

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, March 20, 2014 5:49 PM
To: Verne, B. Michael
Subject: Follow up question

Hi Mike – I hope all is well with you. I wanted to follow up on earlier emails that we exchanged. The principal transaction, which I described below, still will not reach the \$75.9 million transaction threshold. However, the buyer (Company A) is now considering a subsequent acquisition of the other 50% of the LLC, which is held by Company B. Company B learned of the primary transaction essentially at the time it was publicly announced and discussions between Company A and Company B ensued in the following weeks, initially about working together in the LLC and then later about Company A's acquisition of Company B's interest. Company B is unaffiliated with either Company A or the seller of the assets in the primary transaction (Company C). If this second step were to occur, it would be under a separate purchase agreement between Company A and Company B and would not close until after the primary transaction between Company A and Company C. While the second transaction would be contingent on the closing of the primary transaction, the reverse is not true, i.e. the primary transaction is not contingent on the second transaction. If 100% of the LLC were acquired in a single transaction, the value of transaction could exceed \$75.9 million. However, because there are separate transactions, I believe Company A's acquisition of the second 50% interest in the LLC would be exempt under Section 802.30 because Company A would be both the acquiring person and an acquired person (since it would at the time of the second transaction hold 50% of the LLC). See <http://www.ftc.gov/bc/hsr/informal/opinions/0511030.htm> and <http://www.ftc.gov/bc/hsr/informal/opinions/0509016.htm>.

If you need further information or have any questions, please let me know. Many thanks.

Best regards,

From: Verne, B. Michael [<mailto:MVERNE@ftc.gov>]
Sent: Monday, December 02, 2013 11:55 AM
To: [REDACTED]
Subject: RE: Valuation question

Hi [REDACTED] - I agree that this would not be an assumed liability

From: [REDACTED]
Sent: Monday, December 02, 2013 11:07 AM

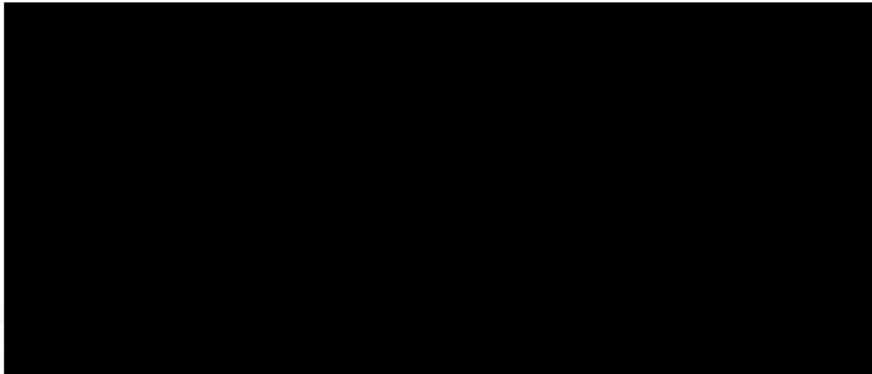
To: Verne, B. Michael
Subject: Valuation question

Mike – I hope all is well with you and that you had a good Thanksgiving.



I would appreciate your thoughts on a proposed asset transaction. There is a determined purchase price for the assets and certain liabilities expressly stated on the balance sheet of the target company will be assumed by the buyer; the aggregate of the purchase price and assumed liabilities will be less than \$70.9 million. One of the assets that will be acquired is a 50% interest in an LLC, which will obligate the buyer to honor a promise of the target company to reimburse the other 50% owner of the LLC for one half of the liability up to \$50 million in the event that the LLC defaults on a debt to a third party. That third party debt is backed by a letter of credit supplied by the other 50% owner. Under GAAP, as applied by the target company in its audited financial statements, this obligation does not appear (as debt or otherwise) apparently because the target company has determined that it is not probable that payments will be made pursuant to the obligation. The question is whether this obligation should be treated as assumed debt for purposes of the size of the transaction test and if so at what value? Because the obligation is not expressly stated on the balance sheet and is so unlikely to occur, I could argue that it should not be considered as an assumed liability. Alternatively, if you believe it should be included, because it is so speculative should the buyer do a fair market value determination of the assets (or the obligation itself) to determine if the size of transaction exceeds \$70.1 million?

Thank you for your assistance.

Best regards,



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Unless the acquisition of the additional 50% of the LLC from B is uncertain to occur, the acquisition would be of 100% of LLC.

0511030 is not on point. In that case, 50% of the LLC was already held and that holder was acquiring an asset held by the LLC. That acquisition would be exempt under 802.30.

0509016 is also not on point. It is saying that the LLC's redemption of interests is exempt under 802.30 (which it is) and that the member who will end up with a controlling interest is not instrumental in causing the redemption.

Bmw
3/24/14

KW & DG CONCERN