

Ferkingstad, James H.

§802.30

From: [REDACTED]
 Sent: Thursday, August 27, 2009 5:01 PM
 To: Ferkingstad, James H.
 Cc: [REDACTED]
 Subject: Intraperson Transaction Exemption
 Attachments: TransactionStructure.pdf

9/1/09 Ayec
 SC agrees
 JF

Mr. Ferkingstad:

Thank you for speaking with me this morning. This email follows up on our conversation regarding whether the transaction described below requires a filing of a Notification and Report Form for Certain Mergers and Acquisitions under the Hart-Scott-Rodino Act ("HSR"). We believe that the transaction falls within the intraperson transaction exemption set forth at §802.30(a) of the HSR rules, and, therefore, no filing is required. If you concur with this conclusion, please respond to this email accordingly.

In its most basic sense, the transaction involves one 50% owner of a limited liability company acquiring the other owner's 50% interest in one of the limited liability company's assets for \$150 million. This appears to fit squarely within the example following §802.30(a). For tax purposes, however, the transaction is not structured so directly, but rather will occur in multiple steps. Please note that these steps will occur simultaneously (in the order specified below), and there are no circumstances or conditions that could cause any particular step not to occur. That is, if the first step of the transaction is undertaken, then all of the other steps will be completed. As a visual aid, I have attached a pdf file illustrating the structure on a pre- and post-transaction basis.

Prior to the transaction, the arrangement between the owners of the subject limited liability company is as follows: A (its own ultimate parent entity) owns 100% of Midstream A, LLC ("Midstream A"), and B owns 100% of Midstream B, LLC ("Midstream B") (B is actually composed of two funds; since B's composition does not affect the exemption analysis, we treat it as a single entity in this email). A also owns 100% of Y. Midstream A and Midstream B each own a 50% interest in Holdco, LLC ("Holdco") (that is, each has a right to 50% of Holdco's profits and 50% of Holdco's assets upon dissolution). Midstream B's 50% interest in Holdco is the company's only asset. Holdco owns two plants ("Plant 1" and "Plant 2") as well as certain facilities shared by each plant.

The transaction will be effected as follows:

- In step 1, Holdco will form two new limited liability companies, Common, LLC and Plant 1, LLC. Holdco will contribute the shared facilities to Common, LLC, and it will contribute Plant 1 and a 50% membership interest in Common, LLC to Plant 1, LLC. Holdco will continue to own Plant 2 directly. We believe that this transaction is exempt from HSR filing requirements on account of §802.30(a), in that the acquiring persons in the formation of each of Common, LLC and Plant 1, LLC, that is, A and B, are also the acquired persons because they each will be deemed to control Common, LLC and Plant 1, LLC after their respective formation. In addition, neither new company will hold non-exempt assets on account of §802.30(c).
- In step 2, Holdco will transfer 100% of its membership interest in Plant 1, LLC to Midstream A. In exchange therefor, Midstream A's 50% membership interest in Holdco will be redeemed by Holdco. Thus, after giving effect to this step 2 (and for the instant in time before steps 3 and 4 are completed), Midstream B will own all of Holdco's membership interests, and Midstream A will cease to be a member of Holdco; thus, for that instant, A will not control Holdco. We believe that this step is also exempt from HSR filing requirements under the §802.30(a) exemption, since A is both the acquiring person (through its control of Midstream A) and one of the acquired persons (since it also controls Plant

- 1, LLC for HSR purposes).
- Step 3 involves moving Plant 1 into Y. Midstream A will transfer its membership interests in Plant 1, LLC to A, and A will contribute the membership interests in Plant 1, LLC to Y, such that Plant 1, LLC becomes a wholly-owned subsidiary of Y. Then, Plant 1, LLC will be merged into Y, with Y surviving the merger and owning Plant 1 directly and owning 50% of the membership interests in Common, LLC. We believe all of these steps are also exempt from HSR filing requirements under the §802.30(a) exemption.
 - In step 4, Midstream A will pay B \$150 million in cash, and B will transfer a 50% interest in Midstream B to Midstream A (that is, a 50% profits interest and the right to 50% of Midstream B's assets upon dissolution).

So, after step 4, A and B will each control Midstream B (depending on the percentage ownership of B, as noted in the third paragraph above, A may alone may control Midstream B). Holdco, as a wholly-owned subsidiary of Midstream B, will be included within A. A will now own 100% of Plant 1 (through its ownership of Y) and 75% of the membership interests of Common, LLC (50% through its ownership of Y and 25% through its ownership of Midstream B); also, just as prior to the transaction, A will own 50% of Plant 2.

The transaction could have been structured as a direct purchase of Plant 1 between A and Holdco, which would clearly be exempt under §802.30(a). For tax purposes, however, the transaction has been structured as described above, but the result is the same as the result in a direct purchase. But for the instant in time that A ceases to control Holdco after step 2, this transaction would clearly be covered by the intraperson transaction exemption set forth at §802.30(a). We believe that, since the above steps will occur simultaneously, the fact that A's control of Holdco ceases for a split second should be ignored.

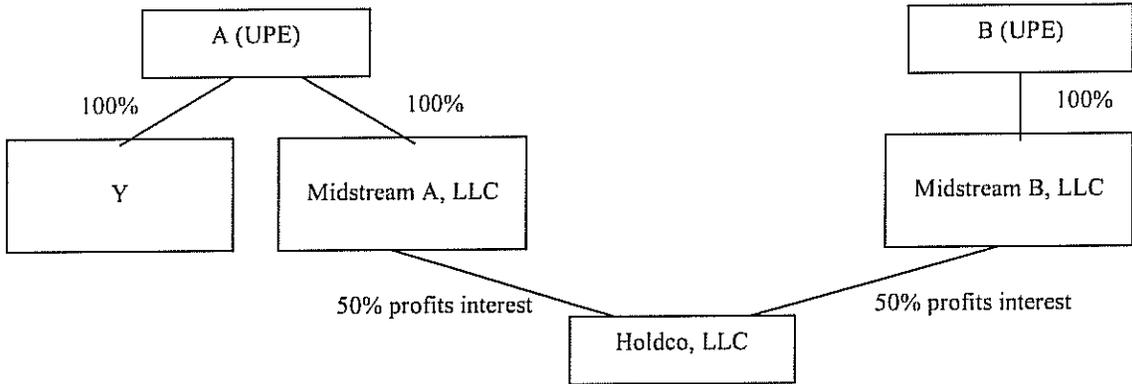
If you concur in our conclusion that the above-described transaction is exempt from HSR filing requirements, I would appreciate it if you could respond accordingly. If you have any questions or would otherwise like to discuss this transaction in more detail, please feel free to give me a call. My telephone number is [REDACTED]

Best regards,

[REDACTED]

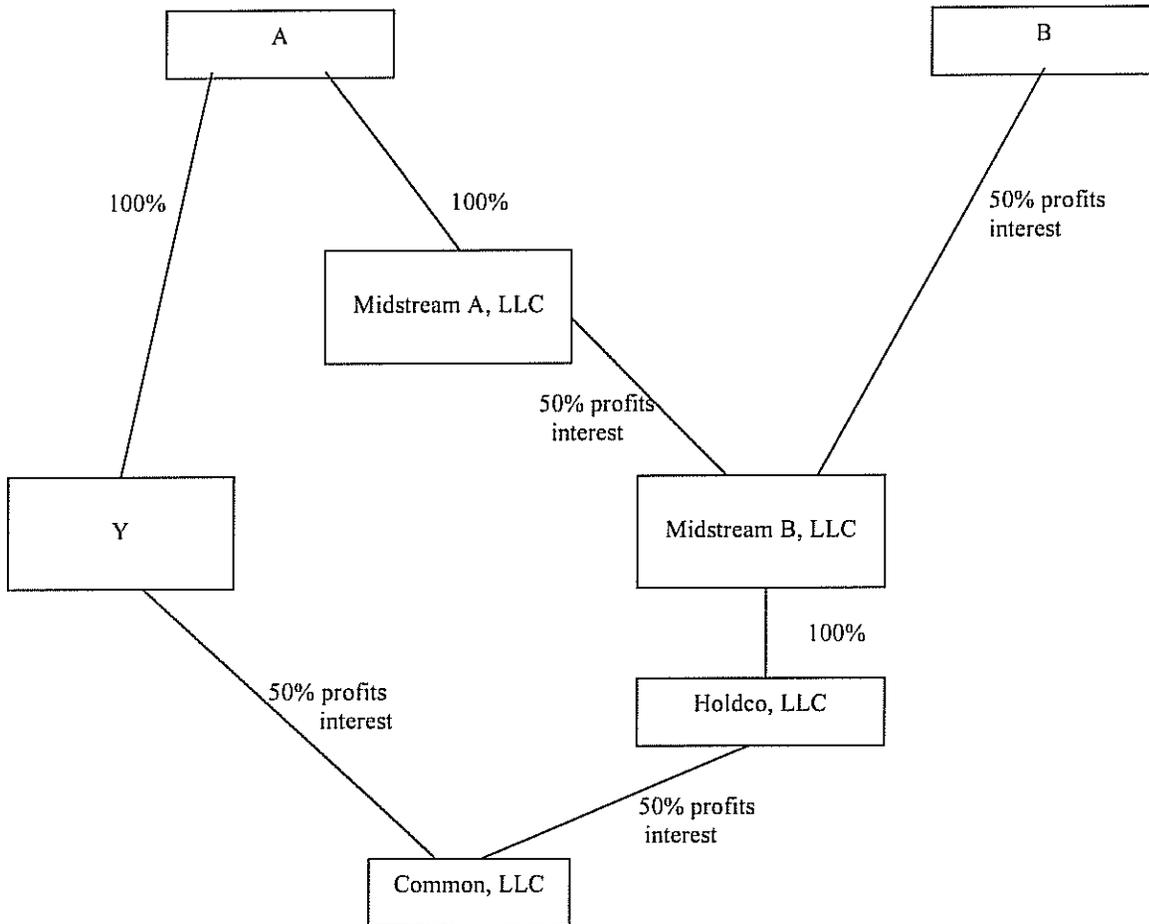
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Structure Prior to Transaction:



Holdco owns two plants ("Plant 1" and "Plant 2"), as well as facilities shared by the two plants.

Structure After Transaction:



Y owns Plant 1 after merger of Plant 1, LLC into Y. Holdco, LLC continues to own Plant 2.