

Verne, B. Michael

802.51

From: [REDACTED]
Sent: Thursday, May 11, 2006 3:30 PM
To: Verne, B. Michael
Subject: Informal Question Regarding the Meaning of "Sale" in Rule 802.51(d).

Dear Mike,

I am writing with the hope of obtaining some informal guidance relating to the reporting obligations of a foreign company under the Hart-Scott-Rodino Act. My e-mail contains several questions, and if it would be easier for you to answer these questions over the phone please feel free to give me a call at the number below at your convenience.

I have a question concerning the application of Rule 802.51(d), the "foreign issuer" exemption to the HSR reporting requirements, to a contract entered into by a foreign issuer in the United States. The facts are as follows. A foreign issuer ("X") is in the business of manufacturing heavy duty widgets. A single widget costs many millions of dollars, and several years, to manufacture. X entered into a contract with a United States entity for the manufacture and delivery of a widget. The contract price is over \$56.7 million, with the United States entity to take possession in 2010. The contract price is to be paid to X in a series of installments. X is subcontracting some of the work on the widget contract.

What is the value of the widget contract when considered as a "sale into the United States ... in (X's) most recent fiscal year" for purposes of determining whether the threshold of \$56.7 in Rule 802.51(d) has been exceeded? Is it the gross revenues accruing to X over the lifetime of the contract? Interpretation 174 of the Premerger Notification Practice Manual (3d ed. 2003) suggests that "speculative future sales in or into the United States are irrelevant to a Section 802.51 analysis." Are future revenues pursuant to a contract "speculative future sales" and thus irrelevant in the sense provided for in Interpretation 174? If not, does the answer to the question depend upon X's internal accounting practices? Does the fact that X is subcontracting some of the work under the contract change the result?

I would also like to confirm that if X's future revenues under the widget contract are not "sales ... in (X's) most recent fiscal year" under Rule 802.51(d), the widget contract can still be considered an asset of X under Rule 802.51(d) (leaving aside the issue of whether this would be an asset in the United States), and that the future revenues of X under the contract would be considered in providing a valuation of the contract when treating the contract as an asset.

Thanks very much.

How much of the contract price did X carry on its annual statement of income for the most recent fiscal year? That figure would be dispositive. The fact that some of the work was subcontracted is irrelevant to the analysis. The contract is an asset of X and future revenues of X under the contract would be considered in providing a valuation of the contract.

B. Michael
5/11/06