

801.10 (d)



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FEDERAL TRADE COMMISSION

July 25, 2006

Mr. B. Michael Verne
Premerger Notification Office
Federal Trade Commission
Sixth & Pennsylvania Avenue, NW
Washington, DC 20580

Re: Application of 801.10(d)

Dear Mr. Verne:

I am writing to confirm the conversation you had with me, [REDACTED] this afternoon regarding the application of 16 C.F.R. § 801.10(d) to the fact pattern set forth below.

We described to you a transaction that originally was envisaged as an acquisition by Buyer of 80% of the membership interests of Sub LLC from Seller Corp. Buyer intended to put up roughly \$30 million in cash and finance the remaining \$50 million of the purchase price. In order to accomplish the financing, Buyer was to acquire roughly 91% of the membership interests of Sub LLC from Seller Corp. and then have 11% of the membership interests redeemed in a transaction that moved the debt from Buyer to Sub LLC. Since Buyer and Seller meet the size-of-the parties test, the transaction, as originally structured, would be subject to the prior notification and waiting requirements of the HSR Act. But this structure was regarded as too complicated for the lenders and the parties had to come up with another transaction structure.

In order to accommodate the lenders' interests, the parties devised an alternative structure in which three things will happen essentially contemporaneously: (1) Sub LLC will borrow \$50 million with the loan being backed by a pledge of Buyer's to-be-acquired interest in Sub LLC and possibly a guarantee of the debt by Buyer (the lenders will certainly require the pledge as a condition to making the loan and, subject to further negotiation, may also require the guarantee); (2) Sub LLC will make a distribution of \$50 million to its sole member, Seller Corp.; and (3) Buyer will acquire 80% of the membership interests in Sub LLC in exchange for \$30 million cash (the agreement will provide that the cash consideration is to be \$80 million less the distribution to Seller Corp. from the proceeds of the borrowing).

Our analysis, which you confirmed, is that the value of the non-corporate interests being acquired by Buyer is governed by 16 C.F.R. § 801.10(d). Because the consideration paid by Buyer is a combination of cash and the pledge/guarantee, the acquisition price is not determined and, therefore, the value of the non-corporate interests being acquired is their fair market value. By



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analogy to other informal interpretations from your office the proper way to determine the value of the non-corporate interest to be acquired is to take the sum of the cash consideration (here \$30 million) plus the fair market value of the pledge/guarantee.

In our conversation, you also noted that you had no idea how to determine the fair market value of the pledge and we recognize that we will have to come up with a reasonable method for making that determination. But in the meantime, we would appreciate it if you could confirm that this letter accurately summarizes our conversation by calling me at the number above.

Thank you for your usual prompt and effective attention.

AGREE -
Burchard
7/25/06