

Verne, B. Michael

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From: [REDACTED]
Sent: Friday, December 05, 2008 3:39 PM
To: Verne, B. Michael
Subject: RE: HSR Inquiry on Valuation of Voting Securities
Attachments: v1 HSR Diagram.pdf

Mike

Thank you again for the assistance.

Based on your responses, I have performed some additional research and would like to clarify the transaction structure that I previously described to you and ask for your guidance on whether this will change who is an acquiring and acquired person for HSR Act purposes, as well as the number of potential HSR Act filings that might be required. The transaction still consists of a merger involving Corporation X and Corporation Y, but I have provided additional information regarding the UPE of Corporation Y ("UPE Y") which I think impacts the analysis. Illustrative charts of the transaction structure are attached to this email to aid in the analysis.

Expanded Transaction Structure Explanation

Currently, UPE Y controls Holdco Y. Holdco Y directly holds 100% of the voting securities of Corporation Y. In the proposed transaction, Corporation X, which is its own UPE prior to the transaction, will create a wholly owned corporate subsidiary ("Sub A"). Sub A will be merged with and into Corporation Y in a reverse triangular merger, with Corporation Y designated as the surviving corporation. In connection with the merger, Holdco Y will receive approximately 60% of the outstanding voting securities of Corporation X. The interests of the shareholders of Corporation X prior to the merger will be diluted to approximately 40%.

Analysis – Acquiring and Acquired Persons

As a result of the merger, UPE Y will become the UPE of Corporation X. Corporation X includes the corporation in existence prior to consummation (Corporation Y) designated as the surviving corporation. It is my understanding that pursuant to 16 CFR 801.2(d)(1)(ii), UPE Y is therefore deemed to have made an acquisition of voting securities, and is the only acquiring person in the transaction. Can you confirm that this understanding is correct?

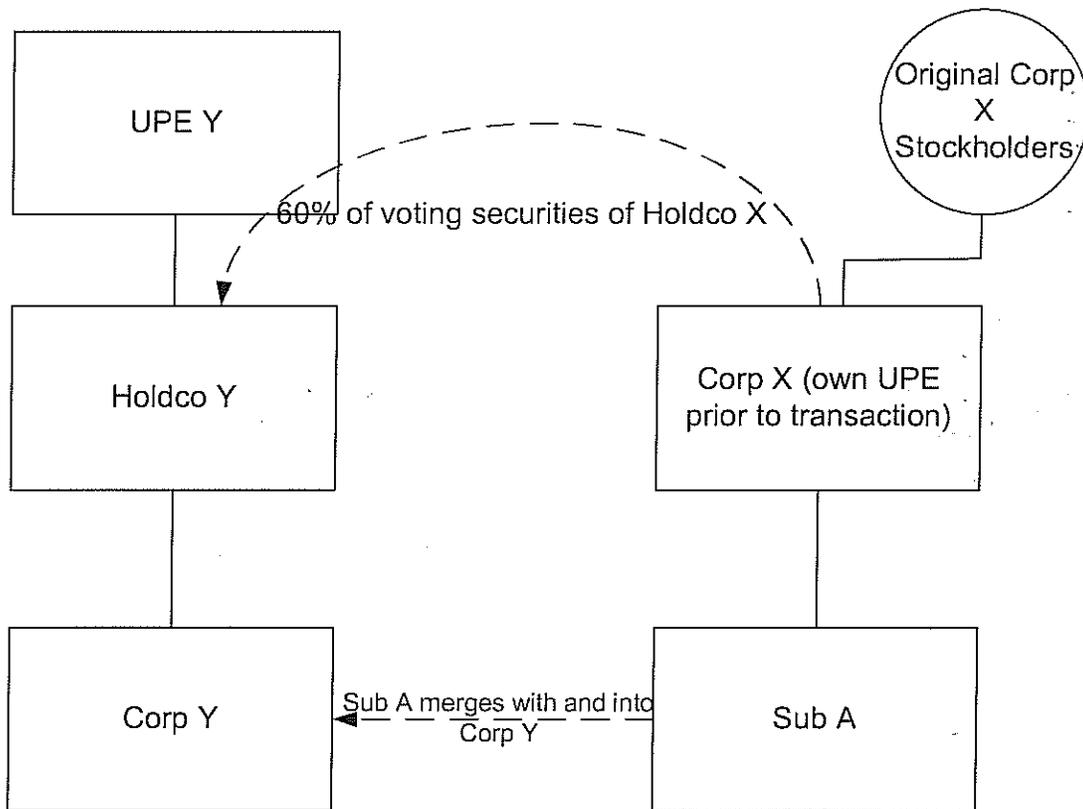
Additionally, because Corporation X will no longer be a person as a result of the transaction, but rather a subsidiary of UPE Y, Corporation X cannot be an acquiring person that holds any assets or voting securities which it did not hold prior to the transaction. Instead, Corporation X is only an acquired person based on the fact that as a result of the transaction its voting securities will be held by UPE Y. (See 16 CFR 801.2(d)(2)(i) and (ii); PNO Informal Interpretation 0405008). As a result of the foregoing, it is my understanding that Corporation X's acquisition of Corporation Y is not reportable. Can you confirm that this understanding is correct?

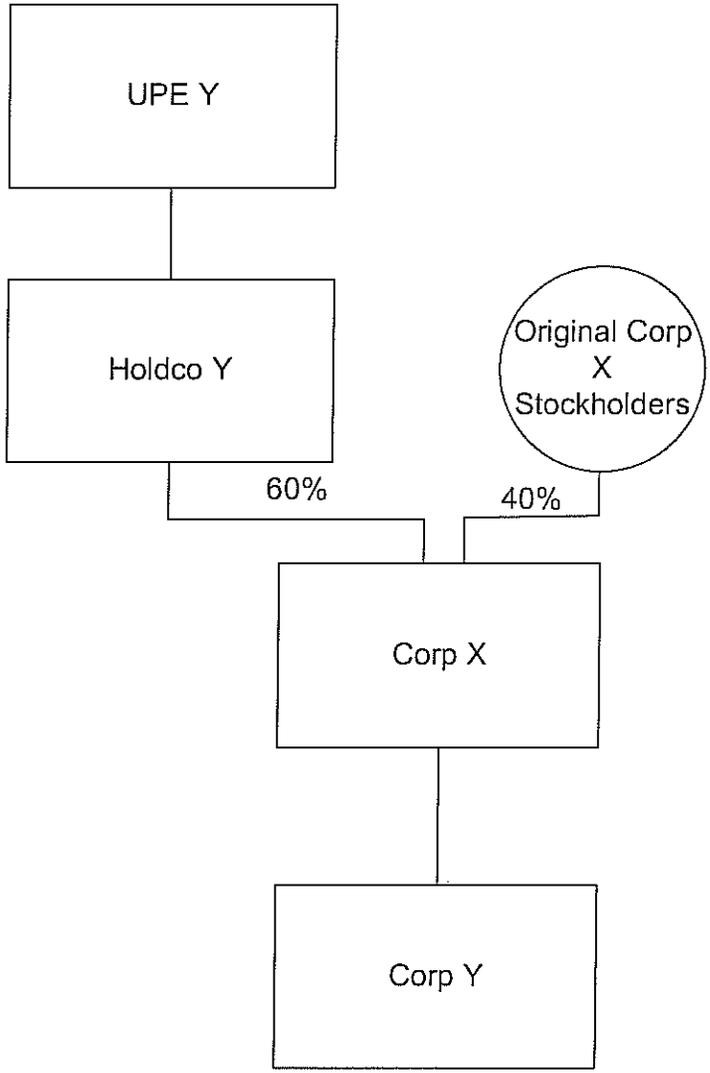
Analysis – Valuation of Acquisition

Finally, consistent with your previous email, because Corporation X is a privately held corporation, the value of the transaction is the acquisition price for the voting securities in Corporation X that will be acquired by Holdco Y, if determined, or the fair market value of the stock as determined by the board of directors (or the board's delegate) of UPE Y. Therefore, assuming that the acquisition price is undetermined, and UPE Y's Board of Directors determines that the fair market value of Corporation X is \$50 million, the value of 60% of Corporation X's shares would be \$30 million. Can you confirm that this understanding is correct?

Thank you for considering these three inquiries.

[REDACTED]





This is a pretty convoluted structure, but I still don't think you have anything reportable. I agree that in the merger UPE Y is the acquiring person and Corp X is the acquired person. It doesn't matter whether it is a reverse triangular merger or a forward triangular merger and it doesn't matter whether Corp Y survives or Sub A survives - the transaction is still viewed as UPE Y's acquisition of 100% of the voting securities of Corp X, valued at \$50 MM, so nothing reportable there.

The consideration going back to the former shareholders of Corp X is really not voting securities of Corp X, but voting securities of New Corp X (X + Y). As long as none of these shareholders is individually acquiring voting securities of New Corp X valued in excess of \$63.1 MM, nothing reportable in that direction either.

BW
12/9/08