802.2

Verne, B. Michael

From: [redacted]
Sent: Wednesday, November 18, 2009 11:55 AM
To: Verne, B. Michael
Subject: HSR Question-New Facilities Exemption

Mike, hope all is well with you. The purpose of this email is to request your advice concerning an HSR issue relating to the application of the new facilities exemption in 16 C.F.R. 802.2(a). The facts are as described below:

Factual Circumstances

A is a company that is in the business of operating refineries and controls the general partner of a master limited partnership (the "MLP") which is in the business of operating pipelines. At the present time, A does not "control" B for purposes of the HSR regulations although it has in the past and may again in the future depending on various factors relating to the outstanding units of the MLP and its balance sheet.

From time to time A builds pipelines for the purpose of resale. The MLP has a right of first refusal with respect to such assets.

A has engaged in two "drop down" transactions with the MLP in recent months and is now considering two other transactions, all of which caused us to look at the aggregation rules under 16 C.F.R. 801.13. For reasons I won't go into here, it is quite possible that no aggregation would be required of all four of the transaction, but the more straightforward course of analysis appears to be to determine whether three of the four transactions , each involving newly built pipelines, would fall under the new facilities exemption.

In Transaction 1, A sold the MLP a new pipeline. This pipeline was built for the purpose of sale. When the MLP bought it, it was "operational" but A was simply using half of it for storage and half of it to ship some refinery crude oil supply. However, the pipeline had generated no revenues (A not charging itself). At the time of the MLP's purchase, no third party had shipped product on it.

Transactions 2 and 3 are to be consummated shortly, with the MLP buying two additional pipelines built by A for sale. The facts are the same as in Transaction 1. A is currently using both the pipelines for storage until the sale. A has shipped some of its crude oil on one of them. Neither pipeline has generated revenues. No third party has shipped product on either of them.

HSR Analysis

The three pipelines in question are new facilities that have not produced income and which were built by A for the purpose of sale. Because of these facts and the fact that no third party had or will have obtained transport of product through the pipelines at the time of the MLP's purchase, FTC informal interpretation 0511021 indicates that the three transactions all fall within the new facilities exemption, with the result that there is no aggregation issue under 16 C.F.R. 801.13 with respect to the three transactions.

Could you please advise if you agree with the above analysis?

Thank you for your assistance.

Agree
11/18/09

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