

Verne, B. Michael

801-11

From: [REDACTED]
Sent: Friday, June 15, 2007 4:25 PM
To: Verne, B. Michael
Subject: Request for Informal Interpretation - sec. 801.11 and Interpretation 76

Dear Mr. Verne,

Thank you for taking the time to discuss this transaction with me over the phone yesterday. I am sending this email to confirm in writing our discussion and the conclusion that the described transaction is not reportable under the HSR Act and its rules. While our discussion focused on the reportability of the two acquisitions, I have included the details regarding the other steps of the transaction which we covered briefly on the phone.

We would appreciate your confirmation of the analysis described below regarding the application of Secs. 801.11(e), 801.11(b) and Interpretation 76 (Premerger Notification Practice Manual, Fourth Edition).

The proposed transaction involves several steps each of which requires an HSR determination. The transaction agreements set forth the sequence of three steps, however, the third and final step is the simultaneous occurrence of three financing transactions and two acquisitions. We have concluded that there is no reportable transaction. Below is the step by step analysis.

1) Share Exchange: Founding shareholders of Investment Company will exchange their shares in Investment Company for shares of Shell Corporation making Investment Company a wholly-owned subsidiary of Shell Corporation. The value of the Shell Corp. shares is approximately \$8 million valued at the IPO Price (described below).

HSR Analysis: This is not a reportable transaction because the value does not meet the \$59.8 million HSR reporting threshold.

2) Assignment: Investment Company will assign certain rights and obligations to engage in the acquisitions described below to Shell Corp.

HSR Analysis: This is not a reportable transaction because the assignment at issue is not an acquisition of voting securities or assets.

3) Financing & Acquisitions (all set to occur simultaneously on the same closing date).

a) Private Investment: A single investor will pay \$50 million cash for Shell Corp. preferred stock (approx. 81%) and common stock (12%). In addition, Private Investor will purchase certain warrants at set exercise rates, however, these will not be exercised until a future date not set. The terms of the preferred stock provide that while the Private Investor holds more than 50% of the preferred, the Private Investor will be able to appoint less than the majority of the Board of Directors until regulatory approval is achieved. Once regulatory approval is granted, if Private Investor holds more than 50% of the preferred stock, it will be able to appoint a majority of Shell Corp's directors.

HSR Analysis: This transaction is not reportable because it is under the \$59.8 million threshold for HSR. The acquisition of warrants is not reportable because warrants are not voting securities for

HSR purposes. Exercise of the warrants may be reportable at the time they are exercised. In addition, for HSR purposes, Private Investor is not acquiring 50% of Shell Corp.'s voting securities nor does Private Investor acquire "control" under sec. 801.1(b)(1). Private Investor will not have the power to appoint 50% or more of the directors until after regulatory approval is achieved. Once regulatory approval is granted, then Private Investor may, depending on its holdings at that time, obtain "control" and become the UPE of Shell Corp.

b) Other Private Investors: Other private investors will pay \$30 million cash for Shell Corp. preferred stock (approx. 19%) and common stock (16.6%). In addition, Other Private Investors will purchase certain warrants at set exercise rates, however, these will not be exercised until a future date not set.

HSR Analysis: This is not a reportable transaction because it is under the \$59.8 million threshold for HSR. The acquisition of warrants is not reportable because warrants are not voting securities for HSR purposes.

c) IPO: Shell Corp. will sell on a public exchange approximately 2,000,000 shares of common stock valued at \$5.00/share (the "IPO Price") raising \$10,000,000. The total stock acquisition is for approximately 7.4% of the common stock.

HSR Analysis: This is not a reportable transaction because it is under the \$59.8 million threshold for HSR.

d) Acquisition #1: Shell Corp. will acquire 100% of the voting securities/interests of LLC in exchange for approximately \$125 million in cash and Shell Corp. stock. The cash portion is \$60.1 million and includes cash to be used to pay off certain debts of LLC. The stock portion is \$65 million. Shell Corp. does not have a regularly prepared balance sheet, therefore, under sec. 801.11(e)(1), the size of Shell Corp. is its assets less cash used to fund the acquisition (all funds exhausted as a result of the transaction), including debt repaid to lenders (March 18, 2005 Informal Staff Opinion 0503014, available at www.ftc.gov/bc/hasr/informal/opinions/0503014.htm <file://www.ftc.gov/bc/hasr/informal/opinions/0503014.htm>). Therefore, Shell Corp.'s assets are \$90 million (the cash raised from all the investments described above) less \$60.1 million (the cash used to fund this acquisition and the debt payment), or \$29.9 million. LLC has assets of \$33 million and revenues of \$72 million. Parent 1 holds 51% of LLC's interests and Parent 2 holds 84% of the interests of Parent 1. Parent 2 has consolidated assets of less than \$119.6 million.

HSR Analysis: This is not a reportable transaction because the size of the parties test is not satisfied. There is no \$119.6 million person.

e) Acquisition #2: Shell Corp. will acquire 100% of the voting securities of X Corp. in exchange for approximately \$23 million in cash and Shell Corp. stock. The cash portion is \$10.1 million. The stock portion is \$12.9 million.

HSR Analysis: This is not a reportable transaction because the size of the transaction is below the \$59.8 million threshold.

Analysis of Other Possible Sequence

Informal Interpretation 76 (Premerger Notification Practice Manual, Fourth Edition) states that if the parties do not spell out the sequence of the transactions, the PNO advises that the parties analyze transactions in all possible sequences. Here, the parties have spelled out the sequence only as to the order between the Share Exchange, the Assignment, and the Financing/Acquisitions. The

financing and acquisitions described above are scheduled to occur simultaneously, therefore we must look at the issue of reportability under all possible sequences. However, as we discussed on the telephone, logically, it doesn't make sense to conduct the analysis with the financing occurring after the acquisitions, so the only other sequence involves the acquisition of X Corp. prior to the acquisition of LLC, the reverse of the order described above.

Acquisition of X Corp. The analysis for the acquisition of X Corp. does not change with reversal of the order of the acquisitions. It is not a reportable transaction because it is below the \$59.8 million reporting threshold.

Acquisition of LLC. The analysis for the acquisition of LLC does change, however the conclusion remains the same. The transaction is above the \$59.8 million threshold, however, the size of the parties test is not met. Shell Corp. has acquired X Corp. which has a regularly prepared balance sheet, therefore, its size is calculated under sec. 801.11(b) to include the assets of X Corp. and the assets of Shell Corp. X Corp. has assets of \$4.4 million. Shell Corp.'s only other assets are the cash raised during financing (\$90 million) less that used to acquire X Corp. (\$10.1 million), or \$79.9 million. Shell Corp.'s total size, therefore, is \$84.3 million. As stated above, LLC is not a \$119.6 million person. The acquisition of LLC, therefore, is not reportable because without a \$119.6 million person, the size of the parties test is not met.

Please let us know if you concur with this analysis.

Thank you.

[Redacted]

AGREE
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6/15/07

[Redacted]

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