

Verne, B. Michael

801-2

From: [REDACTED]
Sent: Tuesday, February 03, 2009 3:57 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR reportability determination on acquisition by insurance brokerage firm

Mike:

We are writing to confirm our recent discussions regarding a proposed acquisition of assets by an insurance brokerage firm from an insurance company and that insurer's insurance brokerage affiliate.

As we have stated over the phone, you may assume that the size-of-person test applies and is met. The question that prompted us to call you was whether certain interests being transferred to the buyer constitute "assets" for purposes of the HSR Act and therefore need to be taken into account in determining whether the size-of-transaction threshold is met. If these interests do constitute "assets" for HSR Act purposes, then you may assume that the size-of-transaction threshold will be met and that the acquisition will be reportable. If the interests are not "assets," however, then you may assume that the transaction will not be reportable, given the low value ascribed to the assets being acquired aside from these interests (e.g., personnel records and certain limited intellectual property rights).

The insurance company that is one of the two affiliated sellers in the proposed transaction has heretofore maintained its own sales and service operation but says it now plans to rely instead on independent agents. The other seller in the proposed transaction is an affiliate insurance agency, which "produces" (*i.e.*, sells) policies predominantly underwritten by the other seller and its insurance company affiliates; although we understand that a small percentage of its business is "producing" policies underwritten by unaffiliated insurance companies. The buyer is acquiring certain rights held by the seller insurance company with respect to certain customers it insures, as well as related rights held by the insurer's affiliated insurance agency. Specifically, the buyer is acquiring the rights to service, continue and renew, and collect all commissions and other amounts on all insurance policies and contracts and services that are part of the relevant business (other than accounts receivable). The buyer is acquiring these rights subject to the right of the customers to choose whether or not to do business with it.

The interests whose treatment we called to inquire about are what are sometimes referred to in the industry as "Expirations," meaning customer lists and information about the identified customers with respect to certain lines of insurance. The customer information that makes up an "Expiration" in the current transaction includes: (a) the customer's name, address, and contact person, (b) insurance products purchased by the customer from the seller insurance company, (c) the terms, conditions, premium rates and dates of expiration of such policies, (d) the customer's purchasing preferences to the extent documented, and (e) strategies for placing insurance for the customer to the extent documented. This information is proprietary to, and constitutes trade secrets of, the seller (meaning that the seller has a protectible and transferable property interest in it).

It is anticipated that the buyer will hire a large percentage of the employees of the seller who heretofore have been responsible for the business functions the seller is discontinuing. Such employees are not under any contractual obligation to come work for the buyer and may decline to do so, although the buyer need not consummate the transaction unless at least a specified percentage of the sales force, accounting for at least a specified percentage of certain sales of the seller, signs employment contracts with the buyer. The sellers also are transferring to the buyer all of their rights under any non-solicitation, non-competition, and confidentiality agreements the sellers and their affiliates may have with current sales force members whom the buyer anticipates hiring, thus allowing these individuals, if they do agree to come work for the buyer, to deal freely with the customers whose "Expirations" the buyer is acquiring. (Once such individuals become employed by the buyer, these old agreements will be superseded by new agreements between the individuals and the buyer governing their employment relationship.)

The most valuable aspect of the transaction in the buyer's view is the transfer of the "Expirations" (*i.e.*, policyholder information), subject to the ability of sales personnel of the sellers who become employees of the buyer to continue dealing with the policyholders whose "Expirations" the buyer is acquiring. This is true notwithstanding the fact that the policyholders will be under no obligation to do business with the buyer when their policies expire. As indicated above and during our discussions, you may assume that the size-of-transaction threshold would be exceeded if these "Expirations" and the rights being transferred with respect to the non-solicitation, non-competition, and confidentiality agreements between the sellers and their soon-to-be-former sales force members had to be counted as acquired "assets" in valuing the transaction for HSR Act purposes.

As we explained, there are several informal staff opinions dealing with acquisitions of insurance "renewal rights" (Nos. 0809009, 0802002, and 0510017) that suggested to us the possibility that the currently-proposed acquisition might not be reportable.

The most recent of these opinions, issued last September (No. 0809009), involved the acquisition by a reinsurance company of a reinsurance brokerage business and the simultaneous acquisition of certain "renewal rights" – *i.e.*, exclusive rights to offer new and/or renewal policies and reinsurance coverages to insureds of two of the seller's insurance company subsidiaries. According to the writer who prompted this opinion, the policies underlying the "renewal rights" were placed by the brokerage being sold to the buyer. The writer noted that there was no assurance that the existing policies would, in fact, be renewed and requested confirmation from you based on the two earlier opinions that, for this reason, the "renewal rights" did not have to be considered "assets" for purposes of the HSR Act. In response, you confirmed that "renewal rights" are not considered "assets" for HSR Act purposes.

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We contacted you to ask whether the same reasoning would apply to the "Expirations" being acquired by the insurance brokerage involved in our current situation, such that these "Expirations" (like the "renewal rights" acquired by the reinsurance company in No. 0809009) similarly would be deemed not to constitute "assets" for HSR Act purposes. You have since advised us that in the staff's view the "Expirations" are not "assets" for purposes of the statute.

Further, you have advised us that the rights being transferred with respect to the non-solicitation, non-competition, and confidentiality agreements sellers have with their sales force members also do not constitute "assets" for HSR Act purposes. You concurred with our assessment that this aspect of the proposed transaction is substantively the same as a prospective employer paying a current employer to waive a non-competition agreement with an employee, which was the situation addressed in Informal Staff Opinion No. 0205019. There, a professional services company paid a second, competing professional services firm to waive the second firm's non-competition agreements with certain partners whom the first firm planned to hire as a result of a set of transactions involving the two firms. You agreed in that instance that the payments made in exchange for these waivers did not have to be counted towards the size-of-transaction threshold, because no asset was being acquired as a result of such payments. You agreed with us that the same principle applies in our transaction to the rights transfer that similarly will permit former employees of the sellers to engage in business activities on behalf of the buyer that their current agreements with the sellers would prohibit.

In light of the foregoing, you have agreed that the proposed transaction we have been discussing does not require notification.

We would very much appreciate it if you would confirm that this e-mail accurately reflects our discussions and the conclusion the staff has reached. If you require any additional information at this stage, please do not hesitate to contact us.

Thank you as always for your prompt assistance.

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