802.2(a)

Verne, B. Michael

From: [redacted]
Sent: Tuesday, August 27, 2013 7:52 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: HSR Rule 802.2(a)

Dear Mike,

Thank you for speaking with us on August 27, 2013. I am writing to confirm the Hart-Scott-Rodino advice that you provided during our call.

As we discussed, Company A is in the business of building new facilities for its customers, who operate industrial facilities. The facilities built by Company A are located on site or adjacent to its customers' facilities, and supply (via a short pipeline) its customers with a commodity input that is widely used in industrial processes. When Company A builds new facilities to service such a customer, it typically does so through one of two business models, neither of which results in a reportable transaction under Hart-Scott-Rodino. In virtually all cases, Company A builds, owns, and operates the new facility, selling the input to the customer "over-the-fence" under a long-term contract. On some rare occasions, Company A builds the input plant for its customers, and the customer owns the plant. When it uses this approach, Company A may contract to operate and maintain the facility for the customer.

In the present case, Company A and its customer, Company B, first entered into contracts reflecting the latter business model, but have subsequently decided that the former model is preferable. Originally, Company A entered into an agreement with Company B to provide equipment for Company B's plant. This original agreement was executed in June 2011, effective as of December 2010. In or around April 2012, the parties needed to proceed with construction, but had not yet determined which business model was preferable, so they executed a construction contract, whereby Company A agreed to build the plant. Thus, Company B owns what has been built.

It was contemplated from the beginning that the structure of the transaction might ultimately be an over-the-fence agreement, which is the more typical approach. Although the parties signed the construction agreement in April 2012, Company B had not yet decided which of the two approaches to take for its facility. Instead, Company B was evaluating and analyzing its options. Consistent with this approach, the parties included a provision in the original (April 2012) construction contract, whereby the parties agreed to negotiate in good faith towards an "over-the-fence" arrangement. After April 2012, the parties did in fact continue to discuss and negotiate an "over-the-fence" arrangement. Construction of the plant began on-site in September 2012, and Company A's construction of the plant for Company B proceeded in parallel with the negotiations.

In December 2012, Company B determined to pursue an "over-the-fence" agreement with Company A. At this time, actual construction of the plant was only 16% complete and completion of the plant (including equipment purchases) was only 45% complete. Today, the facility still requires extensive testing and is not commercially operational. Commercial operation of the facility is not expected until December 2013 after completion of the aforementioned testing, and the facility has not yet generated any revenue. Recently, the companies have finalized their negotiation of the over-the-fence arrangement, and will soon sign an agreement under which Company A will own and operate the new facility (as it usually does), selling the input to the customer "over-the-fence" under a long-term contract. The parties anticipate structuring the transaction to include an asset purchase agreement pursuant to which Company A will buy back from Company B the new facility for slightly more than $70.9 million.

Based on our conversation, our understanding is that the transaction is exempt under 16 C.F.R. § 802.2(a), which exempts acquisitions of new facilities. New facilities are defined as structures that have not produced income and were either constructed by the acquired person for sale or held at all times by the acquired person solely for resale. Here, the

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facility is not yet operational and has not produced any income. It is appropriate to view the facility as "constructed by the acquired person" (Company B) since Company A built it on behalf of Company B, and Company B is selling the facility back to Company A. Under the circumstances described above, the facility qualifies as a new facility and is therefore exempt from the notification requirements.

We would appreciate it if you would please confirm that you agree with this summary. As always, thank you for your advice and assistance.

Best regards,

AGREE -
BN
8/28/13

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