

801.2(f)
802.4

Verne, B. Michael

From: [REDACTED]
Sent: Friday, July 08, 2005 4:51 PM
To: Verne, B. Michael
Subject: Sale of Interests in Partnership or LLC - HSR Analysis

Mike,

I am writing just to confirm a conversation that you and I had about a month ago regarding the non-reportability of a transaction involving the sale of an interest in a power project. I apologize for the long delay, but I was only asked this week to try to memorialize our conversation for the benefit of the Buyer's counsel in this transaction. Obviously, if you require additional facts or would like to discuss the matter further before responding, please do not hesitate to call me.

Basically, the facts we discussed were as follows: Company A, a Delaware LLC, owns a 40% limited partnership interest in Company B, a Delaware Limited Partnership that owns and operates a cogeneration project. Buyer wishes to purchase Company A's interest. Company A has no other holdings or assets other than its interest in Company B, and the other 60% ownership of Company B will remain the same.

The parties are discussing two alternative structures for the transaction. In structure #1 (which we called the "LP Sale" in our discussion), Buyer would acquire the 40% LP interest directly from Company A. In structure #2 (which we called the "Upstream Sale"), Buyer would instead acquire 100% of the LLC interests in Company A from Company A's two owners, which own 15% and 85% interests, respectively. As we discussed, we have concluded that neither structure would require HSR reporting under the new rules.

First, the LP Sale would not be reportable because Buyer would not be acquiring a "controlling" interest in an unincorporated entity under Rule 801.2(f)(1). Company A's 40% interest in Company B basically corresponds to a 40% economic interest (ie, right to profits and right to assets in event of dissolution).

Second, the Upstream Sale would not be reportable, even though it would constitute the sale of 100% of the LLC interests, because of the Rule 802.4 exemption. As you explained, Rule 802.4 has now been broadened to cover any acquisition of non-corporate interests where the unincorporated entity, together with all entities it controls, does not hold non-exempt assets with an aggregate FMV of more than \$50 million (as adjusted). The PNO staff takes the position that the non-reportable 40% LP interest would not count toward this size-of-transaction limit in 802.4, and thus if Company A has no other holdings or assets, the Upstream Sale would qualify for that exemption.

I would appreciate your confirming that this analysis is correct. If you have any other questions, please let me know. Thanks very much for your assistance and guidance.

Sincerely,

[REDACTED]

AGREE-
B. Michael
7/8/05