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Verne, B. Michael

From: [Redacted]

Sent: Tuesday, March 17, 2009 2:11 PM

To: Verne, B. Michael

Subject: HSR Issue concerning step transaction

Mike,

We spoke last week about a Canadian corporation NewCo that would be formed by another Canadian Corporation X. Upon formation NewCo will receive cash from investors in a public offering in return for voting securities of NewCo. Also in return for cash and for voting securities of NewCo (from NewCo), Corporation X will contribute to NewCo the voting securities of Corporation X's wholly-owned subsidiary Corporation A. The new corporation would thus hold cash raised from the public offering and left over from the payout to the forming corporation, and the voting securities of a subsidiary Corporation A. No entity will have the right to elect 50% or more of the directors of NewCo.

Contemplated in the same transaction documentation and scheduled to occur immediately upon the creation of and contributions to NewCo, NewCo will cause to be formed XYZ Partnership, a Canadian partnership. Corporation A (controlled by NewCo) will contribute all of its assets to XYZ Partnership. It will receive partnership interests in XYZ Partnership, which, when combined with partnership interests held by NewCo, will not entitle NewCo and Corporation A to 50% of the profits or assets on dissolution. Corporation X will contribute operating assets to XYZ Partnership and will receive partnership interests that entitle it to more than 50% of the profits and 50% of the dissolution assets of XYZ Partnership. Corporation X will thus control XYZ Partnership immediately after the formation, and for the foreseeable future.

My question concerns the HSR obligations of Corporation X, because Corporation A holds U.S. assets the acquisition of which would be reportable under HSR, if the size tests are met for the parties. Before the contemplated transactions, Corporation X holds all of the voting securities of Corporation A. Between the first and second steps of the transaction, control of Corporation A will pass from Corporation X to NewCo, a separate Person. Immediately after the transaction series, Corporation X will control the assets of Corporation A because Corporation X will control XYZ Partnership (to which the assets will be contributed upon formation).

Despite the technical transfer of control over Corporation A from Corporation X to NewCo, the immediate contribution by NewCo of all of A's assets to XYZ Partnership (which Corporation X will control) means that as a practical matter and viewed as a step transaction with NewCo as an intermediary, Corporation X will not relinquish control over the assets first held by Corporation A and then by XYZ Partnership. Am I correct that no HSR filing would be required for the transaction described? Either:

- 16 C.F.R. 802.10(b) may apply (if one views the transaction as an effective reorganization of Corporation A into XYZ Partnership) because Corporation X will contribute no new assets in the conversion and will not increase its per centum holdings in XYZ Partnership over what it held in Corporation A (in fact, it will hold much less of XYZ Partnership); or
- 16 C.F.R. 802.30(c) may apply to exempt assets contributed to XYZ Partnership not only by Corporation X directly, but also the assets contributed by Corporation A because Corporation X controlled Corporation A at the beginning of the transaction. ABA Letter 85 seems applicable here.

Thanks, Mike. Please let me know if you have any questions or whether you agree with this analysis.

Best Regards,



AGREE - NOT REPORTABLE

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