

Verne, B. Michael

801.10

From: [REDACTED]
Sent: Monday, May 11, 2009 5:28 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: RE: HSR question Under 801.10

Dear Mike-

In follow up to our conference call this afternoon, we discussed the exclusion of certain debt for purposes of determining if a transaction met the size of transaction test.

The transaction contemplated involves the acquisition from the Seller of 100 percent of the voting securities of a non-publicly traded U.S. issuer (the "Target") under 801.10.

The consideration to be paid by Buyer for the securities is determined and equal to (1) \$67.5M reduced by (2) \$17M in outstanding indebtedness of the Target owed to a third-party lender, which indebtedness will be paid off by the Buyer at Closing plus (3) up to approximately \$7.3M for cash balance and working capital adjustments. Thus, total consideration paid to the Seller will be between \$50.5M and \$57.8M.

The \$17M in liabilities of the Target and its subsidiaries represents a current debt of the Target (and its predecessor holding company) to be paid to a third-party bank. (References throughout this paragraph to Target shall include its predecessor holding company.) It is the debt of the Target for a variety of reasons, as we will describe, and thus its assumption is excludable from the size of transaction calculation under existing HSR interpretations by the PNO, including Informal Interpretations 88 and 91. These reasons include the fact that the debt is in the name of the Target, it is used for purposes related to the Target's business, and Target has paid down the debt and related interest payments.

In order to confirm certain financial links to the Seller do not alter the characterization of Target's debt, we do want to provide some additional background on this debt. The liability was originally incurred when Seller bought the operating companies and their predecessor holding company for approximately \$52M. The Seller and the Target each borrowed \$26 M to finance the transaction from separate third-party lenders. Each of the loans is evidenced by separate loan credit agreements. However, the term loan credit agreement representing that portion of the debt to the Target (the "Target Loan Agreement") contains terms and conditions that are tied to covenants and terms in the senior credit facility agreement ("Senior Facility Agreement"), including, but not limited to, containing certain defined terms that are defined in the Senior Facility Agreement, having certain leverage ratio covenants, which establishes the rate of interest charged under the Target Loan Agreement, defining what constitutes a default to include those defaults under the Senior Credit Facility Agreement, and certain other measurement covenants all based upon those contained in the Senior Facility Agreement. Moreover, the requirement of the agent bank to lend funds to the Target was conditioned on (i) all of certain facility loans under the Senior Facility Agreement being fully utilized on the closing date thereof, (ii) that certain other conditions in the Senior Facility Agreement were satisfied, and (iii) that certain representations and warranties made under the Senior Facility Agreement were true and correct and reaffirmed. Seller's debt and the Target Loan Agreement is secured

5/12/2009

and cross-collateralized by the securities and assets of all companies related to the Seller under pledges and cross-guarantees of affiliated entities, in addition to the Seller and the Target pursuant to a general security agreement for the Senior Facility Agreement to Seller's lenders. The Senior Facility Agreement designates lead banks and separate agent banks to identify the specific third party lender for each loan made under the Senior Facility Agreement. The Seller and the Target have each separately paid portions of the respective loans and relevant interest charges (with the Target's current amount owed under the Target Loan Agreement being approximately \$17M).

(Part of the \$50.5-57.8M consideration being paid by Buyer will go to pay off a portion of the Seller's current indebtedness to its banks under one or more loans under the Senior Facility Agreement. But it is not necessary to determine whether or not that is a debt "of the Target" paid to a controlling shareholder of the Target for purposes of determining reportability here, as we are including it in the presumptive consideration.)

Thus, under 801.10 and Informal Interpretations 88 and 91 (and Informal Staff Opinions 0803012 and 0805010), it appears that the \$17M in liabilities assumed by the Buyer are those of and related to the Target (and not its parent, which is the Seller, or any other affiliated entity). Even though such \$17 million of the Target Loan Agreement is part of a series of separate loans under the Senior Facility Agreement, and the Target Loan Agreement incorporates many of the terms and conditions contained therein, and is cross collateralized and secured by all other entities who are borrowers or guarantors under the Senior Facility Agreement, the principal balance outstanding under the Target Loan Agreement is attributable solely to the Target and therefore reduces the purchase price to \$50.5-57.8M. As such the size of the transaction contemplated herein falls below the current \$65.2M size of transaction valuation threshold and would not be reportable based on the facts set forth above.

Thank you.

Regards,

AGREE
BM
5/12/09

