

Verne, B. Michael

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**From:** [REDACTED]  
**Sent:** Tuesday, September 04, 2007 12:17 PM  
**To:** Verne, B. Michael  
**Subject:** HSR Valuation Question

Mike,

I have a slightly complicated transaction (actually, multiple transactions) that I would like to run by you to confirm whether I am valuing the transactions correctly (and ultimately whether any HSR notifications are required).

Buyer will acquire Target A, Target B, Target C, and Target D (in that order) contemporaneously shortly after it successfully completes its IPO. (The IPO will raise the funds necessary to acquire these companies.) Please assume that the parties all meet the size-of-person threshold.

Buyer will first purchase the ULC interests (which I understand are treated as voting securities for HSR purposes) in Target A for approximately \$59 million. Although this is below the size-of-transaction threshold, Target A is a subsidiary of Target B, and the value of the ULC interests in Target A being acquired presumably would need to be aggregated with the LLC interests being acquired in Target B for purposes of determining the size-of-transaction.

Buyer will then purchase the LLC interests of Target B, Target A's UPE, for approximately \$78 million.

Buyer will then purchase the LLC interests of Target C for approximately \$23 million, which is below size-of-transaction. Because Target C is unaffiliated with the other parties and does not have a common parent, we can set Target C aside for purposes of this analysis.

Buyer will then purchase the LLC interests of Target D for approximately \$92 million. Target D also is unaffiliated with the other parties and does not have a common parent.

The approximately \$59 million "purchase price" for Target A includes approximately \$21 million in cash consideration, \$600,000 of consideration in the form of preferred, non-voting stock of the Buyer, and approximately \$37 million in the form of a loan from Buyer to Target A. Part of the loan will be used to pay off outstanding third party debt (so Buyer acquires Target A debt-free), and the remainder of the loan is to provide cash liquidity.

The approximately \$78 million "purchase price" for Target B includes approximately \$21 million in cash consideration, \$1 million of consideration in the form of preferred, non-voting stock of the Buyer, and approximately \$56 million in the form of a loan from Buyer to Target B. Part of the loan will be used to pay off outstanding third party debt (so Buyer acquires Target B debt-free), and the remainder of the loan is to provide cash liquidity.

The approximately \$92 million "purchase price" for Target D includes approximately \$31 million in cash consideration, \$900,000 of consideration in the form of preferred, non-voting stock of the Buyer, and approximately \$61 million in the form of a loan from Buyer to Target D. Part of the loan will be used to pay off outstanding third party debt (so Buyer acquires Target D debt-free), and the remainder of the loan is to provide cash liquidity.

Based on informal interpretations, my understanding is that the amount of debt being paid off (using the loan from Buyer to sellers) would not be included in the valuation of the acquisitions of Targets B and D (where LLC interests are being acquired). This would also be true for Target A since the ULC interests are treated as voting

9/4/2007

1

securities. Please confirm this understanding is correct.

What I am less sure of is whether the amounts of the loans from Buyer to sellers figures into valuation at all. While not directly on point, my reading of Interpretation 111 in the Premerger Notification Practice Manual suggests that the loans would not figure into the valuations of the transactions. Interpretation 111 asks whether "[i]n the formation of a corporate joint venture, where three companies will each contribute an existing operating plant and also extend loans to the joint venture corporation, how do the forming companies determine the value of the new venture's voting securities that they will acquire."

The analysis states (in relevant part): "The PNO's position is that the value of the voting securities to be acquired by each of the three companies reflects the value of the combination of the three plants and also the value of any additional consideration contributed to the venture by each. (Note that the value of the voting securities to be acquired by each of the forming shareholders reflects one-third of the entire value of the three combined plants that they have agreed to contribute, regardless of when the contribution will be made.) The principal amounts of the loans should not be considered in valuing the securities, pursuant to Section 801.10(c)(2), if the loans were arm's length transactions made at current interest rates, with the expectation of being repaid by the venture. If the loans were offered at favorable rates, however, there must be an assessment of the value attributed to the difference between the value of a loan at market rates and the value of the loan at the favored rate, and this must be added to the cash contributions to determine the value of the voting securities being acquired. . . ."

Obviously, the facts above are different since in that the Interpretation addresses the formation of a new entity issuing voting securities, not membership interests, but it was the closest thing I found. Buyer's loans to sellers are being made at market rates.

If I am correct, I would not include the amount of debt being paid-off by Buyer, nor would I include the amounts of the loans being made to Targets A, B and D in valuing any of the transactions. As such each transaction would be below the \$59.8 million size-of-transaction threshold; the acquisitions of Targets A and B would also be below the size-of-transaction threshold even when aggregated pursuant to 16 CFR 801.14.

Please confirm that my understanding is correct, and please feel free to call me if you have any questions or would like to discuss further.

Many thanks,

[Redacted signature]

AGREE  
[Signature]  
9/4/07

[Redacted signature]

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9/4/2007