

801.11

Verne, B. Michael

From: [REDACTED]
Sent: Friday, April 03, 2009 2:36 PM
To: Verne, B. Michael
Subject: Applicability of 801.11(e)

Mike

As we discussed this afternoon, I would like to confirm the applicability of Rule 801.11(e) in an somewhat unusual scenario.

Several parties have formed a new acquisition vehicle in the form of an LLC that is intended to acquire a group of assets for approximately \$70 million. No person controls the LLC, which is its own UPE for purposes of the HSR Rules.

At the time of its formation, each of the members of the LLC submitted an initial deposit towards the total purchase price for the asset acquisition, which is expected to close in approximately 45-60 days. The LLC is not an operating company and has no assets other than the cash deposits submitted by the members, which are being maintained in a company-established escrow account. The total amount of the deposits slightly exceeds the current size-of-person threshold. If the contemplated transaction does not close, the LLC will be liquidated and the deposits returned to the members.

No regularly prepared balance sheet has yet been prepared by the company, nor was one contemplated prior to the closing. However, the LLC operating agreement requires monthly financial reporting to the members. Once those reports begin, they would presumably qualify as a regularly prepared balance sheet for purposes of Rule 801.11(c)(2) and the size-of-person test would be met.

In the ordinary course of business, the LLC would not have begun preparing those monthly financial reports until after the proposed acquisition occurs and the company becomes operational. Now that the requirement in the LLC agreement has come to their attention, the Members have proposed to suspend or modify the monthly reporting requirement until the LLC is fully funded and the acquisition is consummated. Engaging in periodic financial reporting by a non-operational shell entity would consume resources for no business purpose.

If no regularly prepared balance sheet is prepared, then the total assets of the LLC would be determined by 801.11(e), which would exclude the cash deposits currently held in escrow for purposes of funding the acquisition and leave the LLC with essentially no assets.

In this situation, we believe that (a) the size-of-person for the LLC should be determined by 801.11(e) and (b) that a decision by the LLC to suspend the provision of the operating agreement that requires monthly financial reports to the members until such time as the LLC becomes operational is a legitimate business decision and should not be considered a device for the avoidance of HSR reporting obligations under Rule 801.90. In fact, prior to engaging in the analysis of whether an HSR filing would be required for the transaction, the Members had

not realized that such reports were contractually required to be produced prior to closing of the transaction. Thus, a decision to suspend that provision of the LLC Operating Agreement would reflect the parties original intent, in which the LLC would remain dormant until fully-funded for purposes of consummating the transaction.

Based on our discussion, you agreed with the above conclusions that the size-of-person test for the LLC would be determined by 801.11(e) and that, assuming the size-of-person test was not satisfied under that provision, no HSR filing would be required.

Please let me know if this note does not accurately summarize our discussion.

Many thanks for your assistance with this.

Regards,

AGreed -
Bm
4/6/09

Regards,