

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Tuesday, March 05, 2019 11:42 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Biagioli, Kimberley; Carson, Timothy; Sheinberg, Samuel I.; Six, Anne
Subject: FW: Section 7A(c)(4) / Rule 801.1(a)(2)

From: Whitehead, Nora
Sent: Tuesday, March 5, 2019 11:41:57 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Section 7A(c)(4) / Rule 801.1(a)(2)

[Agree with your analysis.](#)

From: [REDACTED]
Sent: Monday, March 04, 2019 9:05 AM
To: Walsh, Kathryn E. <kwalsh@ftc.gov>; Berg, Karen E. <KBERG@ftc.gov>; Biagioli, Kimberley <kbiagioli@ftc.gov>; Carson, Timothy <tcarson@ftc.gov>; Sheinberg, Samuel I. <SSHEINBERG@ftc.gov>; Six, Anne <asix@ftc.gov>; Whitehead, Nora <nwhitehead@ftc.gov>
Subject: FW: Section 7A(c)(4) / Rule 801.1(a)(2)

From: [REDACTED]
Sent: Monday, March 4, 2019 9:04:41 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: Section 7A(c)(4) / Rule 801.1(a)(2)

Dear PNO Team:

I am writing to seek confirmation regarding the application of Section 7A(c)(4) to a potential transaction. The potential transaction involves City Y which is a city within State X within the United States. City Y operates under a city charter that provides that City Y is a city established under the Special Laws of State X and constitutes a body politic and corporate under the name "City of Y." The charter provides that City Y shall constitute a municipal government and shall be a "council-manager government." City Y operates a community-owned electric power and retail energy services provider under the d/b/a "City Y Energy" through which it offers electric power and services to the Greater City Y area and the full legal name is "The City of Y, a State X home-rule municipal corporation d/b/a City Y Energy." City Y Energy earns no profits and pays no federal income taxes and all revenues associated with its operations benefit the customers of City Y Energy and the residents of City Y. The financial benefits to City Y is the transfer of funds received by City Y Energy to the general fund of City Y which funds are then allocated by the elected City Y council members to municipal purposes such as police, fire and parks.

City Y is contemplating purchasing the membership interests of Entity Z, a third party operating a bio-mass fueled electric generating facility. City Y Energy will not be forming an acquisition subsidiary to effect the acquisition; rather, the acquisition of the membership interests of Entity A will be done directly by City Y d/b/a City Y Energy.

Based on my review of Section 7A(c)(4), HSR Rule 801.1(a)(2) and the available FTC guidance (including Information Interpretation 9502015 which provides that an incorporated city is a political subdivision and acquisitions to or from it

are exempt), it does not appear as if City of Y falls within the definition of an "entity" under Rule 801.1(a)(2) and therefore, the transfer of the membership interests of Entity A to City Y d/b/a City Y Energy would be exempt from the requirements of the HSR Act under Section 7A (c)(4) and therefore, not reportable. Can you please confirm that this analysis is accurate?

It is also my understanding that in the event that City Y d/b/a City Y Energy were to form Subsidiary B, an acquisition subsidiary controlled by City Y, to acquire the membership interests of Entity A, such transaction would potentially be reportable unless Subsidiary B itself did not fall within the definition of an "entity" under Rule 801.1(a)(2). In such scenario, the acquiring person would be Subsidiary B and assuming that the size-of-person test and the size-of-transaction tests were satisfied, if Subsidiary B does not fall within the exclusions from the definition of an "entity" under 801.1(a)(2), such transaction would be reportable. Can you please also confirm that this analysis is also accurate.

Thanks in advance for your assistance on this matter. It is greatly appreciated.

[REDACTED]