

Verne, B. Michael

801.90

From: [REDACTED]
Sent: Tuesday, May 03, 2005 2:28 PM
To: Verne, B. Michael
Subject: Necessity for Filing

Mike,

I hope this e-mail finds you doing well. It has been a long time since we have spoken, but I have another question that I hope you can assist me with. My question has to do with whether a bifurcation of the sale of assets from a seller needs to be integrated to satisfy the size-of-the-transaction test when all of the assets of the seller will be sold to two different and unrelated buyers for a sale price that would reach the threshold on an aggregate basis but would not on an individual basis.

Specifically, we have a client that is currently negotiating and has entered into a letter of intent with a buyer ("Initial Buyer") to purchase all of its assets for a total of approximately \$65 million. The size-of-the-person test and the size-of-the-transaction test is clearly met if this transaction were to go forward.

However, in the course of negotiation, the Initial Buyer has indicated that it does not want to purchase the real estate portion of the seller and would rather the seller locate a Real Estate Investment Trust or other buyer (the "Real Property Buyer") to purchase all of the real property assets of the seller (sale price for the real estate would be in the \$30 million range, with the Initial Buyer buying the remaining ~\$35 million in non-real estate assets), and the Initial Buyer would agree to enter into a long term lease agreement with the Real Property Buyer to lease back the real property following the acquisition of all assets.

Both transactions would take place simultaneously and the Initial Buyer and the Real Property Buyer would not be related in any way save for the lease agreement for the real property (i.e., there would be no related ultimate parent entity). The primary purpose of the restructured transaction would not be to avoid the filing requirements of the HSR Act. The primary purposes of the restructured transaction would be for the Initial Buyer (i) to avoid owning real estate in general, (ii) to avoid in any way incurring any liability related to the ownership of this real property that could result from residual liability currently associated with portions of this real property, and (iii) to reduce the initial purchase price it will pay.

It is my understanding and interpretation that based upon this bifurcated sale fact pattern that a HSR filing would not be required. This interpretation is based upon the assets being ultimately owned by no one person in excess of \$53 million and Rule 801.90 not being applicable. If you disagree or have any suspicions, I would greatly appreciate it if you could please point me in the direction of any rules or interpretations that I should review.

AGREE -
B. Michael
5/3/05