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801.90
F.I.15

From: [REDACTED]
To: FTC.SERIOUS("mverne@ftc.gov")
Date: 12/11/01 5:50PM
Subject: HSR treatment of LLC acquisition

CONTAINS CONFIDENTIAL BUSINESS INFORMATION

B. Michael Verne
FTC Premerger Notification Office

Dear Mike:

This will confirm and document our telephone conversation on November 8, 2001 and provide additional details of a proposed acquisition based on the revised acquisition agreement. Our client, BUYER, has entered an agreement to purchase an existing financial services business from SELLER.

SELLER is a C corporation that is the indirect wholly-owned subsidiary of a holding company with various other subsidiaries, some of which are also involved in the same financial services business. BUYER also has some existing subsidiaries in this financial services business. As is common in this business, SELLER has had for some years a compensation arrangement with its managers whereby those individuals received a significant share of the earnings of this business.

Throughout our analysis, we have assumed that BUYER and SELLER meet the size-of-person tests and that the purchase price will exceed \$50 million so that the proposed purchase would meet the size-of-transaction test.

For a variety of tax and financial accounting reasons, BUYER will not simply purchase the shares of SELLER. In order to give key management an incentive to grow the business, BUYER and SELLER will provide them both an interest in the annual earnings that will be taxed at ordinary-income rates and an equity interest whose eventual sale would be taxed at capital-gains rates. BUYER also wishes to obtain a stepped-up basis for depreciation in the full amount of the purchase price. Moreover, the financial accounting rules for corporations could significantly increase the cost to BUYER of granting such an equity interest to management.

The parties have determined that the most advantageous way to obtain each party's objectives would be for

(A) SELLER to organize two new limited liability companies under the laws of Delaware with that parent as the sole member (the "LLCs") and contribute SELLER's intangible assets into one LLC ("LLC-A") and its other assets (including employment agreements) and business to the other LLC ("LLC-B");

(B) SELLER would contribute the interests in LLC-A to a Massachusetts Business Trust ("MBT") in exchange for its shares;

(C) both LLCs to execute operating agreements providing the existing management a 19% interest thereafter in the current profits of the LLCs; and then

(D) the SELLER and the MBT to sell to BUYER the 81% LLC membership interests received for contributing the business to the new LLCs.

Management will thus have a 19% interest in the LLCs' profits going forward. Management will also have a (lower) membership share on liquidation of the LLCs starting at a low percentage proportional to their cash investment and growing in proportion to their share of any LLC retained earnings and to the rate of growth of the business. Unlike the corporate form, a limited liability corporation allows for these significantly-different shares of current earnings and on liquidation. Use of the MBT provides favorable tax treatment under certain state tax laws.

With this context, we discussed three aspects of the application of the HSR Act and Regulations and concluded:

Steps A, B & C. SELLER's transfer of various classes of assets into the new LLCs and the conversion of the existing compensation arrangement with management to minority LLC membership interests [in its (single) existing business] fall under the intra-person exemptions from reporting in 15 U.S.C. 77A(c)(3) or 16 C.F.R. 802.30.

Step D. BUYER's acquisition from the MBT and SELLER of more than 80% but less than all of the membership interests in the LLCs is not reportable under the treatment of limited liability companies confirmed in Formal Interpretation 15, as amended. Acquisition of less than all an existing LLC for cash without the contribution of a formerly-separate business is treated as non-reportable as would be acquisition of less than all a partnership. Only upon acquisition of 100% of the LLC interests would there be an HSR-reportable transaction.

801.90. This acquisition does not constitute a "transaction or device for avoidance" under 16 C.F.R. 801.90 because the parties have substantial non-HSR reasons for using the LLC structure.

After I outlined this transaction for you, you confirmed the three points of analysis above. However, we agreed that I would document the transaction so you could determine if the PNO would need any additional information in connection with this informal interpretation.

[REDACTED]

CC:

[REDACTED]

AGREE - IF NO 801.90 ISSUES ARE RAISED, THERE IS NOTHING REPORTABLE HERE

B. Michael Verne
12/12/01

A: TRANSFER OF ASSETS FROM SELLER TO LLC A BY LLC B IS EXEMPT UNDER 802.30 SINCE HOLDCO IS THE ACQUIRING HOLDING CO. OF SELLER
B: I DON'T RECALL DISCUSSING A MBT. WE TALKED THIS AS A COMP. IF MBT IS WHOLLY OWNED BY SELLER THEN TRANSFER OF LLC INTERESTS TO MBT & TRANSFER OF SHARES TO SELLER IS STILL 802.30 EXEMPT
C/D: THESE STEPS CONSTITUTE THE FORMATION OF LLC A & LLC B SINCE IT IS THE FIRST TIME EITHER HAS HAD MORE THAN ONE MEMBER. SINCE THESE ARE NOT TWO SEPARATE CONTRIBUTED BUSINESSES UNDER FIC 15.