802.1(d)(3)

Verne, B. Michael

From: [redacted]
Sent: Thursday, June 19, 2014 1:35 PM
To: Verne, B. Michael
Subject: Question re Ordinary Course Exemption

Hi Mike,

We are looking at the application of the used durable goods prong of the ordinary course exemption, Rule 802.1(d)(3), to a proposed transaction and wanted to run our analysis by you.

- Company A proposes to sell a cruise ship, Ship X, from its fleet to Company B for a price above the size of transaction threshold. Assume the size of person test is also met.
- Company A has executed a contract to purchase another cruise ship, Ship Y, with greater capacity than Ship X, which will be delivered within 6 months of the sale of Ship X.
- Ship Y will operate as part of a different fleet than Ship X, but will be owned by the same UPE, Company A.

Per our understanding of Rule 802.1(d)(3), as applicable to these facts, the sale of used durable goods qualifies as a transfer in the ordinary course so long as (a) the used durable goods are not being sold as part of a transaction pursuant to which all, or substantially all, of the assets of an "operating unit" are being acquired; and (b) where the seller has replaced (by acquisition or lease) all or substantially all of the productive capacity of the goods being sold within six months of that sale, or the seller has in good faith executed a contract to replace within six months after the sale (by acquisition or lease), all or substantially all of the productive capacity of the goods being sold.

For point (a), we have found guidance from 2004 stating the PNO's position that vessels are not considered operating units for purposes of the ordinary course exemption. (see http://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/0404010). Here, Company A will not be ceasing operations in any location, nor will it be exiting a business for any products or services.

For point (b), we have also reviewed Example 7 to 16 CFR 802.1, which seems applicable here and states: "A" a cruise ship operator, plans to sell for in excess of $50 million (as adjusted) one of its cruise ships to "B," another cruise ship operator. "A" has, in good faith, executed a contract to acquire a new cruise ship with substantially the same capacity from a manufacturer. The contract specifies that "A" will receive the new cruise ship within one month after the scheduled date of the sale of its used cruise ship to "B." Since "B" is acquiring a used durable good that "A" has contracted to replace within six months of the sale, the acquisition is exempt under § 802.1(d)(3)."

It is our view that the purchase of Ship Y, a ship with more productive capacity than Ship X, and which has been contracted for delivery within six months of the sale of Ship Y, makes the sale of Ship X to Company B exempt from the HSR filing requirement under 802.1(d)(3). The fact that Ship X is being sold by a different brand within Company A than the brand that will acquire Ship Y does not change our analysis as to the application of the ordinary course exemption here because both brands are wholly-owned by the same ultimate parent entity, Company A, and ships are inherently moveable assets.

We wanted to confirm the above analysis with you, particularly since some of the guidance we have relied upon is more than 5 years old. Please let us know if you agree.

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As always, thanks in advance for your consideration of this transaction and analysis. Hope all is well with you!

[redacted]

AGREE –
BM
6/19/19

KW / KB
CONCUR

AS LONG AS IT WILL BE OWNED BY THE SAME UPE, THE FACT THAT IT WILL OPERATE AS PART OF A DIFFERENT FLEET IS NOT RELEVANT TO THE ANALYSIS.