

801.90



December 20, 2007

Via E-Mail

B. Michael Verne
Premerger Notification Office
Federal Trade Commission
Bureau of Competition, Room 303
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Joint Venture Formation – HSR Analysis

Dear Mr. Verne:

The owners of two businesses and a private equity company (“PE”) are proposing to combine the two companies into a new company (“Newco”) that will be jointly owned by the owners of the current businesses and PE.

The first business is comprised of two corporations, Company A1 and Company A2, controlled by the same individual, “A-UPE,” who holds 80% of the stock of A1 and A2. (The remaining 20% of the stock of A1 and A2 is held by another individual unaffiliated with A-UPE.) In addition to its U.S. operations, A1 holds a 90% interest, including the general partnership interest, in a Canadian limited partnership with operations in Canada. The total value of the stock of A1 and A2 is estimated to be about \$200 million.

The second business is comprised of one corporation, Company B, controlled by one individual “B-UPE” who holds 52.04% of the stock of B. (The remaining 47.96% of the stock of B is held by family trusts and other affiliated persons of B-UPE (7.14%) and five individuals unaffiliated with B-UPE (40.82%)). The total value of the stock of B is estimated to be about \$85 million.

In creating Newco, the parties would take the following steps (all of these steps will occur simultaneously):

1. Newco and three Newco Subs, all Delaware Corporations, will be formed by the PE. Newco will have two classes of stock: (1) common, (\$10/share), and (2) Series A Convertible Preferred Stock (\$30/share) which is convertible into common at any time at the option of the holder on a one-for-one basis and which has the right to vote with common on an as-converted basis on any matters presented to the stockholders.



2. The two shareholders of A1 and A2 will contribute all of their shares in the two companies to Newco in exchange for (i) \$120 million in cash (adjusted for any outstanding third party debt and capital lease obligations that had not been retired prior to the transaction and also subject to certain working capital adjustments), (ii) 2 million shares of Newco Series A Convertible Preferred Stock (voting) valued at \$60 million, and (iii) 2 million shares of Newco common stock valued at \$20 million. Assuming full exercise of the Management Subscriptions Rights, A-UPE would hold securities representing 31.62% of the Newco voting rights and the other shareholder of A1 and A2 would be entitled to 7.90% of the Newco voting rights.
3. All shareholders of B will contribute a portion of their shares (valued at \$30 million) to Newco in exchange for (i) 666,667 shares of Newco Series A Convertible Preferred Stock (voting) valued at approximately \$ 20 million, and (ii) 1 million shares of Newco common stock valued at approximately \$ 10 million. Assuming full exercise of the Management Subscription Rights, B-UPE would hold securities representing 8.6% of the Newco voting rights and the other shareholders of B (in the aggregate) would be entitled to 7.9% of the Newco voting rights.
4. Shareholders of B will sell approximately \$35 million worth of shares of Company B to PE for cash and will sell approximately \$20 million worth of shares of Company B to Newco for cash.
5. The PE will contribute the \$35 million in company B stock it just bought from B shareholders along with \$5 million in additional cash to Newco in exchange for 4 million shares of Newco common stock. Assuming full exercise of the Management Subscription Rights this would represent 39.53% of the Newco voting rights at closing.
6. Two of the new Newco officers neither of whom are shareholders in A1, A2 or B, will receive 350,000 Restricted Shares of Newco Common Stock, which will vest over a four year period. The value is approximately \$ 3.5 million. Each of the two Newco officers would also have the right to purchase up to \$500,000 worth of Newco common stock (collectively, the "Management Subscriptions Rights") and would be granted an option to purchase one share of Newco common stock (at an exercise price of \$10 per share) for each share of Newco common stock purchased by such officer. Management would be entitled to 4.45% of the Newco voting rights at closing assuming full exercise of the Management Subscription Rights.
7. Newco will take out new bank debt of \$135 million.
8. The Board of Directors will consist of five members. A-UPE will designate one, B-UPE will designate one, the PE will designate one, the Newco CEO will be on the

board and the final member will be an outside director mutually agreed upon by the other four (this will be set out in the stockholders' agreement).

At the conclusion of the transactions described above and assuming the full exercise of the Management Subscription Rights, Newco would hold, indirectly, all of the voting securities of A1, A2 and B (all of the entities would continue to exist as either direct or indirect subsidiaries of Newco), and the shareholders would hold the following Newco shares:

	<u>Common</u>		
	<u>Shares (millions)</u>	<u>Value (millions)</u>	<u>Percent of class</u>
A-UPE	1.60	\$16.0	21.48
Other shareholder of A1 and A2	0.40	4.0	5.37
B-UPE	0.52	5.2	6.98
Other shareholders of B	0.48	4.8	6.44
Private Equity	4.00	40.0	53.69
Management	<u>0.45</u>	<u>4.5</u>	<u>6.04</u>
Total Outstanding	7.45	\$74.5	100

	<u>Series A Convertible Preferred Stock*</u>		
	<u>Shares (millions)</u>	<u>Value (millions)</u>	<u>Percent of class</u>
A-UPE	1.60	\$48.0	60
Other shareholder of A1 and A2	0.40	12.0	15
B-UPE	0.35	10.4	13
Other shareholders of B	<u>0.32</u>	<u>09.6</u>	<u>12</u>
Total Outstanding	2.67	\$80.0	100
Percent of voting securities:			

*This series votes with common on a one-for-one basis.

	<u>Newco Voting Rights at Closing</u>	
	<u>Votes (millions)</u>	<u>Percent of Voting Securities</u>
A-UPE	3.20	31.62
Other shareholder of A1 and A2	.80	7.90
B-UPE	.87	8.60
Other shareholders of B	.80	7.90
Private Equity	4.00	39.53
Management	<u>.45</u>	<u>4.45</u>
Total	10.12	100

As we discussed with you on the phone earlier this week, we analyzed this under Rule 801.40, "Formation of joint venture or other corporations." PE, A-UPE and B-UPE are forming a joint venture company, Newco. A-UPE and the other A shareholder are contributing all of Company A's stock worth \$200 million in exchange for \$120 million in cash and \$80 million worth of Newco voting securities. (A-UPE, A's largest shareholder, will receive \$64 million of the Newco voting securities.) B-UPE and the other B shareholders are selling \$35 million worth of Company B stock to PE and contributing the rest of the Company B to Newco (worth \$55 million) in exchange for an additional \$25 million in cash and \$30 million of Newco voting securities. PE will purchase Company B stock worth \$35 million from B-share holders and then contribute the Company B stock and \$5 million in cash to Newco in exchange for Newco voting securities worth \$40 million.

Under 801.40, all persons contributing to the formation of a joint venture are deemed to be acquiring persons only, with the joint venture deemed to be the acquired person. So PE and all A and B shareholders are acquiring persons with Newco as the acquired person. A-UPE must file before it acquires its Newco shares because it will receive and hold Newco voting securities valued at approximately \$64 million. It will be required to pay a \$45,000 filing fee. Pursuant to the exemption set forth in 802.41, Newco will not be required to make an HSR filing. All of the other acquiring persons will hold Newco voting securities with a value of less than \$59.8 million, the current size-of-transaction threshold, and therefore need not submit HSR filings.

Please confirm that this analysis is correct. If you have any questions, please do not hesitate to call.

Sincerely yours,

AG
B
11/2/08

cc: