

Verne, B. Michael

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Sent: Wednesday, March 14, 2012 2:43 PM
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Subject: Rights and Obligations of Spun Off Entity

Mike, I would appreciate your thoughts on the following factual scenario regarding a spun-off entity that has become its own UPE:

FACTS: Company A has made an HSR filing and during the waiting period crossed an HSR threshold; thereafter, Company A spun off a set of divisions into newly formed Company B; both Company A and Company B are now their own UPE's; at the time of the spin-off Company B also received a minority share of the voting stock of a third person ("Company X") for which Company A originally filed an HSR premerger notification. Less than five years have passed since the original filing by Company A who could have taken advantage of the exemption found in section 802.21 if it wanted to purchase additional Company X stock up to the next threshold. Company B, now the holder of the minority interest in Company X wishes to acquire additional voting stock of Company X up to that threshold.

ISSUE: Does Company B who received the Company X stock at the time of its creation have the same rights/obligations under section 802.21 of the HSR rules as Company A, the original filing person? In other words, may Company B acquire Company X voting stock without a new HSR notification, up to the next HSR threshold that was not crossed by Company A, before the original five year time period has expired?

ANALYSIS: When Company A filed to acquire the voting stock of Company X the assets of what became Company B were within Company A; thus, the governmental agencies were apprised of the relevant facts and could review them from an anti-trust basis; if Company A was allowed to acquire the voting stock of Company X based upon governmental review, the same review in effect (but to a lesser extent) would now apply to Company B. This in effect duplicates the Company A/Company X review if Company B is required to file for a proposed acquisition of additional Company X voting stock that does not cross a new HSR threshold. In this regard, opinion number 242 of the fourth edition of the Premerger Notification and Practice Manual, addressing the issue when must parties to a transaction refile, notes, in part, that "Refiling is required if the ultimate parent entity of any acquiring person changes, unless the new ultimate parent entity was within the original ultimate parent entity." (example 3 of this opinion).

CONCLUSION: Because Company B was in effect part of Company A at the time of the original HSR filing by Company A, Company B's proposed acquisition of Company X voting stock would come within the exemption discussed in example 3 of opinion number 242. This is only logical because the anti-trust review has already occurred at the time of the original filing; thus, Company B has the same rights under section 802.21 to acquire Company X voting stock during the five year period originally granted to Company A based upon its acquisition of Company X voting stock during the one year period following expiration of the original HSR waiting period.

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