



801-11



October 16, 2007

VIA EMAIL AND REGULAR MAIL

Mr. B. Michael Verne
Federal Trade Commission
Premerger Notification Office
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Reportability of Proposed Transaction

Dear Mike:

This letter follows up on our telephone conference yesterday relating to several proposed acquisitions of operating companies by a shell company which is engaged in an initial public offering ("IPO") of its LLC interests. Based on the fact pattern we described to you, you concluded that the acquiring person would not meet the size-of-person test, and therefore the acquisition that meets the size-of-transaction test would not be reportable under the HSR rules. Based on our telephone discussion and the analysis set forth below, the parties intend to complete the transactions without making an HSR filing. Please advise me as soon as possible if you have any questions regarding the facts or analysis below, or if you believe a filing is required under the facts described in this letter.

Facts

The acquiror is a holding company ("Shell Co. LLC") established in December 2006. Shell Co. LLC is currently 100 percent owned by another LLC, but that ownership structure will change prior to closing of the acquisitions described below. Shell Co. LLC will be made public through an IPO of its LLC interests that will raise approximately \$200 million for Shell Co. LLC. Following the IPO, Shell Co. LLC will be its own ultimate parent entity ("UPE"), as no person will have the right to 50% or more of its profits or assets on dissolution. Following the IPO, Shell Co. LLC intends to make several acquisitions of operating companies controlled by three different UPE sellers. One of these acquisitions will involve the purchase of two different entities controlled by the same UPE under separate acquisition agreements, so Shell Co. LLC will acquire four individual operating companies in total. For purposes of this letter, for simplicity and because there are three acquired persons (UPEs), I refer to these as three acquisitions (with one of the acquisitions involving the purchase of two entities from the same



UPE). The largest of these acquisitions meets the HSR size-of-transaction test; the other two transactions are below the size-of-transaction filing threshold.

Shell Co. LLC prepared audited financial statements for the period from inception to December 31, 2006 and unaudited financial statements for the six month period ended June 30, 2007. While Shell Co. LLC has not generated revenues, it has been active in organizing for its IPO and arranging for the operating company acquisitions. The June 30, 2007 balance sheet reflects that Shell Co. LLC has less than \$10 million in total assets. No other balance sheet is expected to be prepared before closing on the three acquisitions, and the funds from the IPO will not appear on any pre-closing balance sheet. Shell Co. LLC also prepared a pro forma balance sheet that reflects Shell Co. LLC as if the contemplated transactions had closed on January 1, 2006. All three of these balance sheets have been filed in its SEC registration statement.

The three acquisitions will occur serially on the same closing date, with the largest transaction expected to occur first. The signed letters of intent do not reflect an order of closing, and the definitive acquisition agreements are still being revised. Nonetheless, the most recent drafts of the acquisition agreements reflect the largest transaction closing first, though the exact times of the closings are still in flux. Counsel for parties to the transaction contemplated that the largest transaction, which meets the HSR size-of-transaction threshold, would occur first for logistical purposes, as it is generally easier in sequential closings to address the largest transaction first. In addition, here, the SEC has required that the largest entity to be acquired be treated as the predecessor entity for purposes of future financial reporting. While this does not require it to close first, it is a logical reason for doing so.

HSR Analysis

As we discussed on the telephone, under the facts described above you confirmed that the pro forma balance sheet would not be treated as a regularly prepared balance sheet. Instead, Shell Co. LLC can rely on its regularly prepared balance sheet of June 30, 2007 for determining its size-of-person for its first transaction. *See* 16 C.F.R. 801.11(c)(2). At the time of the first acquisition, then, Shell Co. LLC will not meet the size-of-person test because its regularly prepared balance sheet will have less than \$12 million in total assets (\$10 million, as adjusted). You confirmed that the first transaction (which meets the size-of-transaction test) is not reportable for HSR purposes because Shell Co. LLC will not meet the size-of-person test and because the value of the transaction is below \$239.2 million (\$200 million, as adjusted). *See* 15 U.S.C. 18(a)(1)(A).

Following the first acquisition, Shell Co. LLC's assets under 16 C.F.R. 801.11(b)(1) will include the total assets of the entity acquired in that transaction, and we said we could assume therefore Shell Co. LLC will have in excess of \$12 million in total assets for purposes of considering the reportability of the second and third acquisitions. However, because we advised you that the second and third acquisitions do not meet the size-of-transaction threshold, you agreed they would not be reportable.

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On the phone, you stated that this analysis hinges on the order in which the transactions close. If the acquisition that meets the size-of-transaction test is not closed first, it would be reportable if Shell Co. LLC's total assets or sales, including those of previously acquired entities, exceed the size-of-person threshold and the acquired person's assets or sales exceed the size-of-person threshold.

We asked you whether there was any issue if the largest transaction is specified to close first. Shell Co. LLC had not yet formally determined the order in which the transactions will close before we spoke to you, even though transaction counsel had been in the process of formulating a closing sequence, and they likely would have closed the largest transaction first for the reasons noted above. We understand that so long as the order of the closings is set forth in the documents, is motivated by a legitimate business purpose, and the transactions actually close in that sequence, the parties can rely on that closing order in conducting the reportability analysis, even if it may result in the largest transaction not being reportable per the analysis set forth above.

We very much appreciate your assistance in this matter.

Sincerely,

[Redacted signature block]

Agree -
B
10/17/07

cc: [Redacted]

[Redacted]