

From: [REDACTED]
Sent: Friday, July 06, 2007 2:05 PM
To: Verne, B. Michael
Subject: FW: HSR inquiry



PNO Interp 97.pdf (605 KB) PNO Interp 114.pdf (74 KB)

Mike: I just realized that I neglected to attach those PNO interpretations to my prior email. Thanks in advance for your help ~

-----Original Message-----

From: [REDACTED]
Sent: Tuesday, July 03, 2007 2:34 PM
To: mverne@ftc.gov
Subject: HSR inquiry

Hi Mike,

I have a transaction that may require a HSR filing, but, because of the relatively unique transaction structure, I wanted to run the facts by you for your thoughts. Let's assume that the size-of-person test is satisfied.

My firm represents the buyer in a purchase of an operating business. The current plan is that the seller would assign the assets necessary to operate the business as follows: (i) all of the tangible personal property and inventory would be assigned to a newly organized LLC (approx. \$30-35 million in value), and (ii) all of the other assets necessary to the business (including some of the accounts receivable related to the business, etc.) would be assigned directly to the buyer (approx. \$5-10 million in value). For purposes of this inquiry, let's assume that the FMV of those assets is \$40 million.

In addition, the seller would either contemporaneously (a) assign to the LLC (and the LLC would assume) substantially all of the liabilities related to the business, or (b) assign directly to the buyer (and the buyer would assume) substantially all of the liabilities related to the business. To be clear, those liabilities were the seller's liabilities before the closing. Let's assume that they total \$20 million in value (putting the transaction just over the size-of-transaction threshold, if those figures need to be aggregated).

Further, the buyer may - at or promptly after the closing - either (y) merge the target LLC with and into the buyer, or (z) transfer all of the LLC's assets and liabilities (if the LLC has assumed the liabilities of the business) to the buyer itself and then dissolve the LLC, with - in either case - the result being that the buyer would succeed (by assignment/assumption and possibly also by merger) to all the rights and

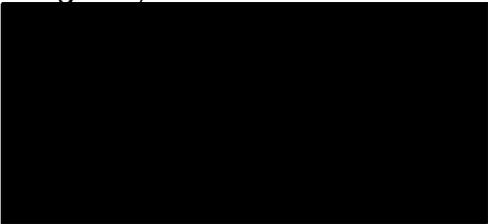
obligations of the target business.

The reason I'm running this structure by you is because it has characteristics of both an asset and a voting securities/non-corporate interest deal. Ordinarily, when determining the size-of-transaction, the value of the target entity's liabilities is not included in the valuation. See ABA manual interpretation no. 114, attached. However, this structure has some traits that are similar to those contemplated in ABA manual interpretation no. 97, attached, because the buyer's (direct or indirect) assumption of the business' liabilities could be deemed to be part of the consideration being paid to the buyer . See 16 CFR 801.10(c)(2). Given this proposed transaction structure, do we need to aggregate the \$20 million with the \$40 million, which would necessitate a HSR filing?

Please let me know if you have questions about the transaction or if your conclusion is based on facts or assumptions not raised in my email.

As always, thanks in advance for your assistance, Mike.

Regards,



Aggregation depends on what the liabilities are attached to. If they are attached to the assets being transferred directly to buyer they should be aggregated with the value of those assets. If they are associated with the assets in the LLC that will be merged with buyer they are not aggregated with the value of the LLC interests. If some of the liabilities are associated with each, allocate the portion attached to the asset acquisition and aggregate.

Bm
7/6/07