

Verne, B. Michael

801.90

From: [REDACTED]  
Sent: Friday, March 09, 2007 9:03 AM  
To: Verne, B. Michael  
Cc: [REDACTED]  
Subject: HSR question

Mike - Would appreciate your views on the following. Thanks very much.

Company B had a letter of intent to acquire Company C and Company D. Our client, Company A then approached Company B and suggested Company A acquire Company B, as well as Companies C and D. However, rather than acquire Company B after it had acquired Companies C and D, Company A would like to make simultaneous (or near simultaneous) acquisitions of B, C and D which would be conditional on each other. In other words a condition to closing on each of them would be that the others would be closing as well. The reason is that Company A would like separate reps and warranties from each of Company B, C and D. It could not get such reps and warranties from Company B with respect to Company C and Company D if Company B owned Company C and Company D only for seconds before the sale to Company A. In addition, there are tax reasons for it to acquire at least Company B and Company D directly. The HSR implications did not factor into the structure decision. The size-of-the-transaction values for the acquisition of each company will be below \$59.8 million. In the aggregate, our client will pay the 3 UPEs' shareholders more than \$59.8 million. We believe that the transaction is not reportable and that our client has ample business justification for the separate agreements and that it was not structured to avoid HSR notification. Do you agree?

*Agree*

Does the analysis change if there is a single agreement in which Company A acquires Company B, C and D separately. The agreement would have some portions that applied to all three transactions, but other sections would involve separate representations and warranties that Company A would receive directly from B, C and D. There would be one agreement for ease of negotiation. Since A, B and C are separate UPEs and the size-of-the-transaction is below \$59.8 for each separate transaction, we believe the transaction, even if structured under as separate acquisitions under a single purchase agreement, would not be reportable and does not raise 801.90 avoidance issues. Do you agree?

*Agree -*

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*Brubler*  
3/9/07