801.50

Verne, B. Michael

From: [redacted]
Sent: Monday, July 09, 2012 11:03 AM
To: Verne, B. Michael
Subject: HSR Question--Joint Venture Formation

Mike, hope all is well with you and you survived the heat wave. We would appreciate your thoughts on the factual situation below in which we represent the acquiring person.

A. Factual Circumstances

1.This transaction involves the establishment of a joint venture limited liability company("LLC") to which one group of entities will contribute cash and the other will contribute an operating business.

2.More specifically, A, B, C, and D are related private equity fund partnerships. Joining with them may be an as yet to be determined additional co-investor, E. The entities A, B , C, D, and E are providing cash to the new joint venture. F, an unrelated corporation, is contributing an operating business owned by various of its subsidiaries.

3.As an interim measure, entities A , B and F have set up a new LLC, which we will refer to as LLC 1. A holds an 8 percent interest in LLC 1, whicle B holds a 43 percent interest and F holds a 49 percent interest.

4.A, B, C and D have also set up an additional new LLC which we will refer to as LLC X.

5.Prior to the closing, the ownership of LLC X is currently anticipated to be roughly as follows: A will hold 6.4 percent, B will hold 33.6 percent, C and D together will hold 31.4 percent percent in the aggregate, and E will hold 28.6 perent. This could change but for purposes of the analysis below it should be assumed that in no event will any one investor hold a 50 percent or greater interest in LLC X.

6. Prior to the closing, LLC X will set up a new LLC and LLC 1 will be placed under it. This intermediate LLC between LLC X and LLC 1 will be referred to as LLC Y. LLC Y will serve as the vehicle for the joint venture. LLC Y will be the sole member of LLC 1.

7.Pursuant to a Contribution Agreement among LLC X, F and LLC 1 and LLC's wholly owned-subsidiary ("LLC 2", also a shell vehicle), at the closing F will contribute an operating business to LLC 2 and in return will receive a one third interest in LLC Y. A, B, C, D, and E will , through LLC X, contribute an aggregate $175 million to LLC Y and LLC X will thereafter hold a two thirds interest in LLC Y. (This could involve both membership interests and debt but in any event LLC X will have a right to 50 percent or more of the profits and 50 percent or more of the assets of LLC Y on liquidation after payment of debts.)

8. Looking through all of these steps, the net result if that LLC X and F are the two owners of the joint venture, LLC Y, and LLC X will hold the controlling interest in LLC Y.

B. HSR ANALYSIS

1. In our view, steps one to six above do not involve HSR reportable transactions because , among other reasons, the HSR size of transaction test is not met and the entities being created or moved around are all shell entities.

2. With respect to Step 7, LLC X is its own ultimate parent because there is no one person having a right to fifty percent or more of its profits or 50 percent or more of its assets on dissolution after payment of debts. As a new entity, it will have no regularly prepared balance sheet and the only asset it will have at closing will be cash which will be downstreamed to the new joint venture, LLC Y. Therefore, we seek to confirm that it may rely on 16 C.F.R.801.11(e) in determining whether, as an acquiring person, it meets the size of person test set forth in 16 C.F.R. 801.50(b)(1)(i) or 16 C.F.R.

801.50(b)(2)(i)? If that is correct, then LLC X would not meet the size of person test for purposes of this joint venture transaction.

3.This leaves us then with the question of whether the size of the transaction is such that the HSR size of person test applies; that is ,does LLC X's acquisition of interests in LLC Y have a value of less than $272.8 million? In that regard, 16 C.F.R. 801.50(d) indicates the value of the transaction is to be determined in accordance with 16 C.F.R.801.10(d) which, in turn, provides that with respect to the acquisition of non-corporate interests, the value of the interests to be acquired is the acquisition price, or if not determined, the fair market value of the interests acquired (the acquisition price including all consideration being paid for the noncorporate interests). Would we be correct that the cash contribution by LLC X to LLC Y would be considered the equivalent of the "acquisition price? If so, then the value of the transaction would be only $175 million and no filing would be required.

4. Please note that various loans may be made by A B, C, D, E and F to the joint venture, LLC Y. While these would certainly be taken into consideration for purposes of 801.50(b)(1)(ii) and 801.50(b)(2)(ii), it is our understanding that they would not be considered for purposes of the size of transaction calculation in paragraph B. 3 above of this email. Could you please advise if you agree with that conclusion?

5.If you agree with all of our conclusions, then no HSR filing would be made with respect to this joint venture transaction.

Thank you very much for your assistance in this matter.

AGREE WITH ALL
B
7/9/12

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