

Gillis, Diana L.

From: Whitehead, Nora
Sent: Monday, June 29, 2015 9:24 AM
To: [REDACTED]
Cc: Gillis, Diana L.
Subject: RE: 802.2(c) Question

Hi Sydney:

Any production machinery or equipment is not exempt under 802.2c and must be separately valued. We agree that the non-machinery/equipment portion of the ethylene plant (as you describe below) is exempt.

Nora Whitehead
(202) 326-3262
Check out the [PNO Blog!](#)

From: [REDACTED]
Sent: Thursday, June 25, 2015 3:08 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Whitehead, Nora; Gillis, Diana L.
Cc: [REDACTED]
Subject: 802.2(c) Question

Hi all,

I hope everyone survived the recent storms with their electricity! This is an 802.2(c) question.

Facts

1. Acquired Person B, owns an ethylene plant. The plant has been idle since 2001.
2. Acquiring Person, A, intends to acquire the plant site and associated assets from B for an acquisition price over the HSR filing threshold.
3. The assets include all of the permits, real property, a take away pipeline, and equipment and other assets associated with the plant.
4. The plant will require significant improvements prior to operating including, overhauling main furnaces, compressors, cold-section compressor & expander, BFW pumps and all other rotating and logistic equipment, replacing boilers, cooling towers, overhauling fire water pumps, rebuilding pipelines etc.
5. The plant has not, and will not have, derived over \$5 million of revenues in the 36 months prior to closing.

We have included below copies of informal interpretations which we believe confirm the applicability of Rule 802.2(c) to the transaction in this case.

Please let us know if you agree that the mothballed ethylene plant and associated assets consisting of the land, offices, the ethylene steam facility (including furnaces, towers, scrubbers, splitters, tanks, driers etc.), ethylene pipelines (all idle), pipeline rights of way, associated permits and other miscellaneous equipment, are exempt under 802.2(c).

Many thanks as always for your guidance.
Sydney

§802.2 Certain acquisitions of real property assets.

(a) *New facilities.* An acquisition of a new facility shall be exempt from the requirements of the act. A new facility is a structure that has not produced income and was either constructed by the acquired person for sale or held at all times by the acquired person solely for resale. The new facility may include realty, equipment or other assets incidental to the ownership of the new facility. In an acquisition that includes a new facility, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(b) *Used facilities.* An acquisition of a used facility shall be exempt from the requirements of the act if the facility is acquired from a lessor that has held title to the facility for financing purposes in the ordinary course of the lessor's business by a lessee that has had sole and continuous possession and use of the facility since it was first built as a new facility. The used facility may include realty, equipment or other assets associated with the operation of the facility. In an acquisition that includes a used facility that meets the requirements of this paragraph, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were acquired in a separate transaction.

(c) *Unproductive real property.* An acquisition of unproductive real property shall be exempt from the requirements of the act. In an acquisition that includes unproductive real property, the transfer of any assets that are not unproductive real property shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(1) Subject to the limitations of (c)(2), unproductive real property is any real property, including raw land, structures or other improvements (but excluding equipment), associated production and exploration assets as defined in §802.3(c), natural resources and assets incidental to the ownership of the real property, that has not generated total revenues in excess of \$5 million during the thirty-six (36) months preceding the acquisition.

(2) Unproductive real property does not include the following:

(i) Manufacturing or non-manufacturing facilities that have not yet begun operation;

(ii) Manufacturing or non-manufacturing facilities that were in operation at any time during the twelve (12) months preceding the acquisition; and

(iii) Real property that is either adjacent to or used in conjunction with real property that is not unproductive real property and is included in the acquisition.

108 Applicable provision. 802.2(c).

Issue. Does the acquisition of a former manufacturing plant from which all machinery and equipment have been removed qualify for the "unproductive real property" exemption under Section 802.2(c)?

Analysis. The stripped-down factory qualifies as "unproductive real property," the acquisition of which is exempt under Section 802.2(c).

Section 802.2(c) excludes from the definition of "unproductive real property" all equipment and manufacturing or non-manufacturing facilities that have not yet begun operation or were in operation at any time during the twelve months preceding the acquisition. The SBP states that "[a] new facility that is partially complete, is not ready to commence operation in the immediate future and requires substantial additional capital investment is not yet a manufacturing or non-manufacturing facility within the meaning of §802.2(c)(2)(i). Such a facility may qualify as unproductive real property." 61 Fed. Reg. 13,666, 13,675 (Mar. 28, 1996); *see also* 16 C.F.R. § 802.2, Example 6 (building is not yet a manufacturing facility if it does not contain equipment and requires significant capital investment before it can be used as a manufacturing facility).

By extension, the PNO has said that if a plant is emptied of all machinery and equipment prior to the sale, it falls outside the definition of "manufacturing or non-manufacturing facility" and the limitation imposed under

Section 802.2(c)(2)(ii) regarding "facilities that were in operation at any time during the preceding twelve months" does not apply. The stripped-down plant therefore qualifies as unproductive real property. See HSR Informal Interpretation Letters, #0505012 (May 27, 2005), available at <http://www.ftc.gov/bc/hsr/informal/opinions/0505012.htm> (plant that requires significant capital expenditures to retrofit, modify, and equip for buyer's intended purpose was not a "manufacturing or non-manufacturing facility"), available at <http://www.ftc.gov/bc/hsr/informal/opinions/0505012.htm>; HSR Informal Interpretation Letters, #0601027 (Jan. 27, 2006), available at <http://www.ftc.gov/bc/hsr/informal/opinions/0601027.htm> (hotel/casino that was completed just before but heavily damaged by a hurricane, never commenced operation, and would need a substantial capital investment to commence operation, was not a "manufacturing or non-manufacturing facility" within the meaning Section 802.2(c)(2)).

Editor's Note. Note that the sale of the plant's equipment and machinery to a third party may be separately reportable if all of the jurisdictional tests are met and an exemption is not otherwise available.

0505012 Informal Interpretation

DATE: May 27, 2005

RULE:

802.2(a), 802.2(c)

STAFF:

Michael Verne

RESPONSE/COMMENTS:

Agree.

 Original Image File (66.17 KB)

QUESTION

May 27, 2005

Via Electronic Mail and FedEx

B. Michael Verne

Federal Trade Commission
Premerger Notification Office
Bureau of Competition
Room 303
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Telephone Call of May 26, 2005
Dear Mike:

I am writing to confirm the Hart-Scott-Rodino ("HSR") advice that you provided to (redacted) and me on Thursday, May 26, 2005. In our telephone call (and also in earlier, separate calls the preceding week), we posed the following scenario:

Buyer is purchasing a Facility, consisting of real property and equipment, from Seller. The size-of-transaction and size-of-parties thresholds under the HSR Act are exceeded. Seller had constructed the nearly-completed, but not yet productive, Facility for its own use (pharmaceutical production), but is now unable to use it for this intended purpose. Instead, Buyer will purchase the Facility, and employ certain of Seller's operational and maintenance employees at the Facility, to engage in the production of other, different pharmaceuticals.

Importantly, after Buyer purchases the Facility, Buyer will have to make significant capital expenditures in order to retrofit, modify and equip the Facility for Buyer's intended purpose. We discussed that, based on current estimates, Buyer would need to expend a minimum of approximately \$31 million to have the Facility operational (consisting of approximately \$24 million of direct construction and equipment costs, and approximately \$7 million of indirect costs including design services, permits and fees, etc.). Buyer might also need to spend additional contingent amounts (of up to 20% more than the amounts indicated above) to

reach an operational stage, and Buyer would need to expend additional amounts (possibly as much as \$5 million more) to reach maximum production.

Our HSR discussion focused on the Section 802.2 exemption for Certain Acquisitions of Real Property. You indicated that the Facility would not be deemed exempt as a "new facility" under 802.2(a) because it was not constructed by Seller for resale. Based on the foregoing expenditures, however, you indicated that the Facility does qualify as "unproductive real property" under 802.2(c). More specifically, you agreed that the above-described scenario is substantially similar to Example 6 under 802.2, in which the exemption applied where a buyer was required to expend approximately \$50 million in order to equip a purchased facility for use in its own production operations. Therefore, you advised us that the acquisition of the Facility, including both the real property and the equipment being acquired (and without requiring any separate valuation of the equipment), is exempt from HSR reporting requirements under 802.2(c).

I understand that the Premerger Notification Office does not generally confirm informal advice in writing. However, if this letter misconstrues our conversations or is inaccurate in any way, I would appreciate it if you would please contact me as soon as possible. As always, thank you for your advice and assistance.

0906009 Informal Interpretation

DATE: June 24, 2009

RULE:


802.2(c)

STAFF:

Michael Verne

RESPONSE/COMMENTS:

06/24/2009 – Agree

 Original Image File (80.6 KB)

QUESTION

From: (Redacted)

Sent: Tuesday, June 23, 2009 5:03 PM

To: Verne, B. Michael

Cc: (Redacted)

Subject: Question re application of 802.20(c)

Mike,

I hope you are doing well. Co-counsel on a matter, (redacted), has suggested that 802.2(c) might apply to the following situation and I wanted your views. My client, Company A is acquiring a steam methane reformer facility (the "Facility") from Company B pursuant to purchase and sale agreement (the "PSA"). The purchase price is in excess of the HSR size of transaction threshold. The Facility is in the process of being constructed, and will continue to be in the process of being constructed, at the time of closing. The construction of the Facility should be in the range of 25% (twenty-five percent) complete at the time of closing and thus is not a "turnkey" manufacturing facility which is excluded from coverage under the exemption. See Informal Staff Opinion Letter 0601027-8.

The Facility will be used by Company A to provide products to Company B, some of them for resale to A's customers. There are three contracts involved in the transaction. First, under a lease agreement, the land on which the Facility is being constructed will be leased by Company B to Company A for a term of twenty years. Second, a supply agreement will be entered into by the parties (A providing products to B) for a parallel period of twenty years. Third, under the previously mentioned PSA, Company A will acquire such assets as (i) real and personal property in the form of the Facility and all fixtures, improvements, equipment and parts comprising the steam methane reformer and related compression facilities and appurtenances thereto that are currently being constructed and installed, or which have previously been delivered or are being held for delivery, (ii) the construction contract for the Facility (title to the Facility passes in stages as completion progress is made), (iii) lube oil

coalescing filters, lube oil blowdown drum and meters and related contracts and warranties, (iv) engineering and processing technology, and (iv) permits, books and records and other assets.

0909003 Informal Interpretation

DATE: September 15, 2009

RULE:

802.2(c)

STAFF:

Michael Verne

RESPONSE/COMMENTS:

Agree.

 Original Image File (169.89 KB)

QUESTION

From:

(Redacted)

Sent:

Thursday, September 10, 2009 7:21 PM

To:

Verne, B. Michael

Subject: HSR Discussion re 802.2(c)

Mike,

Thank you for taking the time to speak with me today regarding whether an HSR filing will be required in connection with a proposed transaction. Below is a summary of the hypothetical fact pattern we discussed and my request for confirmation of the HSR analysis.

Our client, Company A, would like to acquire the assets that constitute a resort and casino project in (redacted) that was never completed. These assets are held by entities that are now in bankruptcy. Alternatively, Company A may seek to acquire the interests in the bankrupt entities that hold the assets that constitute the resort and casino project.

Company A would provide the bankrupt entities with debtor-in-possession financing that would provide funds for the administration of the bankruptcy estate and would permit the bankrupt entities to close up the property, so that the construction works that have already been done would be protected from the elements. Company A would then seek to buy either the assets held by the bankrupt entities or the interests in the bankrupt entities in a sale pursuant to Section 363 and 365 of the

U.S. Bankruptcy Code (11 U.S.C. 101 et seq.) or pursuant to a plan of reorganization under the U.S. Bankruptcy Code. For the purposes of this analysis, we assume that the size-of-transaction and size-of-person tests will be satisfied.

Eventually, Company A would complete the resort and casino project, but there is currently no plan or schedule for completion of the project, the timing of which will largely depend on the business conditions in (redacted) and the credit markets. Company A estimates that completion of the project will require additional investments of more than \$1 billion.

The proposed transaction would be exempt as an acquisition of "unproductive real property." The assets to be acquired (or the assets held by the entities to be acquired) are "unproductive real property, including raw land, structures or other improvements, [...] that has not generated total revenues in excess of \$5 million during the thirty-six (36) months preceding the acquisition." As a result, their acquisition is exempt from the requirements of the HSR Act under 16 C.F.R. 802.2(c).

Under 16 C.F.R. 802.4, the proposed acquisition would be exempt even if Company A were to acquire the interests in the bankrupt entities that hold the assets that constitute the resort and casino project and whose acquisition is exempt under 16 C.F.R. 802.2(c), since these entities do not hold non-exempt assets with an aggregate fair market value of more than \$65.2 million.

Please let me know if this accurately reflects our discussion

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