

Verne, B. Michael

801.10

From: [REDACTED]

Sent: Friday, October 24, 2008 9:51 AM

To: Verne, B. Michael

Dear Mr. Verne,

It was great to meet you yesterday during the Back to Basics Workshop. I greatly appreciated the time that you and the other presenters took in explaining the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended (the "HSR Act"). In all, the seminar was well worth the trip up from Tampa. At the workshop, you indicated that you and the other PNO staff welcomes questions on proposed transactions that may require a premerger notice filing under the HSR Act. Our hypothetical is as follows:

We are counsel to Company A which is proposing to sell certain aspects of its business. For clarity, we will refer to those portions of the business which Company A desires to sell as the "Transferred Business". Company B is the proposed purchaser. Both Company A and Company B have sales in excess of \$100 million, therefore the size of the person test is met. The Transferred Business has an enterprise value of \$70 million, consisting of assets with a fair market value of \$70 million and liabilities of \$20 million. Company A has various real estate holdings and investments that are not associated with the Transferred Business and are not included in the enterprise value.

Company A, the seller, desires to structure the transaction as a stock sale. Among other reasons, Company A prefers a stock sale because the taxes payable by the Seller resulting from a stock sale are less than an asset sale. If structured as a stock sale, the purchase price for the capital stock would be approximately \$50 million (the enterprise value of the Transferred Business, less the liabilities). It is our understanding that this proposed structure would not require an HSR filing because the size of transaction test is not met.

Company B, as the buyer, desires to structure the transaction as an asset sale to, among other matters, provide protection against contingent or undisclosed liabilities. If structured as an asset sale, the Buyer would pay \$70 million in cash, assume liabilities of \$20 million. It is our understanding that this structure would meet the size of transaction test and would require an HSR filing. *See, e.g.,* Statement of Basis and Purpose 43 Fed. Reg. 33450 (July 31, 1978) (stating that "assumption of liabilities, if consideration for an acquisition, must all be valued in computing the acquisition price"); Informal Staff Opinion 0701005 (staff agreed that "in the acquisition of assets, the value of any liabilities being assumed must be added to the value of the assets for purposes of determining whether the size of transaction threshold is satisfied."); Informal Staff Opinion 9405008 (staff comment that "a liability assumed by the buyer . . . must . . . be part of the acquisition price").

To limit taxes payable in connection with the transaction, to segregate the assets associated with the Transferred Business, and to provide Company B with the assurance it is seeking regarding acquiring contingent liabilities of Company A; Company A, the seller, has proposed forming a wholly owned subsidiary, NewCo, LLC. Company A would then transfer all its assets (valued at \$70 million) and only agreed upon known liabilities (valued at \$20 million) to NewCo. Company A will sell all the issued and outstanding membership units of NewCo (valued at \$50 million) to Company B.

It is our understanding that the transfer by A to NewCo will not require an HSR filing because it is an intraperson transaction and is therefore exempt under Section 802.30. Also, because the Seller is structuring the transaction (using the formation of the Newco-subsiary and selling the ownership interests of Newco) to meet the substance of both the Seller's preference for a stock sale and the Buyer's preference for an asset sale, it is our belief that Section 801.90 should not apply. Further, because the sale of all of the issued and outstanding membership units in NewCo by Company A to Company B, by means of a stock sale, is below the current filing threshold of \$63.1 million, it is our belief that an HSR filing would not be required.

Could you please let us know if you agree with our conclusion that an HSR filing is not required?

10/27/2008

AGREE - NOT REPAIRABLE
BM 10/27/08