
From: Walsh, Kathryn E.
Sent: Monday, November 02, 2015 10:42 AM
To: [REDACTED]; Berg, Karen E.; Whitehead, Nora; Gillis, Diana L.
Cc: [REDACTED]; Storm, Evan
Subject: RE: 802.2(c) Question

[REDACTED]:

The key to the 802.2(c) analysis is whether what's being built is complete enough to be called a facility.

The power plant described in your fact pattern is substantially complete, making it a facility which is excluded from the exemption per 802.2(c)(2)(i). Since the plant will be ready to operate at closing or shortly thereafter, it is a "turnkey" facility per the Statement and Basis of Purpose. 61 FR 13666 at 13675 ("The exclusion in § 802.2(c)(2)(i) is also intended to apply to "turnkey" facilities, i.e., new facilities capable of commencing operations immediately with minimal additional capital investment.").

If a facility has started operating, the facility is excluded from the exemption per 802.2(c)(2)(ii) because it was operating during the 12 months preceding the acquisition. If a facility was operating during those 12 months preceding the acquisition, you don't even get to the \$5 million test. The \$5 million test is only relevant if the facility was operating at any time during months 13 through 36 preceding the acquisition, and then operations ceased during months 1-12 before the acquisition.

802.2(c) was intended to exempt things such as unproductive raw land and mothballed facilities, but not new facilities that are complete and have not yet started operations, or new facilities that have just started operations and haven't yet generated significant revenues.

While we seem to have inconsistently applied 802.2(c) to power generating facilities (e.g., solar, wind) in the past, we have consistently applied it to other facilities (e.g., hospitals, manufacturing plants) and are now unifying our application of 802.2(c). To determine whether 802.2(c) applies, we look to whether the structure is a facility, meaning it is capable of commencing operations immediately with minimal additional capital investment. If the facility has yet to start operations prior to the acquisition, then it is not exempt per 802.2(c)(2)(i). If the facility has operated at any time in the 12 months preceding the acquisition, then it is not exempt per 802.2(c)(2)(ii), regardless of revenues generated.

So, your scenario is not exempt under 802.2(c). In fact, the transaction described in your March 22, 2012, email should also not have been exempt because the facility was operating prior the acquisition. As for Interpretation 1111006, which we will revise on the website, it too should not have been exempt since the wind facility was anticipated to be operational prior to the acquisition. If there are other interpretations that need updating, we will make sure to do that.

FYI, for new facilities that have yet to generate income (excluding testing income), 802.2(a) may be applicable.

Regards,
Kate

From: [REDACTED]
Sent: Wednesday, October 28, 2015 10:05 AM
To: Walsh, Kathryn E.; kberg@ftc.gov; Whitehead, Nora; djillis@ftc.gov

Cc: [REDACTED]
Subject: 802.2(c) Question

Hi all,

Hope everyone is staying dry! This is question about the applicability of 802.2(c).

1. A, B, C contributed cash to a newly-formed LLC ("Holdco") to be used to build a new electrical generation power plant. B was the UPE (had the right to 50% or more of the economics) of Holdco.
2. B subsequently sold some of its interest to D. After the sale Holdco was its own UPE.
3. Holdco is in the process of constructing the power plant. The plant is substantially complete and the parties anticipate that the plant will be ready to operate either at closing of the proposed transaction or shortly thereafter.
4. Under the proposed transaction, B will sell its minority interest in Holdco to A in exchange for cash, as a result of the sale A will have the right to 50% or more of the profits/assets upon dissolution of Holdco. The value of A's holding will exceed \$76.3 million.
5. Revenues generated by Holdco from non-test activities are expected to be less than \$5 million in the aggregate at the time of closing of the proposed transaction.

Rule 802.2(c) exempts acquisitions of certain unproductive real property. Property that has not generated total revenues over \$5 million during the 36 months prior to closing is deemed to be unproductive real property. Testing revenues are not included for purpose of determining whether the \$5 million threshold is crossed. We have included below interpretations confirming 802.2(c) applied to acquisitions of wind farms that had commenced operations as long as they had not generated revenues (excluding testing revenues) over \$5 million during the 36 months prior to closing.

Please confirm that the proposed transaction, acquisition of control of Holdco, would be exempt from HSR filing requirements under 802.2(c) assuming any other non-exempt assets are valued at \$76.3 million or less.

Many thanks as always,

[REDACTED]
From: Verne, B. Michael [<mailto:MVERNE@ftc.gov>]

Sent: Thursday, March 22, 2012 10:09 AM

To: [REDACTED]

Subject: RE: 802.2(c) Wind Farm

I agree that you can use 802.2(c). Revenues related to testing/debugging activities do not need to be included in determining the \$5 million limitation.

From: [REDACTED]

Sent: Thursday, March 22, 2012 7:48 AM

To: Verne, B. Michael

Subject: 802.2(c) Wind Farm

Mike,

Hope all is well, I have included below a copy of an informal interpretation in which 802.2(c) was available in

the acquisition of a wind farm that had begun commercial operations prior to closing and wanted to confirm its availability in this transaction.

Section 802.2(c) exempts acquisitions of unproductive real property, including raw land, natural resources and assets incidental to the ownership of the real property that have not generated revenues in excess of \$5 million during the thirty-six months preceding the acquisition. Unproductive real property does not include manufacturing or non-manufacturing facilities that were in operation at any time during the preceding twelve months.

In this transaction, Target LLC holds all of the interest in a wind farm. The wind farm assets include all of the assets associated with an operating wind farm that is generating power on a commercial basis, including leasehold rights to real property, contracts, and permits, wind turbines, electrical transmission lines to connection to the regional electrical grid and supporting infrastructure. The wind farm recently began operating and has generated commercial revenues. Target LLC will not derive more than \$5 million in revenues from its operations prior to closing on the proposed sale transaction. Please confirm that revenues related to testing/debugging activities do not need to be included for purposes of calculating whether the \$5 million revenue threshold has been exceeded.

Please let us know if this would be exempt under 802.2(c). Specifically, as you appear to indicate in the informal interpretation below, the operations of Target LLC would be considered unproductive real property and an operating wind farm with all of its related equipment and facilities would not therefore be considered either a manufacturing or non-manufacturing facility, under Section 802.2(c)(2).

Please let us know if you have any questions.

Best regards,



1111006 Informal Interpretation

DATE: November 14, 2011

RULE: 802.2, 802.4

STAFF: Michael Verne

RESPONSE/COMMENTS: Agree.

[Original Image File \(125.6 KB\)](#)

QUESTION

From: (Redacted)

Sent: Friday, November 11, 2011 11:08 AM

To: Verne, B. Michael

Subject: HSR exemption confirmation -wind acquisition

Michael

Subject: HSR exemption confirmation -wind acquisition

Mike,

I would be grateful if you could provide your opinion on the reportability of the following hypothetical transaction.

Purchaser proposes to acquire 100% of the LLC interests in Wind Power LLC, a limited liability company that owns 100% of the LLC interests in Project LLC. Wind Power LLC is a holding company, with no other assets or holdings aside from the interests in Project LLC. Project LLC owns assets consisting of leasehold rights to real property, contracts, and permits, and in addition, structures and improvements on the leased real property, consisting primarily of towers and wind turbines, and supporting

infrastructure, including a substation and operations and maintenance building. The various contracts and permits are essential in order for Project LLC to generate and sell commercial power created by the turbines operating on the leased real property.

Project LLC currently does not generate any revenue except perhaps certain revenues related to testing/debugging. However, Purchaser's proposed acquisition of Wind Power LLC will likely close after the wind turbines are commercially operational and have begun to generate revenues for Project LLC from the sale of power. The parties anticipate that even if closing of the transaction does not occur in the next six months, Project LLC will have generated well below \$5 million in revenues pre-closing, in the aggregate.

Based on these facts, please let me know if the following conclusions are consistent with HSR regulations.

16 C.F.R. 802.2(a) -The "new facilities" exemption is not applicable if Project LLC will be earning revenues from the commercial sale of power generated by Project LLC's wind turbines before closing.

16 C.F.R. 802.4-The acquisition of interests in an unincorporated entity such as an LLC is exempt from HSR notification requirements if acquisition of the underlying assets held by such LLC would otherwise be exempt under other HSR regulations, including for example, the "unproductive real property" exemption set forth at 16 C.F.R . 802.2(c). (See, e.g., Informal Staff Opinion No.0806023, dated June 12, 2008.)

16 C.F.R. 802.2(c) -The "unproductive real property" exemption is applicable to the hypothetical transaction, and the hypothetical transaction is therefore not reportable under the HSR Act, because:

oLeasehold interests in real property are equivalent to ownership of real property, for purposes of applying the 802.2(c) exemption. (See Informal Staff Opinion No. 0406012, dated July 1, 2004.)

o The wind turbines affixed to and operated on the real property leased by Project LLC are properly classified as "structures and improvements" as described in 802.2(c).

o The wind turbines do not constitute a "manufacturing or non-manufacturing facility" not considered "unproductive real property" pursuant to 802.2(c)(ii).

oThe contracts and permits held by Project LLC, which are inextricably connected to the leasehold interests and structures and improvements held by Project LLC, are properly classified as "assets incidental" to the ownership ofthe real property leasehold rights, as described in 802.2(c). (See, e.g., Informal Staff Opinion No. 0806023, dated June 12, 2008.)

oThe entire group of assets held by Wind Power LLC (via Project LLC) are properly entitled to the 802.2(c) exemption because they are limited to the leasehold rights in real property, structures and improvements on that real property (towers, turbines, infrastructure), and assets incidental to the same real property (permits and contracts).

oThe assets held by Wind Power LLC will have generated less than \$SM in revenues in total, at the time of closing the transaction.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]