

803.5

Verne, B. Michael

From: [REDACTED]
Sent: Friday, August 24, 2007 6:00 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Advice

Hi Mike - Is this still the position of the PNO? I have a cash tender offer transaction that will be effectuated pursuant to an executed merger agreement. The public announcement will be made prior to the filing. May I assume that our client, as the acquiring person has no obligation to send a notice letter to the acquired person, and that the waiting period will be 30, rather than 15 days.

Thanks
[REDACTED]

Rule(s): 803.5; 801.3
Staff: Victor Cohen, Esquire
Response: A consensual agreement between two UPE's to merge their companies based upon a written agreement, letter of intent, etc., is a non-801.30 transaction for which both sides may file their premerger report even though the merger will be effectuated by a cash tender offer which has not been publicly announced. There will be a 30 day HSR waiting period commencing when both persons file compliant HSR forms.
File #: 9505016

May 31, 1995

Dear Victor:

This is to confirm our conversations yesterday in which we discussed the application of the public announcement in which we discussed the application of the public announcement requirement of Section 803.5(a)(2) to a consensual transaction. I described the following situation: Two foreign corporations plan to merge in a reportable transaction. A merger agreement will be executed, which will provide that the merger is to be effectuated through a non-cash tender offer. The parties wish to make premerger notification filings upon execution of the agreement or letter of intent, which would be well in advance of the public announcement.

Section 803.5(a)(2) appears to require a public announcement as a condition to filing for a tender offer. However, the Statement of Basis and Purpose describes the same rationale for both the public announcement requirement and the requirement of a signed agreement in non-801.30 transactions, namely, to protect the agencies from being forced to review hypothetical transactions. See 43 Fed. Reg. 33, 450, 33510-11 (July 31, 1978). The SBP's discussion of the public announcement requirement is plainly predicated upon the assumption that there would be no signed agreement between the acquired and the acquiring persons in a tender offer. Yet it seems that where such an agreement exists, it should suffice to alleviate any concern about the definiteness of the parties' intentions.

You responded that so long as the acquisition is treated in all respects as consensual – i.e., that an executed agreement is included with the filing and the waiting period is understood to commence when both parties have filed – no public announcement will be required.

8/24/2007

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Please give me a call if I have mischaracterized your advice in any way. As always, we are most grateful for your prompt and thoughtful response.

Yours truly,

(redacted)

Victor Cohen, Esquire
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room 303
Washington, D.C. 20580

Via Telecopier and U.S. Mail

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For more information about [REDACTED]

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This is not our current position. Only 801.30(a)(5) transactions where there is an agreement that the issuer is a party to can be treated as non-801.30 transactions (no notice required). Tender offers, whether cash or non-cash, require notice and a statement in the affidavit that the offer has been publicly announced.

BW
8/29/07