

801-13  
803-7

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Thursday, February 08, 2007 3:49 PM  
**To:** Verne, B. Michael  
**Subject:** Request for informal interpretation

Mike,

Sorry for the interruption.

I have a question that relates to Sections 801.13(b) and 803.7 of the HSR Rules. The question is whether a new HSR filing is required in the following situation:

A and B have filed notification and early termination of the waiting period was granted. The transaction involves the acquisition of voting securities and assets of several subsidiaries of B. The transaction has not yet been consummated. Due to changes in the financial condition of the seller, the parties may amend the purchase agreement. As part of the amendments, additional assets of B may be added to the transaction. The value of these assets is below the HSR size of transaction threshold as adjusted and the parties did not contemplate including these assets when the original Purchase Agreement was signed. The alternative may be to provide for the acquisition of the additional assets in a separate agreement.

Under the HSR Rules, it seems clear that if a new and separate agreement is entered into for the acquisition of additional assets from B that are valued at less than \$50 million as adjusted, a new HSR filing is not required. This is based on Section 801.13(b) of the HSR Rules which provides that if the acquiring person signs an LOI or an agreement in principal to acquire assets from an acquired person and within the previous 180 days the acquiring person:

1. signed a an LOI or an agreement in principal to acquire assets from the same person, which is still in effect but has not yet been consummated, or has acquired assets from the same acquired person which it still holds; and
2. the previous acquisition (whether consummated or still contemplated) was not the subject of an HSR filing, then the both acquisitions must be aggregated to determine whether the size of transaction threshold is met and HSR filing is required.

Example 3 to the Rule, which appears to be directly on point, illustrates how the rule applies: On day 1, A enters into an agreement with B to acquire assets valued at more than \$50 million (as adjusted). A and B file HSR notification and observe the waiting period. On day 60, A signs an LOI to acquire additional assets from B for \$40 million. Because the earlier acquisition was subject of the requirements of the HSR Act, A and B are not required to aggregate the two acquisitions of assets. Consequently, because the value of the second acquisition is below the HSR size of transaction threshold, an HSR filing is not required for the second acquisition.

The HSR Rules and informal interpretations are less clear whether the same analysis applies if an agreement that was the basis of an HSR filing is amended and new assets that do not exceed \$50 million (as adjusted) are added that were not included in the original HSR filing. The form of the transaction should not make a difference but the informal interpretations of Section 803.7 set forth in Interpretation 265 of the Premerger Notification Practice Manual provides generally that a new filing is required if significant new information would be revealed in the filing or if such a change may affect

the enforcement agencies' antitrust analysis.

Interpretation 0104005 suggests if the parties agree to make a modification to include additional assets in a transaction for which the parties have filed notification and observed the waiting period, a new HSR filing is not required if the value of the additional assets does not exceed \$50 million as adjusted and the parties did not contemplate the inclusion of the additional assets as part of the transaction at the time of the original filing. The hypothetical presented to the PNO did not explain whether the addition of assets would be accomplished through an amendment to the original agreement or pursuant to a new agreement.

In the PNO's view, does the form of the agreement -- an amendment to an existing agreement versus entering into a new agreement covering only the additional assets -- make a difference. We assume not but would appreciate your views on the subject.

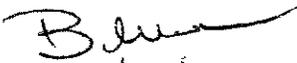
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I agree that we should not elevate form over substance in this transaction. I don't think a new filing is required if a new agreement is entered into for the additional assets or an amendment is made to the original filing to add the new assets, as long as they are valued at less than \$50 million (as adjusted).

  
2/13/07