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Verne, B. Michael

From: [REDACTED]
Sent: Friday, February 24, 2012 3:05 PM
To: Verne, B. Michael; Walsh, Kathryn
Subject: HSR treatment of fiduciary cash, receivables, and payables

Mike and Kate:

A client of ours in the insurance industry is contemplating the acquisition of a "managing general agent," which can be described as an insurance intermediary that offers specialized insurance policies on behalf of insurance carriers for a range of clients, including principally wholesale and retail brokers. In its capacity as an insurance intermediary, the target collects premiums from insureds, from other insurance intermediaries, and/or from premium finance companies. After deducting commissions, the net premium is remitted to the insurer or other insurance intermediary. The target is not a principal to the related insurance contracts under which the right to receive premiums or the right of loss reimbursement arises. Thus, fiduciary cash, uncollected fiduciary receivables, and related fiduciary payables (the net of which will always equal zero) are not really assets and liabilities of the Company.

When one looks at the target's balance sheet, however, one finds – contrary to the way many public companies in the industry report – offsetting "asset" (i.e., "cash in banks" and "accounts receivable") and "liability" (i.e., "accounts payable") entries reflecting these fiduciary activities. This fact would be of no consequence from an HSR perspective if the contemplated acquisition were structured as a stock purchase, because the acquisition price would be considerably below the size-of-transaction threshold. If the parties instead were to structure the acquisition as an asset purchase, however, and if the "accounts payable" were required to be treated as assumed "liabilities" and counted as part of the consideration for the target's assets, then the size-of-transaction threshold might be exceeded.

Our research has turned up one informal staff opinion (No. 9201003) that appears to have involved a similar business and that supports the view that the fiduciary cash and uncollected fiduciary receivables on the target's balance sheet need not be counted among the assets of the target for HSR purposes and, correspondingly, that the offsetting fiduciary payables need not be counted among its liabilities. Given the passage of 20 years, though, we thought we should confirm that this opinion aligns with the staff's current views. Would you please let me know whether it does?

If you have any questions or need any additional information, please do not hesitate to contact me.

Thanks.



AGREE
BM
2/27/12
K. WALSH CONCURS -

SEE - 9804011

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