801.50

Verne, B. Michael

From: [redacted]
Sent: Wednesday, August 28, 2013 10:45 AM
To: Verne, B. Michael; Walsh, Kathryn
Cc: [redacted]
Subject: Rule 801.50 Question

Mike and Kate

[redacted] and I would appreciate your confirming our understanding about the manner in which the size of a joint venture is determined under Rule 801.50 in the below situation. After you have had an opportunity to review this e-mail, please let us know if you agree with the analysis presented or if your view differs. If you need further details or information in order to provide a response, please let us know and we'll be happy to provide it.

Thanks,

[redacted]

FACTS

1. Company A and Company B are considering the possibility of forming an LLC ("LLC X") and contributing all or substantially all of their respective businesses to it, such that at inception Company A and Company B would each have a right to 50% of the profits or assets in the event of the dissolution of LLC X.

2. Company A and Company B are each their own ultimate parent entities and each satisfy the $10 million (as adjusted) part of the size-of-person test but not the $100 million (as adjusted) part of the size-of-person test.

3. The businesses of Company A and Company B are largely contained within other controlled entities such that the interests in such entities would be contributed to LLC X, although there may also be rights/assets contained in Company A and/or Company B outside these contributed entities that may also be contributed to LLC X.

4. The values of each of the respective businesses to be contributed to LLC X by Company A and Company B are, separately, in excess of $70.9 million and less than $283.6 million. The aggregate value of the two businesses may have a fair market value in excess of $283.6 million.

ANALYSIS

5

1. We believe that the formation of LLC X is subject to Rule 801.50. Each of Company A and Company B would be an acquiring person in the formation because each such party would control LLC X for purposes of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act").

2. Under Rule 801.50(b), the size-of-person test is applicable if the transaction is valued at $283.6 million or less.

3. Under Rules 802.4 and 802.30(c), assets or voting securities contributed by an acquiring person to a new entity upon its formation are assets or voting securities whose acquisition by that acquiring person is exempt from the requirements of the HSR Act.

4. For purposes of determining the size of the transaction (i.e. the value of its acquisition of interests in LLC X), each of Company A and Company B would value such acquisition in accordance with Rule 801.10(d). Whether based on a determined acquisition price or by fair market value, the acquisition price for each of Company A and Company B's respective acquisition of interests in LLC X would be based on the value of the businesses that each such party contributed to LLC X, which in our case is anticipated to be less than $283.6 million.

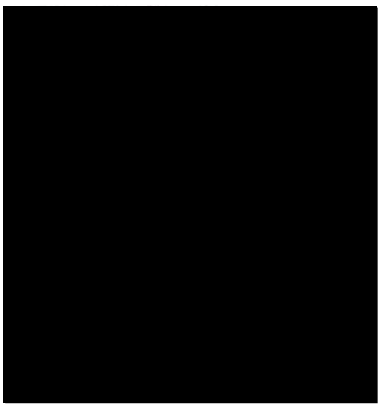
5. In determining the size of LLC X for purposes of the size-of-person test in Rule 801.50(b), we believe that LLC X's assets should be as reflected on the historic balance sheets of Company A and Company B, respectively, and not revalued to their present fair market value (including any assets not included in the contributed controlled entities but that are contributed to LLC X by Company A and/or Company B separately). Interpretations 132 and 169 in the Premerger Notification Practice Manual distinguish between an acquisition of assets that does not involve the acquisition of a controlling interest in an entity or substantially all of the assets of an existing entity from one in which such controlling interest is obtained. In the latter scenario, the PNO's position has been that the values reflected on the historic balance sheet are inherited by the new entity and do not need to be adjusted to reflect fair market value.

6. As LLC X would acquire controlling interests in multiple entities, we believe that for purposes of determining its total assets, LLC X should (i) consolidate the balance sheets of the entities that it acquires using the inherited values on those balance sheets and (ii) with respect to any rights/assets contained in Company A and/or Company B outside such controlled entities that are used in such businesses and that are to be contributed to LLC X to also use the inherited value of those assets.

7. Assuming that the size-of-person test under 801.50(b) is not satisfied, then no filing by any of Company A, Company B or LLC X under the HSR Act would be required, given the fact that the size-of-transaction is not in excess of $283.6 million.

8. We note that the above scenario would be consistent with an interpretation of no filing being required under the HSR Act if instead of a joint venture, Company A or Company B acquired the same bundle of interests as described above from the other in exchange for a

50% interest in the acquirer or a preexisting subsidiary (i.e. in such case, the size-of-transaction would be less than $283.6 million and assuming that the size-of-person test under 15 USC §18a(a)(2)(B)(ii) of the HSR Act is not satisfied, then no filing by either of Company A or Company B under the HSR Act would be required).



It would appear that the size of transaction test for both the acquisition by A of LLC X interests and the acquisition by B of LLC X interests is satisfied, since each would be acquiring interests valued in excess of $70.9 million. Because neither acquisition would be valued in excess of $283.6 million, the size of person test is applicable. You have stipulated that both A and B satisfy the $10 million (as adjusted) test, but not the $100 million (as adjusted) test. So, the only remaining question is whether LLC X is a $100 million person upon formation. To determine that, you would add the balance sheet figure for all controlled entities (contributed by both A and B) and the value of any assets (contributed by both A and B) that are being contributed to the formation. Note that for the size of person of LLC X, unlike the application of 802.4, you would include all contributions by both parties to determine the size of LLC X. If this figure exceeds $141.8 million, both the acquisition by A and the acquisition by B would be reportable, unless one or both is exempt under 802.4.

B
8/28/13