

802.1
7A(c)(1)

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, April 16, 2014 9:08 AM
To: Verne, B. Michael; Walsh, Kathryn
Subject: ordinary course

Dear Mike and Kate,

I am analyzing a proposed transaction and wondering if it could qualify for an exemption from HSR filing requirements as a transaction in the ordinary course of business.

In this transaction, Seller will sell its 33 and 1/3 undivided interest in a currently operational power generation plant to Buyer, including the plants' associated assets such as various rights and interests associated with the plant, and the land on which the plant sits. Seller only owns only 1/3 of the plant, and is thus selling its entire interest. The transaction is structured as an asset purchase.

At present, Seller provides natural gas to the plant, and in turn receives the power output from the plant. Seller wishes to continue to receive the same amount of power from the plant after the sale of its interest. To ensure this continual supply, Seller will enter into a tolling agreement with Buyer under which Seller provides Buyer with natural gas for the plant, and receives the same amount of power from the plant that Seller currently receives. If Seller does not request power from the plant on certain days, Buyer has the option to generate power on those days and sell it to third parties, and will not use it for its own purposes. The purchase agreement and the tolling agreement will be executed simultaneously.

My question is whether the transaction could be exempt from HSR filing requirements under 7A(c)(1) of the HSR Act, or under HSR Rule 802.1(d)(1) or (d)(3). Please let me know if you need any additional facts to make your determination.

Best regards,

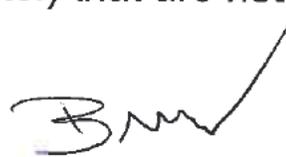
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The acquisition of an undivided interest in real property (i.e., the power plant) is itself treated as a real property acquisition, so it would not fit into any of the sections of 802.1. It also does not fit any of the real property exemptions under 802.2. 7A(c)(1) would not apply, because we have limited the use of the statutory exemption to acquisitions of portfolios of financial instruments (e.g., loans, leases, servicing rights, etc.) that are not specifically exempted by 802.1-802.5.


4/16/14