

## Haynes, Lanea

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**From:** Storm, Evan  
**Sent:** Friday, April 21, 2017 12:05 PM  
**To:** [REDACTED]  
**Cc:** Walsh, Kathryn E.; Gillis, Diana L.; Whitehead, Nora  
**Subject:** RE: HSR Question: 802.2(a)

[REDACTED]

We agree that 802.2(a) applies here.

Regards  
Evan

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**From:** [REDACTED]  
**Sent:** Thursday, April 20, 2017 6:51 PM  
**To:** Walsh, Kathryn E.; Gillis, Diana L.; Whitehead, Nora  
**Cc:** [REDACTED]  
**Subject:** HSR Question: 802.2(a)

Dear Kate, Diana, and Nora,

We are writing to request confirmation that the exemption for a new facility constructed by the acquired person for sale, 16 C.F.R. § 802.2(a), applies to the sale by our client, Company A, to Company B, of three solar power facilities that are not yet operational and have generated no income, but are substantially complete. Company A is selling additional assets to Company B which are not exempt, and we will be submitting an HSR filing for that part of the acquisition.

Company A first acquired in 2015 two LLCs that had (i) established land control through a long-term lease or fee simple ownership (ii) executed long-term power purchase agreements for the sale of the planned projects' output, (iii) executed interconnection agreements, and (iv) conditional use permits issued by the applicable county for the sites on which the solar power facilities would be built. Also in 2015, Company A formed an LLC for the third site and performed these preliminary activities itself. Prior to beginning construction on any of the three facilities, Company A considered constructing the facilities for its own use and issued "Limited Notices to Proceed," or "LNTPs." These LNTPs would have been necessary regardless of whether the facilities would be constructed for sale or for use by Company A and included design work, placing deposits on long-lead time components, and placing a meteorological tower on one of the sites. The meteorological tower is a portable device that is moved from site to site to provide weather data used to generate energy production forecasts. In addition, Company A held the unilateral right to terminate each LNTP upon ten days written notice, and a number of the long-lead time components that were ordered during the preliminary LNTP phase also could be redirected to other sites.

As early as August of 2016, several months prior to beginning construction, but after Company A (i) had signed the various LNTPs, and (ii) had incurred costs demolishing the old improvements on two of the sites, Company A changed course and decided to sell the three facilities to Company B. It was not until after the decision to change course that Company A, on November 28, issued the first "Full Notice to Proceed" or "FNTP" to allow its contractor to begin construction of one of the facilities. At that time, Company A already was actively engaged in exclusive discussions with Company B regarding the sale of the facilities. Company A maintained its intent to sell the facilities to Company B throughout the construction process.

We believe that the acquisition of the three facilities by Company B is exempt under § 802.2(a) because the facilities are turnkey facilities that have not generated any income and were constructed by Company A for sale to Company B. Unlike the solar plant developer in Informal Interpretation 1607007, Company A developed its intent to sell the facilities prior to issuing the FNTF which, as described, was prior to beginning construction. Company A maintained its intent to sell to Company B at all times after the issuance of the FNTF and during the course of construction. Although Company A had considered constructing the facilities for its own use after issuing the LNTPs, it abandoned that intent well before construction began. The preliminary work performed under the LNTPs does not constitute the beginning of construction because (i) physical construction work had not begun at the site, (ii) Company A had not yet fully committed to proceed with construction, (iii) final building permits authorizing the start of construction had not yet been issued, and (iv) Company A had not executed the EPC agreement with its contractor. Accordingly, the acquisition of the three facilities should be exempt under § 802.2(a). We would appreciate your confirmation of our analysis.

Thanks in advance for your reply.

Regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]