

Verne, B. Michael

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From: [REDACTED]
Sent: Thursday, February 22, 2007 12:26 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR questions

Mike, I have a couple of HSR interpretation questions that I need your help with.

1. Identification and valuation of exempt/non-exempt assets contributed to a JV

It is clear from the various HSR interpretations that the acquisition of an exclusive license is reportable (if above the thresholds), so that if an exclusive license were contributed to the JV, the acquirors of the JV interests should count this as a non-exempt asset when considering whether the value of their acquisition exceeds the HSR reporting thresholds. In the royalty-free license scenario, I understand that the value of such a license is its fair market value - whatever it would be worth if negotiated on a commercial arms-length basis. If something is being paid for the license, however, how should it be valued? The difference between what is being paid and the arms-length price?

We are uncertain how to consider or value a non-exclusive license. If such a license were on arms-length commercial terms, should we disregard it entirely when counting the assets of the JV? What about if the license was at below-market rates - would such a license be exempt or non-exempt and how should it be valued?

Finally, how should we treat a hybrid scenario - a license that has a short exclusive window, followed by a non-exclusive period at discounted rates?

2. Contribution of EBIT of a business to a JV

In another scenario, a JV participant is proposing to contribute not a business unit but the revenue and EBIT attributable to that business unit. The details are as follows:

The contributing party plans to contribute the revenue stream of the business unit to the JV and guarantee that revenue stream for some limited period of time.

The business in question (including technology, assets, and agreements related to the business) would continue to be owned by the contributing party.

The JV would have effective control over the content and merchandising of the "storefronts" of the business (using employees of the contributing party who may be seconded or allocated to the JV).

The JV would bear the operating costs and overhead associated with the business.

Would such a contribution be cash/cash equivalent, and hence exempt?

If you would like to discuss these questions, please give me a call at your convenience. I look forward to hearing from you.

Kind regards,

[Redacted]

[Redacted]

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1) With respect to any license contributed to the formation, the JV is not acquiring an asset, because in a formation, the JV is only an acquired person (see 801.40(a)). So, I don't think you can ignore it as an asset of the JV, and would have to determine the license's fair market value in analyzing the size-of-person of the JV, regardless of whether it is exclusive, non-exclusive or "hybrid".

2) Yes - the cash stream and EBIT would be cash equivalents. So, you can exclude them from the total non-exempt assets in the 802.4 analysis. You would still include them in determining the size of the JV.

B. Muehl
2/26/07