, 16 and 21 about the inclusion in the used durable goods provisions of exemptions for sales and purchases of leased goods.

Amended § 802.1 (d)(1) and (d)(2) change the language of the proposals to clarify that the exemptions within these provisions are available only if (1) the buyer acquires the goods to resell or lease to an entity that is not within it, or (2) the buyer acquires goods that the seller has held only to resell or lease to entities not within it. As noted above, this change was also made to § 802.1(c)(1), one of the current supplies provisions.

In proposed and amended § 802.1(d)(2), the exemption applies only if the goods are acquired from an acquired person who held the goods *solely* for resale or leasing. The limitation that the goods be held *solely* for resale or lease is designed to guard against transfers by a seller who has used the goods to maintain a competitive presence and is now selling productive capacity.

The third criterion in § 802.1(d) recognizes that it is in the ordinary course of business for a company to replace or upgrade productive capacity and to sell the capacity it is replacing. Thus, an exemption is permitted for the sale of used durable goods if all or substantially all of the productive capacity of these goods is being replaced. Such replacements may result in an increase in the acquired person's productive capacity or manufacturing efficiencies. The exemption will not apply unless the acquired person has already replaced the capacity or taken definitive steps to replace the capacity of the goods being sold. In addition, these steps must have been taken in good faith; this requirement prevents sham contracts that the acquired person cancels after transferring the productive capacity without observing the notification requirements and without replacing the capacity.

Proposed § 802.1(d)(3) imposed no time limit between the replacement of the capacity and the sale of the capacity being replaced. However, a key factor in determining whether the goods being sold represent productive capacity that has been or will be replaced is whether the sale is sufficiently contemporaneous with the past or future purchase of replacement goods such that the goods being sold represent a bona fide sale of replaced capacity. To insure that the replacement of capacity is sufficiently contemporaneous, § 802.1(d)(3) has been modified to require either that the capacity has been replaced within the six months prior to the sale of the goods being replaced, or that a contract has been executed in good faith to replace the capacity within six months.

Proposed § 802.1(d)(3) allowed use of the exemption if the acquired person had executed either a contract, agreement in principle or letter of intent to replace the capacity of the goods being sold. The exemption now requires an executed contract for the purchase of the replacement equipment, since only the contract imposes a binding obligation on the seller to acquire the equipment to replace the capacity of the goods being sold.

Normally companies that intend to remain in a particular business do not sell capacity prior to replacing that capacity or making contractual arrangements to replace the capacity. If the replacement of capacity is not sufficiently proximate to the sale of the goods representing the capacity replaced, a firm could experience an absence from the market that would have a detrimental effect on its competitive position. The six-month windows will permit firms to integrate the new replacement equipment into its operations for a reasonable period of time before selling the used equipment. The six-month windows will also allow a company to operate without the replacement capacity but only for a brief period of time so as not to affect adversely its competitive presence in the market.

The rule allows replacement of the productive capacity of the used durable goods being sold by acquisition or by lease. No minimum lease term is specified; however, in order for an acquisition of the goods being replaced to be in the ordinary course of business, the replacement goods must be leased for a period that is substantially long enough to maintain or increase the company's productive capacity. Such a period is industry specific and must be determined in good faith by the acquired person. Because this provision requires that all or substantially all of the productive capacity be replaced, the exemption is lost if the replacement goods result or will result in more than a de minimis decrease in the acquired person's capacity or an exit from a line of business in which the acquired person currently operates.

The fourth criterion permits an exemption for sales of used durable goods if (1) the goods are used by the acquired person solely to provide management and administrative support services for the acquired person's business operations, and (2) the acquired person has in good faith executed a contract to outsource the management and administrative support services provided by the goods being sold. Management and administrative support services include services such as accounting, legal, purchasing, payroll, billing and repair and maintenance of the acquired person's own equipment. For example, a company that has equipment in-house to provide its administrative data processing needs may decide that it would be more cost effective to have a third party provide these services. To accomplish this objective, the company may enter into a contract with a third party for these services and sell all of the equipment it used internally to provide this function. Such transfers appear unlikely to pose any competitive concern.

Proposed § 802.1(d)(4) used the term "auxiliary functions" to describe the services provided by the goods being sold. That term has been changed in new § 802.1(d)(4) to "management and administrative support services." This term is more descriptive and conveys more clearly that these services support the business operations of the acquired person and are not integral to the person's business operations.

The rule does not define "management and administrative support services" but instead lists certain services that are included within that term and other services that are not included.

Although companies will sometimes outsource the manufacturing of some products they market, the sale of used durable goods that were used to manufacture those products does not qualify for exemption under this provision. Manufacturing, including the manufacturing of inputs for other products produced by the acquired person, is not a management and administrative support service within the meaning of this exemption. Thus, if a company decides to sell the equipment it had used to manufacture a product, even if it had entered into a contract for a third party to manufacture the product, the sale of that equipment is not exempt under § 802.1(d)(4). The loss of the company's control over the manufacturing of the product may raise competitive concerns warranting investigation by the enforcement agencies.

In the Statement of Basis and Purpose to the proposed rules, research and development, testing and warehousing were listed as auxiliary support functions. The Commission does not consider these activities to be management and administrative support services; they are integral to a company's product design, development, production and distribution and thus are tied directly to the competitive business activities of the company. In an analysis of a given industry, these activities may have a significant impact on issues involving innovation, entry and product distribution.

The exemption requires that the goods have been used "solely" to provide the acquired person with management and support services for its business operations. The transfer of goods that solely provide internal management and administrative support services does not constitute the acquisition of an operating unit. A company division that only provides management and administrative support services to the company's operating units is not itself an operating unit; it supports or benefits the company's operating units. For example, in a company containing a division that only provides the company's internal data processing needs, that division would be deemed to provide management and administrative support services. The limitation on the sale of an operating unit contained in § 802.1(a) would not exclude from the exemption under § 802.1(d)(4) the sale of all of the equipment from that division. However, if that division derived revenues from providing data processing services to third parties, then the unit would be considered to be an operating unit. Further, equipment used to derive third party revenues would not have been used *solely* to provide management and administrative support services for the business operations of the acquired person.

Proposed § 802.1(d)(4), like proposed § 802.1(d)(3), permitted the use of the exemption if the acquired person had a contract, agreement in principle or letter of intent to obtain the administrative and management support services provided by the goods being sold. New § 802.1(d)(4) requires that the acquired person execute in good faith a contract for the services to be outsourced. The contract gives rise to a binding obligation on the acquired person to outsource the services provided by the goods being sold.

Comment 14 suggested that a sale of goods pursuant to the decision to downsize or discontinue a management and administrative support service should also be included within the exemption. The recommendation was not adopted because the Commission does not have sufficient information and knowledge at this time to conclude that the elimination—as opposed to the outsourcing—of management and administrative support services in every business setting is unlikely to raise competitive concerns.

Comment 7 suggested that examples to § 802.1(d)(4) that distinguish between goods that perform a management and administrative support service and goods that are an integral part of operations that affect competition be changed to reflect a more objective standard, such as goods that generate third party revenues. This suggestion was not adopted because of the variation among industries of the factors that distinguish goods that perform management and administrative support services from goods that are integral to the business operations of the company. In a vertically integrated company, for example, equipment it used for componentry manufacture would not be considered goods that perform a management and administrative support service, even though the company derived no third party revenues from the sale of the components, but used the components in the manufacture of its final products. Example 12 illustrates a similar application of § 802.1(d)(4). Therefore, if a company has an internal operation that also derives third party revenues, that operation will not be considered a management and administrative support service; however, the fact that a company's internal operation does not derive third party revenues does not automatically make the operation a management and administrative support service.

Comments 10 and 27 recommended an exemption for transfers of used airplanes that do not qualify for the exemption in § 802.1(d)(3). Comment 27 presented statistics showing that there may be little correlation between used equipment sold by air carriers and new equipment that they purchase. The commenter stated that this absence of correlation would make the exemption in § 802.1(d)(3) unavailable for most potentially reportable sales of used aircraft. Comment 10 suggested an exemption for acquisitions of less than 15 percent of an air carrier's total productive capacity, while Comment 27 stated that exempt acquisitions of used aircraft and spare parts should be limited to less than 15 percent of an air carrier's total productive assets.

Although a specific exemption for acquisitions of used aircraft has not been added to the final rules, the recommendations and concerns raised by Comments 10 and 27 are still under consideration. In providing certain limited exemptions for transfers of used durable goods in this rulemaking, the Commission's primary concern is that the acquisitions that qualify for these exemptions are ordinary course of business transactions and do not constitute either significant downsizing or substantial transfers of productive capacity without replacement. The recommendations made by Comments 10 and 27 suggest a less restrictive exemption for sales of aircraft that would not require replacement and would permit limited downsizing. The Commission has no experience in implementing HSR exemptions based on the sale of a limited percentage of the acquired person's capacity or assets or a basis to conclude that such acquisitions do not pose competitive concerns. Moreover, an exemption based on the sale of capacity would present difficulties in determining the appropriate measure to use in applying the exemption. However, Comments 10 and 27 have raised issues that may be unique to the airline industry, and the Commission believes that further consideration is needed.

Other additions to § 802.1(d) that were suggested by commenters include a recommendation in Comment 3 to exempt purchases of goods for the purpose of demolition, disassembly and sale of usable parts (*e.g.*, an oil tanker being sold for scrap and parts) and goods that can no longer lawfully be used for the purpose for which they were used by the acquired person (*e.g.*, oil tankers no longer allowed to call on U.S. ports because of hull restrictions that are sold for other lawful uses). Specific provisions to address these types of transactions were not adopted. Most purchases of used equipment for scrap and parts should be exempt as an acquisition of current supplies under §§ 802.1(c)(1) and 802.1(d)(1). With regard to the second exemption suggested, the Commission does not have evidence to show that such transactions occur with sufficient frequency to warrant the addition of the exemption, and it is not confident that a clearly-bounded exemption could be created to cover a category of transactions not likely to violate the antitrust laws.

II. Section 802.2: Certain Acquisitions of Real Property Assets

New § 802.2 exempts eight categories of real property acquisitions from the reporting requirements of the act. These include acquisitions of new facilities, certain used facilities by the original lessee in a lease financing arrangement, unproductive real property, office and residential property, hotels and motels, recreational property, agricultural property, and rental retail space and warehouses.

This new rule creates new exemptions for several categories of real property acquisitions that the enforcement agencies, after extensive review, have concluded "are not likely to violate the antitrust laws." Section 7A(d)(2)(B) of the act. For the most part, the types of real property assets that are included within this exemption are abundant, and their holdings are widely dispersed. Transfers of these categories of real property are generally small relative to the total amount of holdings, and entry into regional and local markets for these types of real property assets is usually easy.

Previously, the Premerger Notification Office had interpreted section 7A(c)(1) of the act as exempting certain acquisitions of new facilities, undeveloped realty, office buildings and residential property as transfers of realty in the ordinary course of business. Although new § 802.2 is not based on section 7A(c)(1) of the act, certain acquisitions of realty exempted by this new exemption may also qualify for exemption as transfers of realty in the ordinary course of business. The primary difference between new § 802.2, that exempts the acquisition of certain types of realty, and amended § 802.1, that exempts the acquisition of goods and realty in the ordinary course of business, is that the former—because it is not based on the "ordinary course" concept—does not limit the exemption to acquisitions that are not acquisitions of operating units. In fact, several categories of realty exempted by new § 802.2, *e.g.*, hotels, motels and agricultural land, may qualify as operating units, but they are exempt under this provision.

The exemptions for new facilities, certain used facilities, unproductive real property, office and residential property, hotels and motels, certain recreational land, agricultural property, rental retail space and warehouses state that any non-exempt assets that are being transferred as part of an acquisition of the exempt assets are separately subject to the requirements of the act and the rules. This approach to non-exempt portions of acquisitions is also used in § 802.3. The Commission recognizes that this approach may result, as Comment 9 has pointed out, in "a more fragmented analysis * * * generating value allocation issues." However, the Commission believes that this inconvenience is offset by an approach that results in an expanded exemption for realty acquisitions.

A. *New Facilities.* New § 802.2(a) exempts the acquisition of new facilities, which may include real estate, equipment and assets incidental to the ownership of the new facility. The term "new facility" is new to the rules, and the Commission has concluded that acquisitions of new facilities are not likely to violate the antitrust laws. Although the provision is intended primarily to exempt "turnkey" facilities, *i.e.*, new facilities capable of commencing operations immediately with minimal additional capital investment, it does not require that the facility be ready for immediate occupancy. The facility may need additional construction or outfitting at the time it is purchased and still qualify for the exemption. However, if the facility requires a substantial amount of additional construction or outfitting, it may not be classified as a new facility but may qualify as unproductive real property as defined in new § 802.2(c).

The new exemption is unchanged from proposed § 802.2(a), and it applies only to new structures that have not produced income. It also applies only if the acquired person has held the facility at all times solely for sale. The language of the exemption allows the holder of the new facility to be either a builder of the facility ("constructed by the acquired person for sale") or other persons, such as a creditor, who take possession of a new facility with the intention of selling it ("held at all times by the acquired person solely for resale"). These limitations prevent the sale by an acquired person of capacity constructed for the acquired person's use, as Example 1 to § 802.2 illustrates.

New § 802.2(a) requires separate valuation of non-exempt assets being purchased in an acquisition of a new facility. If the value of the non-exempt assets exceeds $15 million, and no other exemptions apply, then the purchase of these non-exempt assets is separately subject to the notification requirements.

B. *Used facilities.* New § 802.2(b) exempts the acquisition of a used facility by a lessee that has had sole and continuous possession and use of the facility since it was first built, from a lessor that holds title to the facility for financing purposes in the ordinary course of its business. This provision was not contained in the proposed rules. It is being adopted in response to Comment 6.

New facilities are often acquired through lease financing arrangements. In a lease financing arrangement a creditor, in a bona fide credit transaction entered into in the ordinary course of its business, acquires a new facility and immediately leases it to a lessee that will have sole and continuous use and possession of the facility, usually under a long-term lease. The lessee generally has the option to purchase the facility from the lessor at or before the end of the lease term. Currently, there is no exemption for this acquisition even though the acquisition of the new facility may have been exempt under § 802.2(a) if the lessee had acquired the facility directly when it first began operation and had financed the purchase through an installment sales arrangement.

New § 802.2(b) will effectively treat the subsequent acquisition by the original lessee of a used facility that the lessee originally took possession of as a new facility through a lease financing arrangement the same as the direct purchase of a new facility through a more traditional credit arrangement. This new exemption also will effectively treat this category of acquisitions the same as an acquisition of a leased facility by a lessee subject to a sale/leaseback arrangement. In a sale/leaseback arrangement the owner of a facility sells the facility to a creditor that acquires it in a bona fide credit transaction in the ordinary course of its business. The creditor immediately leases the facility back to the owner, now lessee, under a long-term lease. The arrangement is often used as method of raising capital. Since the original owner/lessee held beneficial ownership of the facility prior to the sale/leaseback arrangement and the lessor typically receives only title and a security interest in the facility, the Premerger Notification Office generally has informally interpreted the rules to require no notification for the subsequent repurchase because the original owner/lessee did not relinquish beneficial ownership when it entered into the sale/leaseback arrangement.

C. *Unproductive real property.* New § 802.2(c) exempts acquisitions of unproductive real property. Subject to the limitations of § 802.2(c)(2), unproductive real property is real property, including raw land, structures or other improvements, associated production and exploration assets as defined in § 802.3(c), natural resources and assets incidental to the ownership of the real property, that has not produced revenues of more than $5 million during the 36 months preceding the transaction. Structures and improvements are additions to the real property that add value and include, for example, buildings and parking lots. Production machinery and equipment are not included in the definition of structures and improvements, and their acquisition must be analyzed separately to determine whether notification is required. Natural resources refers to any assets growing or appearing naturally on the land, such as timber and mineral deposits.

New § 802.2(c)(2) excludes from the exemption acquisitions of manufacturing and non-manufacturing facilities that have not yet begun operations as well as facilities that have been in operation at any time during the twelve months preceding the acquisition. The exclusion for manufacturing and non-manufacturing facilities that have not begun operations is narrow and applies to facilities that are held by a person who neither constructed the facility for sale nor held the facility at all times for resale. The acquisition of a new structure from a person who built the facility to sell or held it solely for resale is exempt under new § 802.2(a), the exemption for new facilities. The exclusion in § 802.2(c)(2)(i) is also intended to apply to "turnkey" facilities, *i.e.*, new facilities capable of commencing operations immediately with minimal additional capital investment; whether acquisition of a "turnkey" facility is exempt is determined under § 802.2(a). A new facility that is partially complete, is not ready to commence operation in the immediate future and requires substantial additional capital investment is not yet a manufacturing or non-manufacturing facility within the meaning of § 802.2(c)(2)(i). Such a facility may qualify as unproductive real property.

New § 802.2(c)(2)(iii) also excludes real property that is either adjacent to or used in conjunction with real property that does not qualify as unproductive real property and is part of the acquisition. This exclusion is intended to make § 802.2(c) unavailable for the acquisition of vacant land adjoining productive property, such as a factory, a poultry processing facility or a meat packing plant, which is also part of the acquisition. This exclusion was not in the proposed rule. Without this exclusion, it might have been argued that the acquisition of the vacant land should be exempt under § 802.2 if income has been derived only from the factory and not from activities taking place on the vacant land. However, this exemption is not permitted under § 802.2(c) because the vacant land, due to its adjacency to the factory, is considered to be part of the productive property that is being acquired. If the vacant land were not adjoining the factory but were used in connection with the factory operations, the § 802.2(c) exemption would still be unavailable for the acquisition of the vacant land because it was used in conjunction with the factory. Example 7 illustrates this exclusion from § 802.2(c).

The primary purpose of new § 802.2(c) is to eliminate filing requirements for acquisitions of formerly productive property, which is no longer used to generate revenues, and undeveloped, non-income producing property. New § 802.2(c) will exempt most wilderness and rural land that is not used commercially, and urban land that is vacant or contains facilities that have ceased operations more than twelve months prior to the acquisition and that have generated a minimal amount of income during the most recent three-year period.

"Associated production and exploration assets as defined in § 802.3(c)," was added to the definition of unproductive real property in response to Comments 15 and 24. This addition will include within the exemption for acquisitions of unproductive real property any machinery or equipment associated with a formerly productive coal mine or oil and gas reserve that has not been in operation for twelve months prior to the acquisition and has not generated revenues of more than $5 million during the thirty-six months prior to the acquisition.

New § 802.2(c)(2) incorporates a suggestion made by Comment 14 that the language of the proposed rule's exclusion for manufacturing and non-manufacturing facilities "that began operation within the twelve (12) months preceding the acquisition" be modified. Comment 14 pointed out that the proposed exemption excludes from the definition of unproductive real property facilities that began operation during the twelve-month period prior to the acquisition but includes operations that were commenced more than twelve months before the acquisition. One of the concepts underlying this exemption is to exclude from the reporting requirements formerly productive facilities, *i.e.*, facilities whose operations have ceased and are no longer being used to generate revenues. The exemption was not intended to apply to manufacturing and non-manufacturing operations begun more than twelve months prior to the acquisition and continuing to operate during the twelve-month period prior to the acquisition. The language suggested by Comment 14 excludes from the exemption manufacturing and non-manufacturing facilities that were in operation at any time during the twelve months preceding the acquisition. Because this language is more consistent with the "formerly used/abandoned facilities concept" underlying this exemption, the Commission has decided to adopt this suggestion in the final rule.

Comment 14 also suggested that language be added to § 802.2(c) that, for purposes of this provision, no revenues be deemed generated by any real property used solely to provide management and administrative support services (formerly "auxiliary support functions") for the business operations of the acquired person. The commenter expressed concern that while the acquisition of goods used by the seller to provide these support services would be exempt under § 802.1(d)(4), the acquisition of a facility used only to house equipment that provides these support services may not be exempt from the notification requirements. The

Commission agrees that if the acquisition of the equipment providing the management and administrative support service is exempt under § 802.1(d)(4), then the acquisition of a facility used solely to house the equipment should be exempt. However, in most cases this type of facility can be classified as office property, the acquisition of which is exempt under § 802.2(d).

D. *Office and residential property.* New § 802.2(d) exempts acquisitions of office and residential property. "Office or residential property" is defined as real property that is used primarily for office or residential purposes.

The rule specifies that in determining whether real property is used primarily for office or residential purposes, the total space being measured should consist of real property, the acquisition of which is not exempted by other provisions of the act or rules. Therefore, in making this determination, any portion of the building consisting of, for example, rental retail space, the acquisition of which is exempt under § 802.2(f), should be excluded.

The language of new § 802.2(d)(2) differs somewhat from the language in the proposed rule in order to make clearer the procedure for determining whether real property is used primarily for office and residential purposes. Although new § 802.2(d) does not specify the meaning of "primarily," it is contemplated that at least 75 percent of the space in the qualifying property is used for office or residential purposes. Example 8 applies this threshold to exempt the acquisition of a multi-use building.

If the acquisition includes assets other than office or residential property, the acquisition of those assets is separately subject to the notification requirements. For example, if the acquiring person is also purchasing a factory for $20 million, the acquisition of the factory is separately subject to the reporting requirements.

New § 802.2(d)(3) also specifies that if the purchaser is acquiring a business that is conducted on the office or residential property, the acquisition of the business, including the space in which the business is conducted, is separately subject to the notification requirements of the act. For example, if a company owns an office building in which it operates a department store and the purchaser of that building is acquiring not only the space that the store occupies but also the retail operations of the department store, the acquisition of the department store business as well as the space that the store occupies is subject to the notification requirements of the act. If the value of the business and the space in which the business is conducted exceeds $15 million, the acquisition of the department store business is reportable.

The inclusion of "assets incidental to the ownership of office and residential property" is derived from the language of existing § 802.1. Although incidental assets may have value apart from the real property, they are often necessary for the continued and uninterrupted use of the property. Therefore, incidental assets are included in the description in new § 802.2(d) of office and residential property and are exempt assets.

Comment 14 suggested that language be added to new § 802.2(d) to exempt structures that house equipment that provide management and administrative support services to the seller and owner of the structure. As mentioned above, the Commission believes that the common meaning of office space includes space used solely to provide management and administrative support services to the acquired person. For example, if an acquired person owns a building that primarily houses the computer equipment used to provide its administrative data processing needs, and the acquired person, in good faith, executed a contract for substantially the same services, the sale of the equipment would be exempt pursuant to § 802.1(d)(4). The sale of the building also would qualify for exemption as an acquisition of office property, since the building is not housing a "business" that is being transferred but office equipment that is being sold.

E. *Hotels and motels.* New § 802.2(e) exempts from the reporting requirements acquisitions of hotels and motels, and improvements to those facilities, such as golf, swimming, tennis, restaurant, health club or parking facilities (but excluding ski facilities), and assets incidental to the ownership of those facilities. The exemption, however, excludes the acquisition of a hotel or motel that includes a gambling casino.

The exemption is based on the Commission's review of past HSR notifications and observation that acquisitions of hotels and motels, except for those excluded from the exemption, are unlikely to violate the antitrust laws. Several commenters affirmed the Commission's understanding that these types of assets are plentiful and widely held, and often they are owned by investor groups that hire management firms or national chains to operate the facilities. Even in local markets entry appears to be relatively easy.

The proposed exemption for the acquisition of hotels and motels excluded hotels "acquired as part of the acquisition of a ski resort." This exclusion raised questions concerning the treatment of a ski resort containing a hotel versus a hotel that has ski facilities along with other recreational improvements. The wording of the new exemption excludes ski facilities from improvements included with a hotel or motel which may be acquired without observing the reporting requirements. As a result, in an acquisition of a hotel with ski facilities, the acquisition of the hotel is exempt, but the ski facilities must be valued separately to determine if their acquisition is subject to the notification requirements.

Ski facilities are not included within the exemption for acquisitions of hotels and motels because the Commission does not have a basis for concluding that the acquisition of a ski facility is not likely to violate the antitrust laws. In addition, ski facilities do not appear to be characterized by the same ease of entry as hotels generally. Gambling casinos are also excluded from the exemption because they involve services other than lodging, and their acquisition may affect competition in certain local markets. Also, certain areas may have licensing requirements for gambling casinos that serve as an impediment to entry.

Comments 9 and 14 suggested that the exemption for hotels and motels be expanded to included the acquisition of related improvements, such as golf courses, swimming and tennis facilities and restaurants. The Commission agrees that the inclusion of these improvements, as well as health clubs and parking facilities, does not raise antitrust concerns and, thus, has included such related improvements as qualifying for the exemption. The Commission also has added language exempting the acquisition of assets incidental to the ownership of the hotel or motel being acquired to make clear that all related permits and tangible personal property used directly in the operation of the facility are included within the exemption.

In the Statement of Basis and Purpose accompanying the proposed rule, the Commission made clear that "this exemption would include the acquisition by a national hotel chain of hotel assets of another hotel chain." The Statement of Basis and Purpose went on to say that "if the acquisition includes assets other than hotels and motels, *e.g.*, the selling firm's trademark or its hotel management business, these assets must be separately valued to determine whether their acquisition is subject to the notification requirements."

Comments 19, 26 and 29 suggested that the exemption for hotels and motels be expanded to included the acquisition of trademarks and hotel management businesses. These comments assert that hotel and motel assets are plentiful and that entry into the hotel/motel business is relatively easy, justifying a broader exemption to cover all hotel and motel asset acquisitions. The Commission has learned that acquisitions of hotel and motel assets typically include the transfer of the hotel management contracts in effect at the time of the acquisition as well as licenses to use the trademarks associated with the hotel or motel being acquired. Thus new § 802.2(e) explicitly includes these contracts and licenses among the list of assets incidental to the operation of the hotel or motel. However, the exemption does not include the acquisition of hotel management businesses or the purchase of a hotel trademark. Such acquisitions, even if made in connection with the purchase of a hotel or motel, are not considered to be transfers of incidental assets associated with a hotel or motel and are therefore separately subject to the requirements of the act.

F. *Recreational Land*. New § 802.2(f) exempts the acquisition of recreational land, which is defined as real property used primarily as golf, swimming, or tennis club facilities and assets incidental to the ownership of such property. If an acquisition includes any property or assets other than recreational land, the acquisition of these other assets is separately subject to the notification requirements.

This exemption was not originally included in proposed § 802.2 and is being added to the final rule in response to Comment 14 that suggested an exemption for certain types of recreational land. The Commission has received HSR filings for a very small number of acquisitions of recreational land, primarily golf courses. Based on this experience, the Commission believes that the acquisition of certain types of recreational land is not likely to violate the antitrust laws. This exemption is limited to the types of recreational realty the acquisition of which is exempt as improvements when acquired as part of a hotel or motel under § 802.2(e). Recreational land under § 802.2(f) does not include, for example, ski facilities, multi-purpose arenas, stadia, racetracks and amusement parks.

G. *Agricultural property*. New § 802.2(g) exempts acquisitions of agricultural property, assets incidental to the ownership of the property and associated assets integral to the agricultural business activities conducted on the property. Agricultural property that is covered by this exemption is real property that primarily derives revenues under Major Groups 01 and 02 of the 1987 Standard Industrial Classification (SIC) Manual. Associated assets integral to the agricultural business activities conducted on the property to be acquired include structures (e.g., barns used to house livestock), fertilizer, animal feed and inventory (*e.g.*, livestock, poultry, crops, fruits, vegetables, milk, and eggs). In an acquisition that includes assets that are covered by this exemption, the transfer of any other assets is separately subject to the notification requirements.

Associated agricultural assets do not include processing equipment or facilities. If a meat packing or poultry processing market is concentrated in a given local area, the transfer of in- house processing capacity may have a significant effect on the market. For this reason, the Commission believes that such transfers should be reviewed prior to consummation so the agencies can determine whether the proposed acquisition will affect competition adversely.

The proposed rule exempting acquisitions of agricultural property included within the definition of associated agricultural assets "equipment dedicated to the income-generating activities conducted on the real property." New § 802.2(g) omits this equipment from the definition of associated agricultural assets because in certain cases the equipment may be part of a processing facility, the acquisition of which is not exempt under § 802.2(g).

The final rule also changes the proposed rule by including a parenthetical reference to SIC Major Groups 01 and 02 in the definition of agricultural property. This inclusion is intended to make clear that acquisitions of agricultural land on which other activities involving farm products are conducted, *e.g.*, activities included within SIC Major Groups 20 (*e.g.*, meat packing plants, poultry slaughtering and processing, milk processing, and corn wet milling), 42 (farm product storage and warehousing) and 51 (buying and marketing of farm products) are not included within the exemption.

New § 802.2(g)(2), which has been added to the proposed rule, provides that "agricultural property does not include any real property and assets either adjacent to or used in conjunction with facilities that are not associated agricultural assets and that are included in the acquisition." This provision excludes from the exemption, for example, acquisitions of any real property and assets that are either adjacent to or used in conjunction with poultry or livestock slaughtering, processing or packing facilities that are also being acquired. Thus, if a meat packing plant is surrounded by vacant land that serves as a buffer zone for environmental purposes or as an area for grazing cattle in connection with the plant operations, and an acquiring person intends to purchase the plant and the surrounding property, the acquisition of the vacant land is not exempt either as an acquisition of agricultural land or an acquisition of unproductive real property [see discussion of § 802.2(c)(2)]. The vacant land is considered to be part of the business of the plant, and its acquisition, along with that of the plant, is subject to the reporting requirements.

H. *Rental retail space; warehouses*. New § 802.2(h) exempts acquisitions of two other categories of real property, rental retail space and warehouses. Rental retail space includes structures that house and are rented to retail establishments and include real property assets such as shopping centers, strip malls, and stand alone buildings. These types of assets are abundant and widely held by insurance companies, banks, other institutional investors and individual investors as investments and rental property. The Commission believes that acquisitions of these types of real property assets are unlikely to violate the antitrust laws.

However, the new rule provides that if the retail rental space or warehouses are to be acquired in an acquisition of a business conducted on the real property, the acquisition of the retail rental space or warehouses is not exempt. Thus, if an acquiring person is also acquiring a business that is conducted on the real property, the acquisition of that business, including the portion of the real property on which the business is conducted, is separately subject to the notification requirement of the act. For example, if a department store chain proposed to acquire from another department store chain several shopping centers and the department store business conducted by the seller in several stores located in these shopping centers, the acquisition of the seller's department store business and the portion of the shopping centers in which the stores are located would be subject to the notification requirements. The acquisition of the portion of the shopping centers that housed other retail establishments would be exempt under this rule. Similarly, as illustrated in Example 12, the exemption for the acquisition of warehouses is lost if warehouses are being acquired in connection with the acquisition of a wholesale distribution business.

The new rule also provides that if an acquisition of rental retail space or a warehouse includes other assets, those other assets are separately subject to the reporting requirements of the act. New § 802.2(h) differs from the proposed rule only in the addition to the exemption of assets incidental to the ownership of retail rental space or warehouses. Without this addition, it would be necessary to value separately any incidental assets associated with the ownership of the property, contrary to the treatment of real property assets included in other provisions of § 802.2.

III. Section 802.3: Acquisitions of Carbon-Based Mineral Reserves

New § 802.3 adds exemptions for certain acquisitions of carbon-based mineral reserves. Specifically, § 802.3(a) exempts the acquisition of reserves of oil, natural gas, shale and tar sands or the rights to such assets if the value of the reserves, the rights and associated exploration and production assets to be held as a result of the acquisition do not exceed $500 million. Similarly, § 802.3(b) exempts the acquisition of reserves of coal or rights to coal reserves if the value of the reserves, the rights and associated exploration and production assets to be held as a result of the acquisition do not exceed $200 million. Associated exploration and production assets are defined in new § 802.3(c) to mean, with certain specified exceptions, equipment, machinery, fixtures, and other assets that are integral and exclusive to current or future exploration or production activities associated with the carbon-based mineral reserves that are being acquired.

The Commission's studies of the coal and oil and gas industries have shown that the values of the reserves in these industries are substantial compared with asset holdings in other industries. The holdings of reserves in these industries are widely dispersed, and individual acquisitions have had minimal effect on concentration. However, the Commission believes that an unlimited exemption for reserves of coal and oil and gas is inappropriate, because acquisitions of carbon-based mineral reserves above the newly established thresholds may warrant an examination of their potential effects on competition.

New § 802.3 differs from proposed § 802.3 in that new § 802.3(a) expands the exemption for oil, natural gas, shale and tar sands by increasing the value of the reserves that will be held as a result of the acquisition that qualify for the exemption from $200 million to $500 million. This increase is based on statistical information provided by Comments 5 and 9 indicating that the ownership of oil and gas reserves in the United States and worldwide is relatively unconcentrated. Moreover, the acquisition of $500 million of crude oil reserves in the United States would amount to about 1/10 of 1 percent of domestic oil reserves. Such an acquisition, if made by the leading commercial owner of domestic reserves, would result in an increase in the HHI of about 2 points in an unconcentrated market. The Commission has concluded that acquisitions of oil and gas reserves valued at $500 million or less are unlikely to violate the antitrust laws. However, the $200 million threshold for transactions involving coal reserves was retained from proposed § 802.3. The Commission does not have sufficient information to support a higher threshold for coal reserves acquisitions. Also, because acquisitions of coal reserves may tend to affect local or regional markets, a higher threshold may exempt transactions that should be reviewed for their impact on such markets.

Sections 802.3(a) and 802.3(b) primarily are designed to exempt acquisitions of producing reserves, but also may exempt some acquisitions of non-producing reserves that may also be exempt as unproductive real property under § 802.2(c). Because the exemption is not based on the "ordinary course" concept, the exemptions also apply if the reserves and associated assets being transferred constitute all or substantially all of the assets of an operating unit. If the reserves being acquired are not yet producing, the acquisition also is likely to be exempt under § 802.2(c) as an acquisition of unproductive real property. For formerly producing reserves that have not been in production during the twelve months preceding the acquisition and have not generated revenues in excess of $5 million during the 36 months preceding the acquisition, their acquisition would qualify as unproductive real property. If the reserves qualify as unproductive property, their acquisition is exempt, regardless of the value of the reserves. Currently producing reserves are governed by the valuation requirements of § 802.3. Example 1, which involves an acquisition consisting of non-producing gas reserves, producing oil reserves and assets associated with the producing reserves, illustrates the application of § 802.2(c) and § 802.3 to the separate components of the acquisition.

The $500 million threshold in § 802.3(a) and the $200 million threshold in § 802.3(b) apply to reserves, rights to the reserves and associated exploration or production assets. The acquisition of these associated assets is not separately reportable because these assets generally have no competitive significance separate from the reserves. In many instances, producing reserves contain dedicated equipment that may have a market value exceeding $15 million but have no practical value absent the reserves. In addition, the wide availability of used equipment in the oil and gas and coal industries makes it unlikely that a servicer of oil fields or coal mines could purchase reserves to restrict supply of available equipment in a given region. Thus, the Commission believes that the inclusion of associated exploration and production assets is necessary to facilitate meaningful application of the exemption.

Associated exploration or production assets are defined in § 802.3(c) to include equipment, machinery, fixtures and other assets that are integral to the exploration or production activities of the reserves. Such assets do not include any intellectual property rights that may be transferred with the reserves. In the oil and gas industry, examples of associated exploration or production assets include proprietary or licensed geological and geophysical data, wells, pumps, compressors, easements, permits and rights of way.

As in the oil and gas industry, exploration or production assets associated with coal reserves may include proprietary or licensed geological and geophysical data, easements, permits and rights of way. In surface mining in the western U.S., associated production assets may consist of various load out facilities, including storage barns and silos, dryer barns and railroad spurs, and heavy equipment such as draglines and crushers. Such assets would also include the long-term coal contracts and federal leases related to the reserves.

New § 802.3 also changes the categories of assets that are excluded from the definition of associated production or exploration assets as it relates to oil and natural gas reserves. Proposed § 802.3 excluded from associated production or exploration assets all flow and gathering pipelines, distribution pipelines, interests in pipelines, processing facilities and refineries, because acquisitions of these assets in certain local markets have, from time to time, raised competitive concerns prompting investigations by the enforcement agencies. However, Comments 3, 5, 9 and 24 recommended including in the definition of associated exploration or production assets pipeline systems and field treating facilities that serve a particular producing property and have no competitive significance apart from the oil and natural gas reserves being acquired. The Commission has concluded that acquisitions of these systems and facilities in connection with the reserves to which they are dedicated are unlikely to violate the antitrust laws because they do not have the potential for competing in the provision of services to third parties. Therefore, the definition of associated exploration or production assets now clearly delineates dedicated facilities from facilities serving third parties by excluding "any pipeline and pipeline system or processing facility which transports or processes oil and gas after it passes through the meters of a producing field; and any pipeline or pipeline system that receives gas directly from gas wells for transportation to a natural gas processing facility or other destination."

Comments 17, 18 and 30 proposed an exemption for acquisitions of timberland, noting that the raw material supply and manufacturing resources in the forestry industry are abundant, and ownership of timberland is fragmented. However; because there has been enforcement interest in a number of transactions involving timberland in the western United States, the Commission declined to include an exemption for acquisitions of timberland to insure that the enforcement agencies continue to receive notification of those acquisitions of timberland that may present competitive concerns.

Comment 9 noted that the enforcement agencies, as they obtain additional experience and information about other natural resources, will perhaps identify ways of expanding § 802.3 to include other types of producing reserves without posing undue risk to competition. For non-producing reserves of other minerals and renewable natural resources, § 802.2(c) will exempt acquisitions of these reserves if they qualify as unproductive real property. Regarding producing reserves, the Commission has not included these in § 802.3 at this time because it does not have an adequate factual basis for determining that acquisitions of other types of mineral reserves and renewable natural resources should be exempt from the requirements of the act or subject to a reporting level higher than the statutory $15 million threshold. However, the Commission will continue to collect information about other minerals and renewable natural resources and determine at a later date if expansion of § 802.3 to include acquisition of reserves of these resources is warranted.

IV. Section 802.4: Acquisitions of Voting Securities of Issuers Holding Certain Assets the Direct Acquisition of Which Is Exempt

New § 802.4 exempts the acquisition of voting securities of issuers that hold certain assets the direct acquisition of which is exempt under the act or the rules. New § 802.4(a) exempts the acquisition of voting securities of an issuer whose assets, together with those of all entities controlled by the issuer, consist of assets whose direct purchase is exempt from the notification requirements pursuant to section 7A(c)(2) of the act or §§ 802.2, 802.3 and 802.5 of the rules. New § 802.4(b) defines "issuer" as used in § 802.4 to mean a single issuer, or two or more issuers controlled by the same person. The exemptions provided by new § 802.4 are available so long as the acquired issuer or issuers do not in the aggregate hold exempt assets that exceed the threshold limitations of the cited rules and non-exempt assets with a fair market value of more than $15 million. New § 802.4(c) states that fair market value as determined in accordance with § 801.10 (c)(3) of the rules is the standard to apply in determining the value of assets held by an issuer whose voting securities are being acquired pursuant to § 802.4. New § 802.4 applies to acquisitions resulting in the holding of a minority interest as well as a controlling interest in the acquired issuer's outstanding voting securities.

Section 802.4 derives in part from original § 802.1(a) which exempted "an acquisition of the voting securities of an entity whose assets consist solely of real property" and related assets, if a direct acquisition of that real property and those related assets would be exempt. The rationale for original § 802.1(a) and new § 802.4 is that the applicability of an exemption should not depend on the form of the acquisition. The antitrust analysis would seem to be the same whether assets or voting securities are acquired. *See* Statement of Basis and Purpose to § 802.1(a), 43 FR 33488 (July 31, 1978).

Proposed § 802.4(a) extended this approach by exempting acquisitions of voting securities of issuers whose assets consist solely of assets exempt under proposed § 802.2: new facilities, unproductive real property, office and residential property, hotels and motels, agricultural property, rental retail space and warehouses. Proposed § 802.4(b) contained a comparable exemption for issuers whose assets consist solely of carbon-based mineral reserves exempt under proposed § 802.3.

New § 802.4 differs in five respects from the proposal. First, new paragraph (a) no longer requires that the issuer whose voting securities are being acquired hold *solely* exempt assets. New § 802.4(a) provides that the issuer also may hold up to $15 million of non-exempt assets in addition to the exempt assets. Second, proposed paragraph (b) has been merged into new paragraph (a). In the proposed exemption, the aggregation principles of § 801.15(b) applied only to § 802.4(b), while § 801.15(a) applied to § 802.4(a). Because of the new provision that an issuer whose voting securities are being acquired pursuant to § 802.4 also may hold up to $15 million of non-exempt assets, § 801.15(b) applies to all transactions under § 802.4. New § 802.4(a) now describes all classes of acquisitions that are exempt pursuant to § 802.4.

Third, new § 802.4(a) has been expanded and now provides an exemption for voting securities acquisitions of issuers that hold assets the direct acquisition of which are exempt pursuant to section 7A(c)(2) of the act and § 802.5 of the rules. Fourth, new § 802.4(b) has been added to the rule to make clear that the term "issuer" as used in § 802.4(a) means a single issuer or two or more issuers controlled by the same person. Lastly, new § 802.4(c) has been added to make clear that the value of assets held by an issuer whose voting securities are being acquired pursuant to § 802.4 is the fair market value determined in accordance with § 801.10(c)(3) of the rules.

The first change responds to Comments 2, 5 and 9, which noted that the requirement in proposed § 802.4 that the acquired issuer could hold solely assets exempt under §§ 802.2 and 802.3 was very limiting and caused the proposed exemption to fall short of the goal of treating voting securities acquisitions the same as asset purchases. Proposed §§ 802.2 and 802.3 provided an exemption for asset acquisitions involving the purchase of certain types of realty and carbon-based mineral reserves and required that the acquisition of any non-exempt assets be separately analyzed to determine whether notification was required prior to their purchase. Thus, under proposed §§ 802.2 and 802.3, a person could acquire certain exempt assets and non-exempt assets valued at $15 million or less and would not be required to file. However, in contrast, the requirement in proposed § 802.4 that the acquired issuer hold solely exempt assets precluded the exemption if the issuer held any assets not exempt under §§ 802.2 and 802.3.

The Commission agrees that this limitation seemed to undercut the rationale underlying § 802.4 to reduce the extent to which the form of the transaction affects the requirement to file notification. For this reason, as noted previously, the Commission has modified proposed § 802.4 to exempt acquisitions of issuers that hold assets exempt under section 7A(c)(2) of the act and new §§ 802.2, 802.3, and 802.5, and non-exempt assets with a fair market value of $15 million or less.

Comment 2 also suggested that proposed § 802.4 be amended to exempt acquisitions of voting securities of issuers that hold "incidental assets," *i.e.*, assets incidental to the ownership of the exempt assets, in addition to the assets that are exempt pursuant to proposed §§ 802.2 and 802.3. The commenter pointed out that since incidental assets were not included in every provision of the proposed rules as exempt assets, the ownership of incidental assets by an acquired issuer would limit the application of § 802.4. As noted previously, the Commission has modified the language of proposed § 802.4 to include within the exemption acquisitions of voting securities of issuers holding assets exempt under the cited rules and non-exempt assets with a fair market value of $15 million or less. The Commission also has included within the various subsections of §§ 802.2 and 802.3 language that will include within the exemptions, assets incidental to the ownership of the exempt assets. The Commission believes that since the ownership of incidental assets has little effect on competition, the value of incidental assets should not be included in the determination of whether the acquired issuer holds non-exempt assets with a fair market value exceeding $15 million. The Commission believes that these modifications adequately address the concerns raised by this comment.

The second change was made because the provisions of § 801.15(b) that address aggregation of previous acquisitions now govern all voting securities acquisitions of issuers holding assets exempt under the sections included within new § 802.4(a). Proposed § 802.4(a) contained exemptions that did not require aggregation because the exemptions were not based on the holding of assets valued at less than a set threshold amount. For instance, the exemption for certain types of realty provided in § 802.2 is applicable regardless of the value of the exempt assets to be acquired. However, since new § 802.4(a) has eliminated the restriction that an issuer whose voting securities are to be acquired hold solely exempt assets and now permits the acquired issuer to hold non-exempt assets valued at $15 million or less, the principles of § 801.15(b) apply, and aggregation is required to determine whether this limitation will be exceeded.

The third change from the proposed rules reflects a suggestion by Comment 9 that section 7A(c)(2) of the act be included within § 802.4. Section 7A(c)(2) exempts acquisitions of "bonds, mortgages, deeds of trust, and other obligations which are not voting securities." The Commission agrees that the acquisition of these types of assets are of little antitrust concern, whether acquired in the form of an asset or voting securities acquisition, and has added section 7A(c)(2) of the act to new § 802.4(a).

Similarly, an exemption for acquisitions of voting securities of issuers holding assets the direct acquisition of which would be exempt under § 802.5 is now included in § 802.4(a) as a result of revisions to § 802.5 (see discussion, below). Because proposed § 802.5 included a limitation on the type of purchaser that qualified for the exemption, comparable voting securities acquisitions could not be included within § 802.4 and thus were exempted within proposed § 802.5. New § 802.5 has been revised to remove the limitation, and the exemption for the equivalent voting securities acquisition has been moved to § 802.4. Therefore, acquisitions of the voting securities of issuers holding investment rental property plus non-exempt assets valued at $15 million or less will be exempt pursuant to § 802.4(a).

The addition of § 802.4(b) stems from the rationale underlying this exemption that voting securities acquisitions and asset purchases be treated similarly for purposes of § 802.4. The first step toward achieving similar treatment was to modify proposed §§ 802.4(a) and (b) to include within the exemption the acquisition of issuers that hold exempt assets and non-exempt assets valued at $15 million or less. The Commission believes that, in addition to this modification, purchasers should be required to aggregate acquisitions of voting securities of different issuers controlled by the same acquired person. Otherwise, the form of the transaction will affect the notification requirement. For this reason, new § 802.4(b) defines issuer, for purposes of § 802.4, to mean a single issuer or multiple issuers controlled by the same acquired person. Thus, when the voting securities of more than one issuer controlled by the same person are being acquired, aggregation of the non-exempt assets held by these issuers and aggregation of the carbon-based mineral reserves for which there are threshold limitations is required. For example, if "A" proposed to acquire the voting securities of three subsidiaries of "B" and each subsidiary held $200 million of oil and gas reserves, the acquisition would not be exempt under § 802.4(a) because the acquired issuers hold in the aggregate $600 million of oil and gas reserves. If the acquisition were structured as an asset acquisition with "A" purchasing the oil and gas reserves held by "B's" three subsidiaries, the acquisition would not qualify for exemption under new § 802.3(a) since the value of the reserves to be acquired exceeds $500 million.

Similarly, if "A" proposed to acquire the voting securities of three of "B's" subsidiaries and each held, respectively, (1) two hotels and $10 million of non-exempt assets, (2) two hotels and $7 million of non-exempt assets and (3) three hotels and $3 million of non-exempt assets, "A" would be required to aggregate the value of the non-exempt assets to determine whether the acquired issuers hold in the aggregate non-exempt assets exceeding $15 million in value. Since the value of the non-exempt assets exceeds $15 million, "A's" proposed acquisition would not be exempt under § 802.4(a). If the acquisition were structured as an asset acquisition with "A" purchasing the hotels and the non-exempt assets directly, "A's" acquisition of the hotels would be exempt under § 802.2(e) but "A" would be required to file notification for the acquisition of the non-exempt assets. The Commission recognizes that in this situation the holdings of non-exempt assets exceeding $15 million in the voting securities acquisition negated the availability of the exemption for the entire acquisition, whereas in the asset acquisition filing would be required only for the acquisition of the non-exempt assets. However, since voting securities acquisitions are by their nature different than asset acquisitions because voting securities represent an interest in the undivided totality of the underlying assets, this difference in outcome is unavoidable but reasonable.

New § 802.4(c) has been added to make clear that the value of the exempt and non-exempt assets held by the issuer is fair market value determined in accordance with § 801.10(c)(3). The Commission recognizes that this requirement may be difficult to meet when the acquisition is hostile or the acquiring person proposes to acquire a minority interest through the acquisition of voting securities from third party holders, *e.g.*, open market purchases. However, § 801.10(c)(3) requires that the acquiring person make a good faith determination of the fair market value of the assets of the issuer whose voting securities are to be acquired. The acquired person cannot rely on the absence of data to make a good faith determination that the fair market value of the assets held by the acquired issuer(s) does not exceed threshold limitations.

The modifications that have been made to proposed § 802.3, providing different thresholds for oil and gas reserves and coal reserves, and proposed § 802.4, expanding the exemption to include issuers holding non-exempt assets with a fair market value of $15 million or less, complicate the application of the rules requiring aggregation of acquisitions of voting securities of different issuers controlled by the same acquired person. The previous discussion addressed the issue of aggregation when the voting securities of different issuers are acquired in the same transaction. The following discussion addresses some of the intricacies of aggregation involving subsequent acquisitions from the same acquired person of voting securities of the same issuer (and of different issuers) holding assets exempt under §§ 802.2, 802.3 and 802.5 and section 7A(c)(2) of the act.

To address the issue of aggregation involving subsequent acquisitions from the same issuer of voting securities governed by the exemptions provided by § 802.4, § 801.15(b) has been revised to include §§ 802.3 and 802.4. Section 801.15(b) provides that voting securities, the acquisition of which was exempt under certain identified exemptions, are not held as a result of an acquisition unless in a subsequent acquisition the limitations contained in those specified exemptions are exceeded. For example, "A" acquires for $40 million, in an exempt transaction, 20 percent of the voting stock of B, which holds petroleum reserves valued at $300 million and subsequently plans to acquire an additional five percent of the B's voting securities for $10 million. "A" would be required to determine whether its subsequent acquisition of B's stock qualifies for the exemption under § 802.4(a). If B's holdings of oil and gas reserves have increased and the value of its reserves exceeds $500 million, "A's" subsequent acquisition of B's stock would not be exempt under § 802.4(a). Under § 801.15(b), "A" is considered to hold 20 percent of the voting stock of B, and "A's" subsequent acquisition is not exempt under § 802.4(a).

Another situation in which aggregation is required under § 801.15(b) involves an acquisition of a minority interest in the voting securities of an issuer exempt under § 802.4(a) followed by a subsequent acquisition of either a minority or a controlling interest in the voting securities of another issuer included within the same acquired person. For example, assume that "A" acquired 30 percent of the voting securities of C, an issuer controlled by "B," for $40 million and that the acquisition was exempt under § 802.4(a) because C held oil and gas assets valued at $300 million and non-exempt assets valued at $7 million. Six months later, "A" proposes to acquire from "B" all (or a minority) of the voting securities of D and E, issuers controlled by "B," for $20 million each. D has oil and gas reserves valued at $150 million and non-exempt assets valued at $2 million, and E has oil and gas reserves valued at $150 million and non-exempt assets valued at $2 million. Under § 801.15(b), "A" is required to aggregate its current proposed acquisitions of D and E with its previous exempt acquisition of C's voting securities to determine whether the limitations set forth in § 802.4(a) will be exceeded as a result of the subsequent acquisition. In this situation, since the value of the oil and gas reserves held by the C, D, and E exceed $500 million, the acquisition of the voting securities of D and E is not exempt under § 802.4(a).

Aggregation is not required in a subsequent acquisition of voting stock of an issuer included within the same acquired person if the acquiring person acquired control of that issuer in an earlier transaction, *i.e.*, holds 50 percent or more of the issuer's outstanding voting securities. In such case, the issuer is now included within the acquiring person, and the aggregation requirements of § 801.13(a) do not apply since control has passed to the acquiring person. (In a situation in which the acquiring person acquires exactly 50 percent of an issuer's voting stock and the acquired person has retained 50 percent, the Premerger Notification Office has long treated the issuer as within the acquiring person alone in applying the aggregation requirements of §§ 801.13 and 801.14 for subsequent voting stock and asset purchases from the same acquired person.) Therefore, if an acquiring person has acquired 50 percent or more of the voting stock of an issuer and proposes to acquire additional voting stock from the same issuer or another issuer controlled by the same acquired person, the acquiring person is not required to aggregate the assets of the issuer in the first acquisition with assets of the issuer in the second acquisition to determine if any limitations have been exceeded.

Section 802.4 contains three examples that illustrate the application of the rule, including an example involving simultaneous acquisitions. Examples illustrating the aggregation principles of § 802.4 in sequential transactions are included in the examples to § 801.15. Section 802.4 represents the Commission's first major effort to accord the same treatment to asset acquisitions and comparable voting securities acquisitions. The aggregation principles, though necessary, complicate the application of the exemption. If the complexity of the aggregation principles makes applying the § 802.4 exemption overly burdensome for parties, the Commission will review the provision to determine if any changes to the exemption are necessary.

Proposed Section 802.5: Acquisitions of Investment Rental Property Assets

Section 802.5 exempts acquisitions of investment rental property assets. It is intended to exempt certain acquisitions of real property that are not exempt under new § 802.2. The exemption applies only to acquisitions of real property assets that will be held by the acquiring person solely for rental or investment purposes and that will be rented only to entities not included within the purchaser (except for the sole purpose of maintaining, managing or supervising the operation of the investment rental property assets). Thus, the intent of the purchaser at the time of the acquisition must be considered to determine whether the exemption is available. Although the application of new § 802.5, unlike proposed § 802.5, is no longer limited to certain types of acquiring persons such as institutional investors, the Commission believes that this provision will exempt most real property acquisitions typically made by institutional investors, real estate investment trusts ("REITs"), or real estate development and management companies that are not exempted by new § 802.2.

New § 802.5 is designed to supplement new § 802.2 by recognizing that there may be additional categories of real property assets, such as industrial parks and multi-purpose sports and entertainment facilities, that,