

Sheinberg, Samuel I.

From: HSRHelp
Sent: Tuesday, November 14, 2023 12:58 PM
To: Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle; Burton, June
Subject: FW: HSR Question re: Foreign Exemption

From: Walsh, Kathryn E. <kwalsh@ftc.gov>
Sent: Tuesday, November 14, 2023 12:58:15 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: FW: HSR Question re: Foreign Exemption

CONTROLLED

While we agree that these do not appear to be sales in or into the US, you have all the facts and will need to make the final call on the analysis (and be prepared to defend it should the agency investigate).

From: [REDACTED]
Sent: Monday, November 13, 2023 3:46:07 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Cc: [REDACTED]
Subject: HSR Question re: Foreign Exemption

Good afternoon,

We write to confirm that certain sales do not constitute "sales in or into the US" under Rule 802.51, and therefore no HSR filing is required.

We represent Company A in its potential acquisition of all the voting securities of Company B. The size of transaction is expected to be greater than US\$111.4 million and we can assume size of person is satisfied.

Using Rule 802.51, we assume the following:

- Company B is a foreign issuer.
- Company B has minimal US assets and Company A has determined the fair market value of Company B's non-exempt US assets is below US\$111.4 million.
- Therefore, the only remaining question is whether Company B generates sales in or into the US of less than US\$111.4 million in Company B's most recent year.

The PNO has indicated that the indicia of beneficial ownership, including title and risk of loss, are a determining factor when evaluating "sales in or into the United States" for purposes of Section 802.51. See, e.g., Premerger Notification Practice Manual, Fifth Edition, #153. "Generally, sales are counted only where title to the goods passes in the United States as U.S. sales for purposes of the application of the Section 802.50 and Section 802.51 exemptions; *all other sales, including sales where title passes outside the United States but risk of loss passes inside the United States, are excluded.*" See PNPM #154 (emphasis added).

In the current transaction, the risk of loss for relevant sales passes at a delivery point in the US when cargo is loaded on a ship, but title only passes once the ship reaches international waters. The cargo is then shipped to countries outside of the US. Importantly, the goods are not manufactured to uniquely US specifications where there is certainty they will be sold in the US.

Therefore, although risk of loss passes in the US, it is reasonable to determine that these relevant sales do not constitute sales "in or into the US" for 802.51 because title passes *outside* of the US. See PNPM #154.

Thank you very much.

[Redacted]

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