

801.1(b)

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, February 07, 2007 3:40 PM
To: Verne, B. Michael
Subject: My voicemail HSR question to you

Perhaps to re-state the question a bit more clearly.

Newly formed LLC currently has multiple investors and is its own UPE. The LLC will make a reportable acquisition that's too big to take advantage of 801.11(e). So they are willing to make their HSR filings.

However, the organizers of the LLC are seeking co-investors, and they're talking with a potential co-investor that might put in enough cash so that the co-investor becomes more than a 50% equity owner of LLC, and therefore its ultimate parent. The question they have put to me is: how should we proceed?

Seems to me they can make two filings and pay two filing fees (one with the co-investor as UPE, the other with the LLC as its own UPE), since they have the good faith intention for the LLC to make the acquisition. Alternatively, they can wait until they know who their UPE will be (i.e., until they know how much the co-investor will put in).

I thought about whether it would be possible for the co-investor to file, and whether that filing would allow consummation of the acquisition in the event that the co-investor doesn't become the UPE, and the UPE status reverted back to the newly formed LLC itself. Because the new LLC is a "lesser included" entity, would that work (i.e., obviating the need for a second filing)? Or is a new HSR filing required whenever the UPE on the buying side changes, even if the new UPE is lesser included? I would think that if the co-investor didn't put in enough to become the UPE, and the result were that one of the other investors (rather than the LLC itself) becomes the UPE, we would clearly have to make another filing. But I'm curious whether the lesser included theory makes any sense.

Any thoughts? Suggestions?

[REDACTED]

[REDACTED]

[REDACTED] made the following annotations.

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Yes - you can do it on one filing if you know the identity of the co-investor who will potentially control. File as if the co-investor already controls the LLC and an officer or director or managing member of the LLC can certify and execute the affidavit on behalf of the investor UPE. If at closing, the LLC is its own UPE, no additional filing is required, because the LLC was within the UPE who filed notification.

Bj
2/2/02