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Verne, B. Michael

From: [REDACTED]
Sent: Thursday, May 01, 2014 3:09 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Request for informal interpretation - multiple agreements

Mike,

[REDACTED] and I have a question related to multiple closings in a single agreement, a possible subsequent agreement between the same parties, and the timing for an aggregated HSR filing. Your guidance would be much appreciated given the lack of interpretations on point. The facts are as follows:

Company A, Seller, entered into an asset purchase agreement with Company B, Buyer. The Agreement involved a customer list worth approximately \$13 million, and certain accounts receivables worth approximately \$54 million. The Agreement did not meet the threshold size of transaction test. The Agreement envisioned 2 closings, the first for the customer list (which has since closed), and a second closing for the accounts receivables. The second closing is expected to occur next week.

Following the execution of the Agreement, Company A began looking for potential buyers for the remaining accounts receivables not sold to Company B. Since that time, Company B has expressed interest in purchasing the remaining accounts receivables from Company A pursuant to a separate agreement. Assume for the purposes of this hypothetical that any second agreement, aggregated with the first Agreement, would exceed the size of transaction threshold for HSR notification. Our question is, **can the parties close on the unreportable portion of the accounts receivables pursuant to the first Agreement as scheduled even if the parties decide to enter into a second agreement for the remaining accounts receivables?**

Formal Interpretation 231 appears to indicate that even with two separate agreements, the first of which is valued at less than the current threshold, the parties must wait for clearance on both deals before closing either one. However, **Informal Interpretations 0409006** and **0312008** seem to indicate that the parties could move forward with closing on the first (non-reportable) agreement, and if the second agreement goes forward, the first and second agreements would be aggregated for HSR purposes. Notwithstanding, I don't believe there are any interpretations providing guidance on a situation where, as here, the parties are contemplating a second agreement while still implementing the multiple closings of the first, otherwise unreportable agreement.

Could you please clarify what the PNO's current position is on the treatment of multiple agreements as outlined above? Thanks for your assistance.

If they enter into the second agreement before they have closed on the accounts receivable from the first agreement, they would have to aggregate and file for both sets of A/R before closing on any of them. If they are certain that the second agreement will be entered into they should file for both sets prior to closing on the first set. However, if they are merely contemplating entering into a second agreement (assuming no device for avoidance is in play), they would be able to close on the first set of A/R and then if the second agreement is entered into they would file for both sets prior to closing on the second set.

Bruce
5/11/19

KW CONCURS