

Verne, B. Michael

801.10(d)
802.4

From: [REDACTED]
Sent: Monday, February 02, 2009 12:02 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR Advice - Acquisition of Non-Corporate Interests - Rule 801.10(d); Rule 802.4

Set forth below is the description of a proposed transaction for an existing business corporation to acquire 100 percent of the membership interests of an existing unincorporated entity, and tentative conclusions on HSR reportability for same.

Please confirm based on the stated facts that you agree with the conclusions set forth below, or clarify how the proposed transaction should be analyzed for purposes of determining whether some or all of the parties must observe the HSR notification and waiting period requirements for the proposed transaction.

1. ABC LP and DEF LLC are two existing private investment funds, each of which is its own ultimate parent entity, and each of which presently holds voting stock of GHI Corp. ABC holds more than 50 percent of GHI's voting stock and we presume here that ABC is the ultimate parent entity of GHI.
2. ABC and DEF have executed a letter of intent (LOI) to acquire 100 percent of the membership interests of JKL LLC, an existing operating company, from MNO LLC, a holding company that holds the membership units of JKL.
3. The total purchase price stated in the LOI is \$71M, comprised mostly of cash, plus GHI voting stock that will be issued to certain members of JKL management as described below. GHI will fund the cash payment with new senior and subordinated debt totaling approximately \$40M, and new equity contributions into GHI by ABC, DEF, and certain members of JKL management totaling approximately \$31M. The equity contributions to GHI for the proposed transaction will not materially affect the percentage ownership of GHI voting stock, and ABC will continue to hold more than 50 percent of GHI voting stock post-closing.
4. Certain individuals in JKL management presently hold a small percentage of membership units in MNO, and at closing will be paid cash and will receive GHI voting stock from MNO (or directly from GHI if so directed by MNO), in exchange for their ownership interests in MNO. The total value of GHI voting stock issued to these individuals has not been determined, but the parties presently expect that the value of same in the aggregate will be substantially less than \$5M.
5. GHI and ABC satisfy the current \$130.3M size of person test, and JKL satisfies the current \$13M size of person test.
6. JKL's current balance sheet shows: (i) total assets with book value of approximately \$39M, which includes \$31M of intangibles and goodwill from prior acquisitions by JKL; (ii) existing long-term debt of approximately \$31M, which includes earnout liabilities of approximately \$2.4M from prior transactions, which MNO will assume or pay prior to closing, leaving total long-term debt at closing of approximately \$28.6M; and (iii) cash and cash equivalents of approximately \$2.5M.
7. The LOI provides that the \$71M purchase price assumes a debt-free and cash-free transaction at closing. The parties are negotiating a definitive Securities Purchase Agreement for the proposed transaction, which provides as follows:

"The aggregate consideration for the Securities [JKL LLC interests] to be purchased by Buyer shall be equal to \$71 million (the "Purchase Price"). The Purchase Price plus the amount of Cash as of the Closing Date, minus the amount of Financial Debt of the Companies as of the Closing Date, minus the amount of Transaction Expenses, minus the Retained Liabilities, minus Contingent Payments, minus the Escrow Amount, shall be paid to Seller on the Closing Date, as provided in Section 8.3. The Financial Debt of the Companies and the Transaction Expenses shall be paid in accordance with the funds flow memorandum that shall be delivered to Buyer in advance of Closing."

8. The parties presently expect that GHI as Buyer will pay off JKL's Financial Debt at closing, consisting of GHI's existing long-term debt net of earnout liabilities, in the approximate amount of \$28.6M, and that JKL will distribute its cash and cash equivalents to MNO prior to closing.

9. Net of the adjustment to Purchase Price for GHI's pay-off of JKL Financial Debt at closing, the parties presently expect that GHI as Buyer will pay a total of approximately \$40M to MNO at closing in cash and GHI voting stock, with a portion of the cash payment used to fund a customary Escrow Amount as referenced above.

10. The parties to the proposed transaction are not required to comply with the notification and waiting period requirements under the HSR Act for the following reasons:

(i) Under Rule 801.10(d), the value of non-corporate interests in JKL that GHI will acquire, net of JKL debt that GHI will pay off at closing, does not exceed the current minimum size of transaction threshold of \$65.3M;

(ii) The exemption in Rule 802.4 will apply to GHI's acquisition of non-corporate interests in JKL if GHI's UPE determines that the fair market value of JKL assets is less than \$65.3M; and

(iii) None of the acquisitions of GHI voting stock by members of JKL management will exceed the current minimum size of transaction threshold of \$65.3M.

With respect to the first point, we reference the following FTC Staff Informal Opinions:

<http://www.ftc.gov/bc/hsr/informal/opinions/0802010.htm>

<http://www.ftc.gov/bc/hsr/informal/opinions/0707023.htm>

<http://www.ftc.gov/bc/hsr/informal/opinions/0809010.htm>

With respect to determining whether the exemption in Rule 802.4 may apply, we presume that GHI's UPE may use normal valuation methods to determine the fair market value of JKL assets at the time of closing, and is not required to impute a value to same of \$71M, which is the approximate amount of payments to holders of JKL membership units and for pay-off of JKL's existing long-term debt, as described above.

Please advise if you agree with the above conclusions, or advise as to how the parties must account for the payments described above to determine whether the proposed transaction exceeds the current \$65.3M minimum size of transaction threshold, and whether the exemption in Rule 802.4 applies.

Best regards, GG Wrobel

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