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Liquefied Natural Gas (LNG)	Nuclear	Geothermal
Petrochemicals		Waste-to-Energy

We draw on talent from our offices around the world, including the principal energy and energy finance centers of London, New York, Hong Kong, Houston and Singapore. These market centers have a tradition of hosting, servicing or financing energy firms, and we have a substantial presence in each of them.

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In this issue of Mayer Brown's *Global Energy Industry Review*, we analyze two regional developments—in Mexico, President Enrique Peña Nieto's proposal to overhaul the country's energy industry by promoting broad constitutional changes that would open the Mexican petroleum industry to private participation, and, in Myanmar, the emergence of myriad opportunities in the energy sector as that country experiences a period of political transition and reform.

At a time of considerable consolidation in the energy industry, we also take a fresh look at the premerger notification filing requirements under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 and the energy-specific exemptions under HSR that apply to broad categories of energy mergers and acquisitions.

We assess the potential income tax advantages of a master limited partnership as a business structure for companies with revenues tied to the extraction of natural resources, a benefit that, according to several recent IRS private letter rulings, also can accrue to many businesses involved with hydraulic fracturing.

Finally, we look at US Securities and Exchange Commission staff guidance regarding disclosure requirements for "conflicts minerals"—certain minerals originating in the Democratic Republic of Congo or an adjoining country that are used in products manufactured or contracted to be manufactured by an SEC-reporting company. Similar guidance was provided by the SEC staff for the SEC's resource extraction payments disclosure rules, but those rules were vacated by a federal district court's ruling in July 2013. It is likely that a very similar version of the vacated rules will be re-proposed and adopted by the SEC, but probably not in 2013.

We regularly publish legal updates on timely industry issues. We invite you to visit the **Energy "News & Publications"** page on our web site to view a complete list of our energy updates.

If you have questions or comments on any of the articles in this edition, please contact us. ◆

Mexico's President Unveils Historic Proposal to Open the Country's Energy Sector to Private Investment

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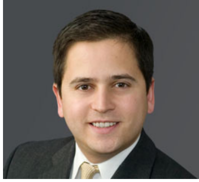
On August 12, 2013, Mexican President Enrique Peña Nieto of the current ruling party, the *Partido Revolucionario Institucional* (PRI), delivered a highly anticipated constitutional energy reform proposal to the Mexican Senate, which, if passed, will constitute the most significant overhaul of the Mexican energy sector since 1938. The proposal is expected to be considered by the Mexican Congress in September.

Peña Nieto's announcement comes on the heels of a separate reform proposal by the country's center-right party, *Partido Acción Nacional* (PAN), which was announced on July 31, 2013. For a detailed description and analysis of the PAN's proposal, see our Legal Update, "Sweeping Mexico Energy Reform Proposal."[1]

Overview of Peña Nieto's Reform Proposal

Peña Nieto is proposing broad constitutional changes that would open the Mexican petroleum industry to private participation and investment, including by international oil companies (IOCs), to explore for, and produce, oil and gas. The proposed constitutional changes would also open the midstream and downstream petroleum sectors and the electric power generation sector to private participation and investment. The key points of Peña Nieto's proposal are as follows:

- Vests in the Congress broad authority to designate those that may carry out oil and gas exploration and production activities in the country and to specify by what terms and under what conditions. The proposal includes no requirement that the national oil company, *Petróleos Mexicanos* (Pemex), maintain its monopoly on exploration and production. Private companies may be granted exploration and production rights directly by the State or under some form of association with Pemex;
- Allows private companies to own oil and gas production and to fully share in the economic risks and benefits of the business;
- Allows for direct private investment and participation in the midstream and downstream sectors, including refining, petrochemical production, distribution and the retail marketing of petroleum and refined products; and
- Reduces the domination by *Comisión Federal de Electricidad* (CFE), the national electricity utility, of the country's electricity generation, and opens the door to a competitive wholesale power market.



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Currently, Mexico has one of the most restrictive legal frameworks for energy development in the world. The Mexican Constitution and the Regulatory Law, a statute governing the petroleum industry, severely restrict the role that private companies can play in the Mexican petroleum industry. Indeed, Pemex currently has a monopoly over every step of the petroleum value chain, from production and refining to distribution and marketing.

The government also controls the electric power industry sector through CFE, which dominates the country's electric power generation and maintains a monopoly over its transmission and distribution.

Peña Nieto's proposal calls for specific constitutional changes but leaves many of the details of the broader overhaul to secondary legislation. While the proposed constitutional changes offer little guidance on how the industry will operate after the reforms, the proposal's introductory "statement of intent" (*exposición de motivos*) provides key insights into Peña Nieto's overall vision for liberalizing the Mexican energy industry. The statement of intent characterizes the proposals as a modern-day return to the spirit of the reforms instituted by President Lázaro Cárdenas at the time he expropriated and nationalized the Mexican petroleum industry in 1938. The statement of intent emphasizes that Cárdenas never intended to entirely exclude private parties from the energy industry.

Mexico's Constitution, like most constitutions around the world, provides that hydrocarbons in the subsoil belong to the state. This regime remains unchanged in the Peña Nieto's proposal. Pemex will also remain state-owned and the proposal does not open the door to a privatization or to selling shares in Pemex to the public.

UPSTREAM EXPLORATION AND PRODUCTION

Peña Nieto's proposal calls for amending Articles 27 and 28 of the Mexican Constitution, which restrict the role private companies can play in oil and gas exploration and production. Article 27 of Mexico's Constitution currently provides that when it comes to extraction of hydrocarbons, "no concessions or contracts shall be granted…and the Nation shall carry out the exploitation of those substances, under the terms set forth in the respective Regulatory Law."

The proposal seeks to amend this restriction in order to allow the government, either directly or through Pemex, to enter into contracts with private parties to explore for and produce hydrocarbons. The proposal does not address the type of contract or incentives that will be offered to private parties; rather, it leaves the specific details to secondary legislation. Specifically, the proposal provides that the "respective Regulatory Law shall determine the form in which the Nation shall exploit such resources." Thus, if the Constitution is amended, the Mexican Congress will be charged with passing subsequent legislation detailing the types of contracts that can be offered.

The statement of intent provides some guidance on Peña Nieto's view on the issue. It states that the government shall grant "efficient contracts that align the incentives of the contractors with those of the State" in exploration

and production activities. It also states that "the Regulatory Law shall determine the form…of the contracts for the exploration and extraction of hydrocarbons, which may provide for payment mechanisms in the *form of the resources that are obtained, through cash payments or equal to a percentage of the same, among others*, as it was provided in the Cárdenas reforms and observing the best practices in this area (emphasis added)."

The proposal does not expressly discuss the issue of the booking of reserves. This accounting practice, essential to IOCs, is currently banned by Article 60 of the *Petróleos Mexicanos Law* (*Ley de Petróleos Mexicanos*) and by the current model exploration and production service contracts. Peña Nieto's proposal maintains that the hydrocarbons in the subsoil are the property of the nation but, under international practice, IOCs can book reserves and show their value or quantity in their financial statements even though they do not technically own them. Indeed, companies typically do not own reserves outside of the United States and companies can book reserves with respect to their *reasonably anticipated* production under contracts around the world.

In the United States, the US Securities and Exchange Commission (SEC) has published accounting guidelines for the booking of reserves by US reporting entities. The SEC defines "bookable proved reserves" as "the estimated quantities of crude oil, natural gas and natural gas liquids which geological and engineering data demonstrate with reasonable certainty to be recoverable in future years from known reservoirs under existing economic and operating conditions…." Thus, whether a company will be able to book reserves will largely depend on what rights the company has, or what its economic interest is, in the subject hydrocarbons upon extraction. Where the company participates and derives an economic interest in the hydrocarbons produced like a producer, and is exposed to technical, environmental and commercial risks like an ordinary producer, then, arguably, the operators should be permitted to book reserves under applicable SEC guidance. If the law or the applicable contract expressly prohibits operators from booking reserves, then this treatment may be entirely different.

While the proposed amendments to the Constitution do not specifically refer to the development of deepwater, ultra-deepwater or shale resources, the statement of intent does discuss the importance of developing these resources. Accordingly, the reforms will likely open the door for the participation of IOCs in both conventional and unconventional resource development in the country.

REFINING, TRANSPORTATION, STORAGE AND DISTRIBUTION

Article 27 of the Constitution does not currently ban private participation in oil and gas refining, transportation, storage and distribution—i.e., the midstream and downstream sectors. Rather, it is the Regulatory Law, a federal statute, that bans private participation in these activities.
By establishing that the nation may enter into contracts with private parties regarding "oil and solid, liquid and gas hydrocarbons," the proposed reform is intended to open the door to private investment in all activities in the oil and gas chain, including upstream, midstream and downstream. As stated before, the specifics of these activities will largely depend on future statutory changes to the Regulatory Law and other relevant secondary laws.

The proposed amendment to Article 28 removes the "basic petrochemical industry," as well as petroleum and electricity (as noted below), from the list of industrial activities that are reserved exclusively for the State. In its place, the proposed amendment establishes that the provisions of Article 27 shall be applicable. This change is intended to allow the opening of the refining and petrochemical industry in Mexico to private participation and investment.

The proposal's statement of intent provides that "third parties may be able to participate in refining, transportation, storage and distribution of hydrocarbons without putting ownership of the nation's resources at risk." The statement of intent also provides that in regard to midstream activities, "private parties shall be able to directly participate in all of the petroleum value chain after the extraction, including the transportation, of the resources extracted from the subsoil (crude oil, natural gas

and its liquids) as well as transformed products (petrochemicals and refined products), on terms established by a secondary law, and through permits granted by the Executive Branch."

ELECTRICITY GENERATION, TRANSMISSION AND DISTRIBUTION

Peña Nieto's proposal seeks to reduce CFE's domination of electric power generation and to open the electric power sector as a whole to greater private participation and investment. The price of electricity for Mexican businesses is said to be more than 25 percent higher than for their competitors in the United States—despite the subsidies inherent in CFE's loss-making activities, which are projected to render the utility technically insolvent by next year.

Article 27 of the Constitution currently provides that generation, transmission, distribution and supply of electric power that is not for self-consumption or sale to CFE constitutes the rendering of a "public service," and, thus, is reserved exclusively to the Nation. The proposed amendment to Article 27 removes this restriction and establishes that, although no electricity concessions may be granted, the "State may enter into contracts with individuals *on the terms established by [secondary] laws* (emphasis added)." Here again, secondary laws will determine the extent to which private parties may participate in the electricity sector.

The proposed amendment to Article 27 establishes that the State shall control the national energy network, as well as the transmission and distribution of electricity as "public services." The proposed amendment deletes the reference to power generation included in the current formulation of that Article. Accordingly, it appears that electric power generation would not be considered a "public service," thereby opening the door to greater participation by the private sector.

In 1992, the Public Service Law of Electric Energy (*Ley del Servicio Público de Energía Eléctrica*) and the regulations implementing it were reformed to allow for several power generation schemes that were not considered "public service." At first, these consisted solely of independent power producers (IPPs) selling power and energy to CFE and later grew to incorporate increasing numbers of "self-supply" arrangements as well as limited numbers of small producer and cogeneration projects. Although these reforms ushered in new investment in this sector (which contributed to the improved efficiency of the Mexican electricity sector), the Mexican electric power sector still lacks sufficient capacity and investment to meet the country's growing industrial demand. Based on the proposed reforms, Peña Nieto appears to be opening the door to private generation participation in a competitive wholesale electric generation market.

Under the proposal, the government retains the exclusive right to conduct electric transmission and distribution activities constituting public service. Peña Nieto's proposal would, however, appear to allow private parties to participate in service contracts to assist CFE in the transmission and distribution of electricity.

On this point, the statement of intent establishes that:

> the State shall maintain title to electric and transmission services, confirming their "public service" nature. Under this constitutional framework, the transmission and distribution networks of CFE which currently provide these public services, will remain property of the State. Additionally, the proposed reform will permit that, pursuant to the terms established by the laws, CFE may enter into contracts with private parties. Thus, the State's title with regard to these activities shall not be an obstacle for this entity to be assisted by third parties to meet its public service objectives.

Conclusions

Peña Nieto's proposal comes at an important time for Mexico and its energy industry. Over the past eight years, crude oil production has declined rapidly, dropping from a peak of 3.4 million barrels per day (bpd) in 2004 to a total of 2.5 million bpd in 2012 (even as capital investment has increased

to $20 billion per year from $4 billion 10 years ago). If current trends continue unabated, Mexico could be a net importer of crude oil by 2020. Peña Nieto has said that the proposed reform could bring in billions of dollars of private investment and boost total oil production to 3 million bpd by 2018 and 3.5 million bpd by 2025.

While Peña Nieto's proposal is ambitious, it leaves many details to secondary legislation, including the soon-to-be-submitted fiscal reform. The question remains whether this secondary legislation will attract the private capital, technology and technical expertise needed to develop Mexico's abundant energy resources, particularly its deepwater, ultra-deepwater and shale resources. If the Mexican Congress strikes the right balance and the reform succeeds, then it would likely bring billions of dollars of much-needed foreign investment into Mexico's oil and gas and electric power sectors.

The overall impact of Peña Nieto's proposal is one that will require time to be assessed. Nonetheless, Peña Nieto's proposal represents a significant step toward the liberalization of the Mexican energy sector. ◆

Endnote

1 Available at http://www.mayerbrown.com/Sweeping-Mexico-Energy-Reform-Proposal-08-02-2013/.

Myanmar: An Emerging Power Market

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Background

Myanmar's emergence in the last 12 months as one of the world's most promising markets needs little introduction. With a population of around 60 million and a strategically advantageous geographical location, it presents significant opportunities across a broad range of sectors. However, with only 26% of Myanmar's population having access to electricity and demonstrations last year against rolling power cuts, the power sector is a top priority for the Government of Myanmar (GOM). The latest announced goal of the GOM is to increase capacity by 16,000MW by 2030, with a master plan and regulations for the power industry currently under development and due for release in 2014.

Current Key Projects

Gas-fired projects have seen the most initial activity. In addition to other projects, Mayer Brown JSM is currently advising Toyo-Thai (from Thailand) on their development of a 120MW gas-fired combined-cycle power project in Yangon, the most progressed IPP in the country. The other significantly progressed projects are a 500MW gas-fired power project in Tharkayta being developed by a Korean consortium (comprising Busan Korea Biotechnology Co, Korea Western Power Co, Hyundai E&C, Hana Daewoo Securities Co and Hexa International Co) and three locally developed power projects of 50MW each.

Myanmar also has significant hydropower potential of around 100,000MW, and although such projects remain less popular due to seasonality issues affecting power supply and resettlement issues, the sector is seeing some activity, with around 39,720MW having so far been identified for possible development.

Renewables are also likely to play a significant role, particularly for smaller off-grid systems, with suitable sites for solar and biomass power projects having been identified throughout the country. However, a successful renewables sector requires a solid underlying regulatory framework, and there are no plans as yet to implement a feed-in tariff, for example.

Phases of a Project

Power projects in Myanmar may be broken down into four key phases, as follows:

- **Preliminary Phase – Memorandum of Understanding (MOU):** The power sector is not yet subject to formal bidding procedures and projects will be granted to developers on the basis of bilateral negotiations with the Department of Electric Power (DEP) (which falls under the

Ministry of Electric Power (MOEP)). If there is agreement on the potential for a project with the developer, the DEP will then execute an MOU with the developer.

- **Feasibility Study:** Following execution of the MOU, the developer will undertake a feasibility study, in conjunction with an environmental and social impact assessment (ESIA). This phase will usually take around four months from engagement of advisors.
- **Memorandum of Agreement (MOA):** This is effectively the concession granted to the project company to undertake the project. It will be granted by the MOEP and DEP, usually within 4-6 months of completion of the feasibility study, and will specify, among other things, the length of the concession period granted, the time period for construction of the project, the manner for determining the tariff, the obligation of the GOM to provide the project site and any tax exemptions to be granted.

  In order to achieve this key milestone, which is a binding agreement, a developer will usually require a clear funding strategy and developed financial model, a satisfactory ESIA (as referred to above) and a viable tariff proposal.

  It should be noted that the MOU is a relatively short-form document, and under existing GOM policy, no further more detailed BOT contract is entered into with developers. Many parties are pushing for a change to this policy.

- **Project Documents and Financial Close:** As with a project financing in any other jurisdiction, during this phase the terms of the project documents will be finalized (including the power purchase agreement with the Myanmar Electric Power Enterprise (MEPE)) and Lenders will undertake their due diligence on those project documents. A financing term sheet will also be negotiated with the lenders, leading to the negotiation of the finance documents and, all being well, financial close. Myanmar has yet to see its first project financing (of any sort) since the suspension of international sanctions.

Cautionary Items for Foreign Investors

Whilst there are a host of factors a potential foreign investor in the power sector will need to take into account, the following are some of the more significant ones:

- **WHT:** Myanmar imposes a 15% withholding tax on loan interest payments to overseas lenders payable by a Myanmar company, which can significantly impact the economics of a project. The project and financing will likely require structuring to avoid or reduce such payments. Singapore has the most advantageous double taxation treaty, which brings the withholding tax rate down to 8% if the interest is received by a bank or financial institution.
- **Lender Security:** Myanmar law does not allow foreign lenders to take security over land and local law advice will be essential in establishing a robust security structure.
- **Gas Supply:** Whilst Myanmar enjoys significant reserves of gas, a large proportion of it is already contractually committed to Thailand and China, and this will remain an issue for gas-fired projects until new gas fields come on stream.
- **Security of Off-take:** MEPE does not yet have a lengthy track record of off-take payments which lenders can take comfort from; therefore, structuring the project to provide such comfort (through political risk insurance for example) will be key.

Through its role on the Ahlone power project, Mayer Brown JSM is at the forefront advising on these and other issues, in what is likely to be a significant market for the firm and its clients in the years ahead. ◆

Income from Providing Hydraulic Fracturing Services is "Qualifying Income" for Master Limited Partnerships

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Background

A Master Limited Partnership or MLP (sometimes called a publicly traded partnership or PTP), is an attractive business entity because it is treated as a partnership for federal income tax purposes even though the ownership interests in the MLP are publicly traded. Thus, the income of the MLP is subject to a single level of tax at the partner level; moreover, ordinary business deductions flow through the MLP and reduce the partners' taxable income from the MLP. By contrast, income of a corporation (other than an S corporation) is subject to tax at the corporate level, and the net after-tax income of the corporation is subject to a second level of tax when distributed as dividends to its shareholders.

In order to obtain this favorable tax treatment, the MLP must meet certain requirements, one of which is that 90% or more of the MLP's gross income for each taxable year must consist of "qualifying income." Failure to meet this requirement could result in treatment of the MLP as a corporation for federal income tax purposes. Qualifying income generally includes passive income such as interest, dividends, and real property rents. However, with respect to natural resources, qualifying income also includes income and gains derived from the exploration, development, mining or production, processing, refining, transportation (including pipelines transporting gas, oil, or products thereof), or the marketing of any mineral or natural resource (including fertilizer, geothermal energy, and timber); this is sometimes referred to as the "natural resource exception." The Internal Revenue Service has issued a number of favorable private letter rulings to the effect that income from various sources qualifies for the natural resource exception, including several recent private letter rulings dealing with income from the provision of hydraulic fracturing services or other income related to hydraulic fracturing. These recent private letter rulings are discussed in greater detail below.

Income from the Provision of Hydraulic Fracturing Services

In Private Letter Ruling 201322024 (released May 31, 2013), the IRS addressed the income of an MLP that (as successor to the business operations of its sponsor) provides well stimulation services to the oil and gas industry. Specifically, the MLP (itself or through affiliated operating entities treated as partnerships or disregarded entities for federal income tax purposes) provides high-pressure hydraulic fracturing services to exploration and production

companies in order to enhance the production of oil and natural gas from unconventional oil and natural gas basins (i.e., geologic formations such as shale and other tight formation reservoirs where natural flow is restricted). To provide these services, the MLP uses mobile hydraulic fracturing units and associated heavy equipment that are owned by the MLP and operated by its employees and independent contractors. This hydraulic fracturing equipment is specifically designed to pump specially formulated fracturing fluid into a perforated well casing or tubing under high pressure.

The ruling describes the fracturing process as completed in multiple stages, or horizontal zones. Sand, bauxite, resin-coated sand, or ceramic particles, each referred to as a proppant or propping agent, are suspended in the fracturing fluid and prop open the cracks created by the fracturing process in the underground formation. This propping causes the underground formation to crack or fracture, thereby allowing the hydrocarbons to flow more freely into the wellbore. As part of the ruling process, the MLP represented to the IRS that these hydraulic fracturing services are integral to the production of oil and natural gas from wells drilled in shale and other tight formation reservoirs, because the production of such oil and natural gas would be significantly curtailed in the absence of such services.

The MLP entered into a contract with an independent exploration and production company (the "E&P Company") engaged in the acquisition, development, and production of unconventional natural gas resources in the United States. Under the contract, the MLP will provide hydraulic fracturing services to the E&P Company in a specific geographic location over a 24-month period. The contract requires the MLP to provide an initial fleet of a specified number of pumps, and to perform a minimum number of stages per day for a number of days per month, that result in a minimum number of fracturing stages per quarter. The MLP's fees for providing these hydraulic fracturing services consist of (i) mobilization fees based on mileage from the location of the MLP's hydraulic fracturing fleet, charged at the initial stage of each job; (ii) operating stage/well/day rates; (iii) standby times rates and downtime rates in circumstances where the E&P Company does not provide the MLP with the minimum number of quarterly stages through no fault of the MLP; (iv) *force majeure* payment rates and payments in the event a governmental body or regulatory agency issues a mandate that either makes it impossible for the MLP to continue operations or causes an increase in the MLP's rate; and (v) reimbursable costs with respect to hydraulic fracturing-related material, equipment, work, or services that are to be furnished by the MLP at the E&P Company's request, plus a percentage of such costs for handling.

The MLP represented to the IRS that the contract with the E&P Company is illustrative of the contractual relationships that the MLP expects to have with other exploration and production companies. The fee structure of these additional contracts is expected to be similar to the fees charged in the contract with the E&P Company. In certain instances, the MLP may also source chemicals and proppants that are consumed during the fracturing process and charge its exploration and production customers a fee for providing such materials. Such charges for materials generally will reflect the cost of the materials plus a markup and will be based on the actual quantity of materials used in the fracturing process. Finally, the MLP may charge its other exploration and production customers a handling fee for chemicals and proppants supplied by the customer.

Based on the facts submitted and representations made, the IRS ruled that the gross income that the MLP derives from providing hydraulic fracturing services will be qualifying income.

Other Income Related to Hydraulic Fracturing

In Private Letter Ruling 201234005 (released August 24, 2012), an MLP was engaged in the transportation and processing of natural gas within the United States through affiliated operating subsidiaries treated as partnerships or disregarded entities for federal income tax purposes. To facilitate its transportation and processing activities, the MLP owns natural gas gathering pipelines, natural gas processing systems, and the natural gas pipeline rights-of-way associated with each pipeline.

The MLP's customers are natural gas producers that use hydraulic fracturing to extract natural gas from geologic formations. Hydraulic fracturing involves the injection of fluids, primarily water mixed with a proppant, into an oil or gas well at high pressure to fracture geologic formations and open pathways for the oil or gas to flow. The fracturing process requires very large volumes of water.

To meet the water needs of the MLP's customers, the MLP formed a subsidiary operating limited partnership (the "OLP") to develop, construct, own, and operate a water delivery pipeline system (the "Pipeline") for the purpose of supplying fresh water to the MLP's customers and other natural gas producers for use in the production of natural gas through hydraulic fracturing. The Pipeline will run primarily parallel to the trunk-line of the MLP's natural gas gathering pipelines and will share the MLP's existing rights-of-way. The OLP will earn income from long-term pipeline capacity and supply agreements with the MLP's customers. The OLP expects to enter into additional long-term pipeline capacity and supply agreements with other natural gas producers in the region. Under these agreements, natural gas producers will pay the OLP for the pipeline supply and transportation of fresh water to water impoundment ponds designated by the natural gas producers.

As part of the ruling process, the MLP represented to the IRS that the supply and transportation of fresh water to natural gas producers for use in hydraulic fracturing is integral to the exploration and production of natural gas from shale formations and the preservation and growth of the MLP's existing activity of natural gas transportation. The MLP, through the OLP, is uniquely situated to supply fresh water efficiently through a pipeline due to its existing rights-of-way and expertise in pipeline transportation. The OLP intends to provide the water supply solely to natural gas producers operating in proximity to the MLP's natural gas gathering assets, many of whom are either current customers or prospective customers of the MLP's natural gas gathering services.

Based on the facts submitted and representations made, the IRS ruled that the MLP's distributive share of the gross income derived by the OLP from the supply and transportation of water to oil and gas producers for use in the exploration, development, and production of oil or natural gas is qualifying income.

In Private Letter Ruling 201233009 (released August 17, 2012), modified by Private Letter Ruling 201316005 (released April 19, 2013), the IRS ruled that income derived by an MLP from the mining and marketing of silica for sale to oil field service companies for injection as a proppant in the production of crude oil and natural gas constitutes qualifying income.

Conclusion

It should be noted that a private letter ruling may be relied upon only by the taxpayer that obtained the ruling. Nonetheless, private letter rulings can provide a valuable insight into the IRS' analysis of the issue addressed. Given the IRS' favorable disposition toward the natural resource exception, and the dire tax consequences of failing the qualifying income requirement, MLPs engaged in or considering the types of activities described above should consider with their tax advisors the desirability of obtaining their own private letter rulings confirming that the income from those activities will indeed constitute qualifying income. ◆

Digging into SEC Mineral Disclosure Policies

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Editor's Note: After this bylined article appeared (in June 2013), the SEC's resource extraction payments disclosure rule was vacated on July 2, 2013 by the U.S. District Court for the District of Columbia. The findings indicated the Court's disagreement with the SEC's construction of a provision in the statute upon which the new rule was based, and that the SEC's arguments for not providing an exemption for certain disclosures meant that some complying companies would be competitively disadvantaged. On September 2, 2013, a spokesperson for the SEC indicated that it would not appeal the decision, but that it would re-propose the rule informed by the court's decision.

Law360, New York (June 17, 2013, 11:25 AM ET) -- On May 30, 2013, the Division of Corporation Finance of the U.S. Securities and Exchange Commission provided guidance in the form of frequently asked questions with respect to two recent SEC rules: (i) disclosure requirements regarding the use in products manufactured or contracted to be manufactured by an issuer of conflict minerals originating in the Democratic Republic of Congo or an adjoining country (DRC), and (ii) disclosure requirements for certain payments to governments by resource extraction issuers.[1]

The SEC adopted these rules on Aug. 22, 2012, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, creating new Form SD for these specialized disclosure requirements.[2] The conflict minerals disclosure rules require issuers to follow a three-step process in determining whether, and to what extent, to make the required disclosures. The first step is to determine whether a company is subject to the rule. If it is, the second step is to conduct a reasonable country of origin inquiry to determine whether the conflict minerals originated in the DRC. Depending on the outcome of that inquiry, the third step is to conduct supply chain due diligence and, if necessary, to prepare a conflict minerals report.

The resource extraction payments disclosure rules require resource extraction issuers to disclose annually certain information on payments they make to the US government and foreign governments for the purpose of the commercial development of oil, natural gas or minerals.

Although both sets of rules were accompanied by extensive adopting releases, ambiguities remain, which have resulted in a substantial number of compliance questions as issuers analyze the applicability of the new rules to their operations and what disclosures, if any, must be provided. The FAQs do not address all of the

questions that issuers are struggling with, but they do provide helpful interpretations with respect to some of the more commonly raised issues and also provide insights into how the staff may be looking at applying these new rules.

FAQs Applicable to Both the Conflict Minerals and Resource Extraction Payments Rules

FORM S-3 ELIGIBILITY

The FAQs made clear that the failure to timely file a Form SD regarding conflict minerals or resource extraction payments will not make an issuer ineligible to use a Form S-3 registration statement. While the Form SD is a mandatory filing to the extent required by applicable SEC rules, a failure to file that form timely will not prevent an issuer from raising capital using the streamlined procedures of a short- form registration statement if the issuer is otherwise eligible to use Form S-3. Even though the failure to timely file a Form SD will not impact Form S-3 eligibility, it remains important that issuers develop appropriate disclosure controls and procedures as the Form SD
is a report that is filed with the SEC and is therefore covered by the certifications filed by an issuer's chief executive officer and chief financial officer.

SUBSIDIARIES

The issuer must include applicable disclosures with respect to subsidiaries. In the case of conflict minerals, the disclosure is required with respect to the issuer and all of its consolidated subsidiaries. In the case of resource extraction payments, the disclosure is required with respect to the issuer and its subsidiaries, as well as any other entity over which the issuer has control (e.g., a joint venture with a national oil company). Accordingly, issuers should implement disclosure controls and procedures to make appropriate inquiries throughout their organizations when determining if they are subject to the conflict minerals and/or resource extraction payment disclosure rules.

Key Points of the Conflict Minerals FAQs

VOLUNTARY FILERS

The conflict minerals FAQs make clear that the conflict mineral rules apply to issuers that voluntarily file reports with the SEC under Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act"). This means that any issuer that files reports with the SEC, whether or not it is required to do so, must comply with the conflict minerals disclosure rules, if applicable.

CUSTOMARY MINING ACTIVITIES

Issuers that only engage in mining and ancillary activities customarily associated with mining, such as transporting, crushing, milling, mixing and smelting the mined ore, are not considered to be manufacturing those minerals. The staff's position is a helpful clarification that mining companies do not become subject to the conflict minerals disclosure rules as a result of these ancillary activities. For example, the staff noted that gold mining of lower grade ore can involve a number of ancillary activities and the performance of those activities does not subject an issuer to the new conflict minerals disclosure rules.

ETCHED LOGOS

Issuers specifying that a logo, serial number or other identifier be etched on a generic product manufactured by a third party is not considered to be "contracting to manufacture the product." In other words, a company may direct that the branding of an "off-the-shelf" product be accomplished through a permanent marking of the product, as opposed to being affixed to the product, without being deemed to be contracting to manufacture the product for the purpose of the conflict minerals disclosure rules.

GENERIC COMPONENTS

The FAQs make clear that if an issuer purchases generic components containing conflict minerals to include in a product, it must conduct a reasonable country of origin inquiry with respect to conflict minerals included in the generic components, even if it did not contract to manufacture such

components. Accordingly, as a disclosure control, issuers should confirm that they are evaluating the content of generic parts used when they manufacture or contract to manufacture their products.

PACKAGING

The packaging or container sold with a product is not to be considered part of the product, even if a product's package or container is necessary to preserve the product following purchase. The staff interpretation explains that the packaging or container sold with a product is not considered part of the product and is generally discarded. On the other hand, if a company manufactures and sells the packaging or containers independent of the product inside, the packaging or container itself would be a product, subject to the conflict minerals disclosure rules.

EQUIPMENT USED TO PROVIDE SERVICE

When an issuer uses equipment in order to provide a service that it sells, the staff does not consider such equipment to be the issuer's product for the purpose of the conflict minerals disclosure rules, even if the issuer manufactures or contracts to manufacture such equipment. As an example, the staff noted that a cruise line company that contracts to manufacture cruise ships does not have to file reports on Form SD regarding cruise ships. In its response, the staff made clear that it does not interpret equipment used to provide services to be products subject to the conflict minerals disclosure rules.

RESALE OF EQUIPMENT

Issuers do not have to file reports on Form SD with respect to tools, machines or equipment used in the manufacture of their products, even if they subsequently resell such equipment. Entry of used tools, machines or equipment into the stream of commerce after a company no longer needs them does not transform these items into products of that company for the purposes of the conflict minerals disclosure rules.

MODEL NUMBERS

Issuers do not need to disclose in Form SD the model numbers of products that have not been found to be DRC conflict free or that are DRC conflict undeterminable. The staff reiterated that the conflict minerals disclosure rules permit an issuer to describe its products based on its own facts and circumstances because each individual company is in the best position to describe its products in terms commonly understood within its industry. While issuers have flexibility in describing their products, they nevertheless must clearly disclose that such products "have not been found to be 'DRC conflict free'" or are "DRC conflict undeterminable," as applicable.

REPORT AND AUDIT NEEDED EVEN IF "DRC CONFLICT FREE"

Issuers that manufacture or contract to manufacture products that contain conflict minerals from the DRC must file a Form SD with a conflict minerals report and obtain an independent private sector audit, even if they determine the products to be "DRC conflict free." However, issuers do not have to disclose "DRC conflict free" products in their conflict minerals report or make certain other disclosures (such as describing processing facilities and country of origin) with respect to the "DRC conflict free" products.

IPO TRANSITION PERIOD

Following an issuer's initial public offering, the staff clarified that it will not object if the issuer starts conflicts mineral reporting for the first reporting calendar year that begins no sooner than eight months after the effective date of its IPO registration statement. This staff interpretation will provide a useful transition period for newly public companies, comparable to the transition period directly provided in the conflict minerals disclosure rules in the acquisition context.

Key Points of the Resource Extraction Payments FAQs

CONTRACT DRILLING AND OTHER OIL FIELD SERVICES COMPANIES

The staff clarified that issuers involved only in providing contract drilling and other oil field services (and presumably equipment) associated with exploration, extraction, processing and export activities would generally not be considered resource extraction issuers for purposes of the resource extraction disclosure rules. While noting that these activities are "related to" the commercial development of resources, the staff took the same approach as the Extractive Industries Transparency Initiative (EITI) did, in providing that only companies directly engaged in the extraction or production of oil, natural gas or minerals should disclose payments to governments or governmental agencies.[3]

The staff's position resolved a major uncertainty that many service and equipment companies had been grappling with since the effective date of the rules. This staff Interpretation also stated that in the event that any payment otherwise falling within the definition of "payment" under the rules is made by a service provider to a government or governmental agency on behalf of a resource extraction issuer, that payment must be disclosed by the resource extraction issuer.

WHAT IS A "MINERAL" FOR PURPOSES OF THE RESOURCE EXTRACTION DISCLOSURE RULES?

A "resource extraction issuer" is defined in the statute and resource extraction disclosure rules as an issuer engaged "in the commercial development of oil, natural gas, or minerals." There is no specific definition of the word "minerals" in the statute or rules. The FAQs provide that for purposes of the statute and rules, disclosure is required with respect to "any material commonly understood to be a mineral," and would include any material for which disclosure is required under the SEC's Industry Guide 7 under the Securities Act of 1933 — "Description of Property by Issuers Engaged or to Be Engaged in Significant Mining Operations."

EXPORTING WITHOUT AN OWNERSHIP INTEREST IN THE RESOURCE

An issuer engaged in transportation activities moving a resource from one country to another country is generally considered to be "exporting" the resource. However, the issuer generally would meet the definition of "resource extraction issuer" and be subject to the requirements to disclose its payments to governments if the issuer has an ownership interest in the resource being transported. If the issuer does not have an ownership interest in that transported resource, then the transportation activities generally are not considered to be directly related to the export of the resource, and the issuer generally would not be considered to be a resource extraction issuer.

TYPES OF PAYMENTS AND DISCLOSURES

The FAQs also clarified a number of questions with regards to specific types of payments made by resource extraction issuers to governments. For example, a question was raised whether payments from a resource extraction issuer to a majority-owned government transportation service that supplies people or materials to a job site are required to be reported. The staff responded that because the payments are made in connection with a service activity that is considered to be "ancillary or preparatory" to the commercial development of resources, disclosure of those payments is not required.

Payments of penalties and fines to governmental agencies related to resource extraction activities are not reportable as "fees." For purposes of the resource extraction disclosure rules, disclosure is required of specified payments including, among other categories, fees and other material benefits that the SEC determines, consistent with the EITI guidelines, are part of the commonly recognized revenue stream for the commercial development of resources. Penalties and fees, according to the staff, are not within the type of fees mentioned in the EITI guidelines, and therefore they are not part of the commonly recognized revenue stream for the commercial development of the subject resources.

Payment information presented by a resource extraction issuer cannot be provided on an accrual basis for financial accounting purposes. The staff noted that the rules only contemplated the payment information to be presented on an unaudited, cash basis for the year in which the payments are made.

A resource extraction issuer may have many sources of income from a particular country. That resource extraction issuer likely pays corporate-level income tax to that country's government based on the consolidated amount of its income in that country and not segregated out by resource extraction activity.

According to the FAQs, the income taxes that are paid with respect to the issuer's covered commercial development activities that must be disclosed for that country may be reported in one of two ways: (i) either on a segregated basis, separating out the amounts of income taxes that the issuer pays on its other business activity income in that country, which may be difficult to do if the provider of the resource extraction activities is not a separate taxpayer, or (ii) on an aggregate basis, reporting the total income taxes paid for that country but noting that the disclosed aggregate amount includes payments made for purposes other than the commercial development of oil, natural gas or minerals.

As noted earlier, there are a number of open questions issuers are trying to address in determining how to apply the new requirements. While the FAQs address some of these questions, there are a number that remain unanswered and we hope that the staff will continue to issue FAQs providing additional guidance interpreting the application of the new rules. ◆

Endnotes

1 The FAQs relating to the conflict minerals disclosure rules are available at http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm. The FAQs relating to the resource extraction payments disclosure rules are available at http://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm.

2 For a detailed description of the conflict minerals disclosure rules, see Mayer Brown LLP's Legal Update dated Sept. 5, 2012, entitled Securities and Exchange Commission Adopts Final Conflict Minerals Disclosure Rule, which is available at http://www.mayerbrown.com/US-Securities-and- Exchange-Commission-Adopts-Final-Conflict-Minerals-Disclosure-Rule-09-05-2012/. For a detailed description of the resource extraction payments disclosure rules, see Mayer Brown LLP's Legal Update dated September 4, 2012, entitled SEC Adopts Dodd-Frank Resource Extraction Payments Disclosure Rules, which is available at http://www.mayerbrown.com/SEC-Adopts-Dodd-Frank-Resource-Extraction- Payments-Disclosure-Rules-09-04-2012/.

3 Section 13(q)(1)(C) under the Exchange Act directs the SEC in its rulemaking to determine the types of payments to be included as "part of the commonly recognized revenue stream for the commercial development of oil, natural gas or minerals." It provides that the payments and benefits to be included should be "consistent with the guidelines of the EITI (to the extent practicable)."

Energy M&A Under the Hart-Scott-Rodino Act: Is There an Exemption That Applies to Your Deal?

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Introduction

At a time when there is significant M&A activity in the energy industry, it is critical for energy companies to understand how the premerger notification filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or "the Act"),[1] and the regulations promulgated under the Act ("HSR Rules" or "Rule(s)"),[2] may apply to their transactions. In fact, there are both energy-specific exemptions to the Act and other exemptions of more general application that can be used to exempt broad categories of energy mergers and acquisitions from HSR Act filing requirements. These exemptions are highly technical, however, and include a number of exceptions. As a result, transactions that exceed the Act's basic jurisdictional thresholds often must be reviewed carefully to determine whether any of these exemptions can be applied to the particular transaction at issue. Moreover, amendments to the HSR Rules and reporting form implemented in 2011 require parties to certain energy transactions, particularly those involving master limited partnerships ("MLPs"), to report additional information where the transaction does not qualify for an exemption. This article provides a brief overview of how these various provisions may apply to energy-related transactions, including the circumstances under which such transactions are and are not exempt.

HSR Act Overview

Under the HSR Act and Rules, parties to acquisitions of assets, voting securities, and equity interests in non-corporate entities (e.g., limited liability companies, partnerships) that meet certain jurisdictional dollar thresholds, are required to file premerger notification forms with the Federal Trade Commission (the "FTC") and the Department of Justice (the "DOJ"), and observe a waiting period—usually 30 days—before they are permitted to consummate the transaction. There are two basic jurisdictional thresholds. The Size-of-Persons threshold is satisfied where there is a person on one side of the transaction with $141.8 million or more in total assets or annual net sales, and a person on the other side with $14.2 million or more in total assets or annual net sales.[3] The Size-of-Transaction threshold is met if the value of the transaction exceeds $70.9 million.[4] Transactions valued in excess of $283.6 million meet the jurisdictional threshold regardless of the size of the persons.[5] Transactions meeting these thresholds are reportable unless there is an applicable exemption.

Energy-Specific Exemptions

Since 1996, the HSR Rules have included Rule 802.3, which provides specific exemptions for acquisitions of carbon-based mineral reserves. Under the Rule, an acquisition of reserves or rights in reserves of oil, natural gas, shale or tar sands, together with associated exploration or production assets, is exempt if the fair market value of such assets to be held as a result of the acquisition does not exceed $500 million.[6] Similarly, an acquisition of reserves or rights in reserves of coal together with associated exploration or production assets is exempt if the fair market value of such assets to be held as a result of the acquisition does not exceed $200 million.[7] "Associated exploration or production assets" means equipment, machinery, fixtures and other assets that are integral and exclusive to current or future exploration or production activities associated with the carbon-based mineral reserves that are being acquired, but does not include (1) any pipeline and pipeline system or processing facility which transports or processes oil and gas after it passes through the meters of a producing field located within reserves that are being acquired, or (2) any pipeline or pipeline system that receives gas directly from gas wells for transportation to a natural gas processing facility or other destination.[8]

Significantly, in determining whether the $500 million or $200 million thresholds have been exceeded, the parties do not need to count the value of any nonproducing reserves.[9] As a result of this provision, acquisitions of oil and gas reserves with a total value substantially in excess of $500 million may be exempt (e.g., an $800 million acquisition consisting of $400 million in producing oil and gas reserves and $400 million in nonproducing reserves). As noted above, however, the exemption does not apply to transportation or processing assets outside of the production field. In particular, such assets may include natural gas-gathering systems, processing and treatment plants, transportation pipelines, storage facilities and terminals.[10] In a transaction in which both exempt assets valued below the Rule 802.3 thresholds and nonexempt assets are being acquired, the parties must determine whether, viewed separately, the aggregate value of the nonexempt assets exceeds the $70.9 million size threshold, in which case a filing will be required for the acquisition of those assets.

Note that parties can take advantage of these exemptions regardless of whether the transaction is structured as an acquisition of assets or an acquisition of voting securities or noncorporate interests. Under Rule 802.4, where a direct acquisition of assets is exempt under Rule 802.3, the acquisition of an equity interest in an entity holding such assets also will be exempt provided that the entity also does not hold nonexempt assets valued in excess of $70.9 million.

Other Exemptions Applicable to Energy Transactions

In addition to the Rule 802.3 exemptions, there are a number of exemptions of more general application that can be applied to exempt transactions involving energy-related assets. A few of the most relevant exemptions are described below.

ACQUISITIONS OF NONCONTROLLING INTERESTS IN NONCORPORATE ENTITIES

There are many cases in which energy-related assets such as gathering systems and transportation pipelines are held in noncorporate entities, including limited liability companies (LLCs) and limited partnerships.[11] Under the HSR Rules, acquisition of an equity interest in a noncorporate entity is not reportable unless, as a result of the acquisition, the acquiring person will hold a controlling interest in the entity.[12] Control of a noncorporate entity is defined under the Rules purely in financial terms as having the right to 50 percent or more of the entity's profits or 50 percent or more of its assets upon dissolution.[13] Thus, an acquisition that will result in the acquiring person holding only a minority interest in a non-corporate entity that holds energy-related assets is exempt regardless of the dollar value of the interest acquired. Further, this exemption applies even where the minority interest being acquired is a general partner or managing member interest that will give the acquiring person management control of the entity and its underlying assets.[14]

ACQUISITIONS OF NON-CORPORATE INTERESTS IN FINANCING TRANSACTIONS

Under Rule 802.65, an acquisition of a controlling interest in a non-corporate entity is exempt from HSR Act filing requirements if (a) the acquiring person is contributing only cash to the non-corporate entity, (b) for the purpose of providing financing, and (c) the terms of the financing are such that the acquiring person no longer will control the entity after it realizes a preferred return. In recent years, it has become increasingly common for financial investors to contribute funds to entities that hold renewable energy projects, including solar power and wind projects, under terms that meet the requirements of this rule. Thus, parties to such investments should consider whether their transaction qualifies for the Rule 802.65 exemption.

ACQUISITIONS OF ASSETS AND ENTITIES LOCATED OUTSIDE THE US

In an increasingly global energy industry, it is more likely that both US and non-US companies will be acquiring energy-related assets and entities located outside the US. Even if the parties to such transactions that meet the Act's jurisdictional thresholds cannot take advantage of the exemptions discussed above, such acquisitions may be exempt under HSR Rules exempting certain acquisitions of non-US assets and interests in non-US entities. In general, the acquisition of assets located outside the US is exempt so long as the non-US assets being acquired from the same acquired person did not account for aggregate sales in or into the US of more than $70.9 million in the acquired person's most recent fiscal year.[15] A similar rule applies to acquisitions of voting securities in non-US corporations and controlling equity interests in non-US non-corporate entities. Where a non-US person acquires a non-controlling (less than 50 percent) voting securities interest in a non-US corporate issuer, the transaction is exempt. Where a non-US person acquires a controlling interest in a non-US corporate or non-corporate entity, or a US person acquires any voting securities interest in a non-US corporation or a controlling interest in a non-US non-corporate entity, the acquisition is exempt unless the target entity, including any of its controlled subsidiaries, holds assets located in the US with a current fair market value of more than $70.9 million, or had sales in or into the US of more than $70.9 million in its most recent fiscal year.[16]

In transactions involving the acquisition of both US and non-US assets or entities, it may be helpful for the parties first to assess whether the US part of the transaction alone is valued in excess of $70.9 million and, if not, then determine whether the non-US part is exempt; if it is, the transaction is not reportable; if the non-US part is not exempt, the parties then should determine whether the value of the US and non-US parts together exceed the $70.9 million threshold.

ADDITIONAL REPORTING OBLIGATIONS RELATING TO MASTER LIMITED PARTNERSHIPS

In 2011, the FTC implemented changes to the HSR Act reporting form and regulations that were designed to obtain additional information in filings made by both private equity funds and MLPs, which frequently are used to hold assets in the oil and gas sector.[17] The effect of these new rules can be illustrated with the following, simplified example. Assume GP is the general partner and holds a 5 percent interest in both MLP1 and MLP2, each of which owns natural gas pipelines. MLP1 now plans to acquire another natural gas pipeline in a transaction reportable under the HSR Act. Under the old rules, MLP1 was not required to report anything about MLP2's pipeline holdings, even if they competed directly with the pipeline MLP1 now is planning to acquire. Under the new rules, GP and MLP2 are considered to be "associates" of MLP1, and MLP1 must include information in its HSR Act filing regarding any entity in which GP or MLP2 holds a 5 percent or greater equity interest that operates in the same industry as the assets or company being acquired by MLP1. In this example, that would include information regarding MLP2's pipelines, including the geographic areas in which they operate.[18] As this example shows, an MLP that is managed by a general partner that also manages one or more other MLPs, and is engaged in a

transaction reportable under the HSR Act, needs to identify both relevant associate relationships and the resulting information it may need to report regarding those relationships.

Conclusion

As this discussion shows, there are many energy-related transactions that, while potentially reportable under the HSR Act, may qualify for one or more energy-related or more general exemptions from the Act's reporting requirements. Parties to transactions of the types discussed above should confer with counsel to determine whether their transaction is exempt, ensure that the transaction does not fall within an exception to the relevant exemption and, particularly if an MLP is involved, for guidance in identifying any associate relationships. ◆

Endnotes

1 15 U.S.C. §18a.

2 16 C.F.R. § 801 *et seq.*

3 15 U.S.C. § 18a(a)(2)(B)(ii). "Person" for these purposes is the ultimate parent of the entity making the acquisition (acquiring person), or whose assets, voting securities or non-corporate interests are being acquired (acquired person). Rule 801.1(a)(1). Whether the relevant size threshold has been satisfied is determined by reference to each person's most recent, fully consolidated balance sheet and statement of annual income. Rule 801.11(c).

4 In an acquisition of assets, whether the $70.9 million threshold has been exceeded is determined by looking at the greater of the acquisition price or the fair market value. The acquisition price includes the amount of consideration being paid and the value of any assumed, accrued liabilities. The fair market value must be determined by the buyer acting in good faith and using a commercially reasonable valuation method. See Rule 801.10(b), (c)(1)(iii). Acquisitions of voting securities that are publicly traded are valued at the greater of the market price or the price agreed upon by the parties. Voting securities that are not publicly traded and equity interests in non-corporate entities are valued at the acquisition price agreed upon by the parties, or if there is no acquisition price, the fair market value determined as described above. Rule 801.10(a). Note that since 2004, these jurisdictional thresholds have been adjusted annually based on the rate of growth in the US Gross National Product. 15 U.S.C. §18a(a)(2)(A). The current thresholds described above were announced in February 2013. See 78 Fed. Reg. 2406, 2406 (Jan. 11, 2013), available at http://www.ftc.gov/os/2013/01/130110claytonact7afrn.pdf.

5 15 U.S.C. § 18a(a)(2)(A).

6 Rule 802.3(a).

7 Rule 802.3(b).

8 Rule 802.3(c).

9 Rule 802.3, Exs. 1 & 4 (the value of reserves meeting the definition of unproductive real property in Rule 802.2(c) does not count towards the Rule 802.3 exemption thresholds). Rule 802.2(c) exempts the acquisition of real property—including raw land, structures or other improvements (but excluding equipment), associated production and exploration assets as defined in Rule 803.2(c), and 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.

10 Acquisitions of these types of non-exempt assets repeatedly have been the subject of antitrust enforcement actions by the DOJ and FTC in which the parties have been required to divest assets to obtain antitrust clearance. See, e.g., *In re Kinder Morgan, Inc.*, Dkt. No. C-4355 (F.T.C. June 12, 2012) (Decision and Order), http://www.ftc.gov/os/caselist/1210014/120614kindermorgando.pdf (requiring Kinder Morgan to divest pipeline assets to acquire El Paso Corporation); *In re Enter. Prods. Partners LP*, Dkt. No. C-4123 (F.T.C. Nov. 23, 2004), http://www.ftc.gov/os/caselist/0410039/041126do0410039.pdf (requiring Enterprise to divest interests in a natural gas pipeline and propane storage and terminal assets to acquire GulfTerra Energy Partners, L.P.). Note that this exception to the Rule 802.3 exemptions also would apply to any assets being acquired in the transaction not related to energy production, processing or transportation, such as a manufacturing plant. See Rule 802.3(a) and (b).

11 See, e.g., Anthony Reale, *Master Limited Partnerships—Understanding an Evolving Asset Class*, http://www.jpmorgan.com/tss/General/Master_Limited_Partnerships_Understanding_an_Evolving_Asset_Class/1320477769983 (last visited July 17, 2013) ("MLP's are significant owners of America's energy infrastructure, controlling substantial assets involved in the transportation, processing, refining, marketing and storage of the nation's energy resources.").

12 Am. Bar Ass'n, *Premerger Notification Practice Manual*, Interpretation No. 102 (4th ed. 2007).

13 Rule 801.1(b)(1)(ii).

14 On the other hand, if the target entity is a corporation, acquisition of a minority voting securities interest is reportable if it will result in the acquiring person holding voting securities valued at more than $70.9 million, unless there is another applicable exemption.

15 Rule 802.50.

16 Rule 802.51. When the acquiring person is acquiring interests in multiple subsidiaries of the same acquired person, the value of those subsidiaries' US assets and sales is aggregated for purposes of the Rule 802.51 $70.9 million thresholds. See Rule 802.51(a)(2) and (b)(2).

17 See 75 Fed. Reg. 57110, 57112 (Sept. 17, 2010) (proposed rule changes), available at http://ftc.gov/os/fedreg/2010/september/100917premerger.pdf (failure to capture competitive information under then-current rules "frequently arises in the energy industry with Master Limited Partnerships, where potentially crucial overlaps among LPs with the same general partner may go undetected.").

18 The definition of “associate” under Rule 801.1(d) is “an entity that is not an affiliate of [a filing firm] but: (A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a ‘managing entity’); or (B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or (C) directly or indirectly controls, is controlled by, or is under common control [has a common parent] with a managing entity; or (D) directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.” Under this definition, in the example above, both GP and MLP2 are associates of MLP1. Note that while the rules regarding associates were enacted primarily to address reporting gaps in transactions involving private equity funds and MLPs, the definitions are not limited to those entities and can apply to other types of entities that meet the “associate” definition.

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