

Ferkingstad, James H.

802.2(e)

From: [REDACTED]
 Sent: Tuesday, January 12, 2010 1:06 PM
 To: Ferkingstad, James H.
 Subject: Bankruptcy Auction of Unfinished Hotel and Casino Property

Unproductive RE
 Not reportable
 1/12/10 JMF
 MW agrees

Dear James:

As a follow up to our call yesterday, I am writing to confirm your advice that the asset acquisitions described below will be exempt from the reporting and waiting period requirements of the HSR Act.

Our client, Company A, will participate in a bankruptcy auction to purchase substantially all of the assets and assume certain liabilities of certain bankruptcy debtors (together the "Sellers"). Sellers filed in U.S. bankruptcy court last year and maintain debtor-in-possession status at this time. The relevant assets being acquired include an unfinished casino hotel resort, including related assets such as swimming, restaurant, and health club facilities, as well as convention, entertainment, and retail rental space. At the time of the bankruptcy filing, the property was approximately 70% completed and will require significant capital investment before it will begin producing revenues. The asset acquisition will be made pursuant to one or more Sale Orders under Chapter 11 of the Bankruptcy Code.

We believe the following exemptions apply:

1. Unproductive real property. HSR Rule § 802.2(c) exempts unproductive real property, which includes raw land, structures or other improvements (excluding production machinery and equipment), and assets incidental to the ownership of the real property, that have not generated total revenues in excess of \$5 million during the thirty-six month period preceding the acquisition. Although this exemption does not apply to manufacturing and nonmanufacturing facilities that have not yet begun operations, the HSR rules explain that unfinished facilities that will require "significant capital investment" remain exempt. See 16 C.F.R. 802.2, Example 6. Assuming the assets to be acquired as described above did not produce in excess of \$5 million during the 36 month period preceding the sale and significant capital must be invested in the project before it will begin producing income, it is our understanding that the transaction will be subject to the exemption for unproductive real property.

2. Hotels and motels. HSR Rule § 802.2(e) exempts the acquisitions of hotels and motels except when they are acquired in connection with a casino or ski resort. This exemption also applies to the transfer of associated improvements such as golf, swimming, tennis, restaurant, health club or parking facilities, and assets incidental to the ownership and operation of the hotel or motel including prepaid taxes or insurance, management contracts and licenses to use trademarks associated with the hotel. During our call, you advised that the "casino" exception to this exemption does not apply where the assets include an unfinished hotel and associated casino that has yet to be licensed. Because the unfinished casino at the subject hotel is not yet licensed and there is no guaranty that a license will be issued, the hotel property and improvements remain subject to this exemption.

3. Retail Rental Space. Acquisitions of retail rental space and assets incidental to the ownership of retail rental space are exempt from the reporting requirements of HSR under Rule 802.2(h), except when such assets are acquired as part of an acquisition of a business conducted on the real property. Here, the resort property includes substantial retail rental space, which will be rented to retail establishments once the project is completed. Accordingly, the transfer of the retail rental space is also exempt.

Based on the foregoing, I would ask that you please confirm that the acquisitions described above are not subject to the Act's requirements. Your assistance is appreciated.