

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, March 22, 2006 6:54 PM
To: Verne, B. Michael
Subject: HSR Assistance -- Whether "Assets" Are Being Acquired

Mike--

I would appreciate your guidance in analyzing the following transaction for HSR purposes:

My client, Company A, will enter into an "Asset Purchase Agreement" to acquire the retirement recordkeeping services business of Company B. In essence, the retirement recordkeeping services business involves performing the "back-office" functions for 401(k) and other retirement plans. In general (and as an oversimplification), this business ensures that the correct amount of funds is deposited in the right investment fund and that records for the plan participants are updated regularly (in the internet age, this updating is now done daily as people are able to access their accounts online). The "assets" being acquired are generally described as "Trust/Custodial Relationships" with customers, which would include associated contracts to perform the recordkeeping and custodial functions. Other than general intangibles (e.g., good will and customer lists), virtually no other assets are being acquired (no leases, facilities, tangible personal property, accounts receivable or similar assets are being acquired). The purchase price exceeds the size-of-transaction threshold (the size-of-person test would also be satisfied).

Under ERISA, there must be a plan trustee who will have significant fiduciary responsibilities over the plan assets. With respect to almost all of the business that is being acquired, Company B is the trustee (normally, no one else would want to be the trustee because of the potential liability under ERISA law in the event of a breach of fiduciary duties). In addition, under ERISA, the plan sponsor has the absolute right to remove Company B as the trustee for any or no reason. If this occurs, all of the contracts that are part of the "Trust/Custodial Relationship" would terminate (usually after a short transition period during which all plan assets can be transferred to a new trustee).

Upon the closing of the acquisition, all contracts with the customers in the "Trust/Custodial Relationship" will be assigned by Company B to Company A, provided that, if any of the contracts require the consent of the customer, then they will not be assigned. In addition, trust relationships cannot be assigned without the consent of the customer and would remain with Company B. For those contracts that are assigned, Company A would perform under the contracts in its own name although it

would not be the trustee. For any contracts that cannot be assigned without the customer's consent, Company A will act as an agent for Company B and perform Company B's obligations under the contracts until the consent is obtained (Company A would be entitled to all resulting revenue, subject to associated expenses). In any event, Company B will remain as trustee until the consent is obtained.

Shortly after the closing, Company B will seek the consent of the customers for the trustee relationship to be transferred to Company A (and for any associated contracts that required such consent in order to be transferred to Company A). Obviously, Company A is expecting that the customers will be delighted to have Company A be the trustee, but there are no assurances. In fact, a significant portion of the purchase price will be paid after the closing and only if consent from most of the customers is obtained. Theoretically, a customer could refuse to consent, but not withdraw its business (leaving Company A to continue acting as Company B's agent). However, we would expect that the customer would either consent or withdraw its business. In the unlikely event that the customer refuses to consent, but does not withdraw its business, we expect that Company A will require Company B to resign as trustee in order to force the issue (in addition, the Asset Purchase Agreement would provide that Company A does not have to continue acting as Company B's agent longer than a period to be negotiated).

Is this situation analogous to Int. #115 in the Premerger Notification Practice Manual (3rd ed.), which addressed whether payments under a recruiting agreement, where a seller is paid to assist in persuading its employees to become employees of the buyer, should be included in determining the "acquisition price" for purposes of the size-of-transaction test? Int. #115 concluded that the consideration paid under the recruitment agreement would not be included in the "acquisition price" since no "asset" is being acquired. In addition, is this situation analogous to situations in the insurance industry where a buyer pays a seller to assist in transferring a seller's customers to a buyer? I understand that the payment for assistance in transferring the seller's customers would not be considered a payment for an "asset" and, as such, would not be reportable.

Any guidance that you could provide with respect to the foregoing would be most appreciated. Feel free to call me if my description of the situation is not clear or you need additional facts. Thanks.

Best regards,

██████ - I talked this through with Nancy as well, and we concluded that this is not analogous to #115. It appears here that A is purchasing contracts from B, and the only question is whether or not all of the contracts will come over. I think that because there is some possibility that some of the customers will withdraw their business, that can be taken into account in determining the acquisition price, but if you conclude that the size-of-transaction is satisfied, I think you have a reportable asset acquisition. Give me a call if you want to discuss further. Thanks

B. Michaelson
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