

801.50
801.1(b)**Verne, B. Michael**

From: [REDACTED]
Sent: Wednesday, May 13, 2009 6:54 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Premerger Notification Discussion

Dear Mr. Verne,

Thank you for taking the time to speak with us on Wednesday, May 06, 2009, regarding whether a Hart-Scott-Rodino ("HSR") filing will be required in connection with a proposed transaction.

As I explained, the parties to the proposed transaction do not believe that an HSR filing is required. While they arrived at the structure of the transaction after considering a number of business objectives, including tax, the potential of obtaining outside expertise, and certain contractual terms, the question of whether an HSR filing is required is important since the deal is time-sensitive and may not proceed if a filing is required.

During our call, we discussed several scenarios, each building upon its predecessor, with the final scenario outlining the transaction as currently contemplated by the parties.

Scenario 1: Companies A, B, and C wish to form an LLC, which I will call "Newco."

Company A will contribute assets, which for purposes of our question we will assume are non-exempt, to Newco upon formation, in return for which it will receive the right to 49% of Newco's profits and 49% of its assets upon dissolution.

Company B will also contribute assets, which for purposes of our question we will assume are non-exempt, to Newco upon formation, in return for which it will receive the right to 46% of Newco's profits and 46% of its assets upon dissolution.

Company C will contribute cash or cash equivalents to Newco upon formation, in return for which it will receive the right to 5% of Newco's profits and 5% of its assets upon dissolution.

Newco will have a five-member Board of Managers. Under Newco's LLC Agreement, Company A will be entitled to elect three Managers and Company B will elect two Managers. Company C will be entitled to elect a non-voting observer to the Board.

Notwithstanding the fact that Company A will be entitled to elect more than half of Newco's Board of Managers, it is our understanding that regardless of the value of the assets contributed, no HSR filing requirement will arise as none of the Companies would have "control" of the newly-formed LLC under 16 CFR 801.1(b)(ii). You confirmed that this was correct.

Scenario 2: For tax reasons, it could be advantageous to conduct the initial formation of the Newco LLC in two stages. Rather than the formation outlined in Scenario 1, Companies A and B would form Newco by contributing assets, and Company C would immediately thereafter

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buy-in to Newco for cash or cash equivalents, with cash contributed to Newco, rather than Company A or Company B. These events would all take place on the same day and be contingent on each other. At the end of the day, all three companies would have the exact same interests as in Scenario 1.

You confirmed that the PNO would treat this alternative situation as the joint formation of the Newco LLC by Companies A, B, and C under 16 CFR 801.50, as in Scenario 1, and thus, the formation would remain non-reportable.

Scenario 3: To ensure that Company C has the ability to withdraw from this investment in the future, the parties will modify the facts in Scenario 2 by providing Company C with a "put option" upon the formation of Newco that would allow it, at some point in the future, to compel Newco to buy-out its interest. This would be a "put," and not a "call," which means that Newco would *not* have the power to compel Company C to sell its interest. The decision would be solely up to Company C. The strike price of the "put option" would fluctuate with the financial performance of Newco. It would be subject to a minimum floor, but that floor would be set at an amount *lower* than the amount which Company C is initially contributing to the LLC. As such, Company C will be at risk economically.

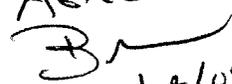
You confirmed that the creation of this option would not impact the preceding HSR analysis. You also noted, however, that if and when the option is exercised, it may give rise to an HSR filing obligation at that point in time.

Scenario 4: Finally, as we discussed, the parties actually expect to modify the facts in Scenario 3 by having Company C hold its interest in Newco through Company X, a newly-formed LLC in which Company A will have a minority ownership interest. Specifically, for purposes of raising capital and also potentially securing industry knowledge with regard to the formation and operation of Newco, Company A has enlisted the help of Company C. Prior to the formation of Newco, Company A and Company C will form Company X, an LLC which will hold the five percent interest in Newco referenced previously.

To form Company X, Company A will contribute cash or cash equivalents, in return for which it will receive the right to 40% of Company X's profits and 40% of its assets upon dissolution. Company C will contribute cash or cash equivalents, in return for which it will receive the right to 60% of Company X's profits and 60% of its assets upon dissolution. Company C will have the right to choose the Observer which Company X is entitled to elect to the Newco Board. Company C will also be solely entitled to determine whether to exercise the "put option" discussed earlier, which in this scenario will be provided to Company X.

You confirmed that the formation of Company X would not be reportable. You also confirmed that, notwithstanding Company A's minority interest in Company X, the only profits or rights upon dissolution considered for purposes of determining whether Company A has control over Newco under 16 CFR 801.1(b)(1)(ii), for purposes of applying 16 CFR 801.50 to the formation of Newco, would be the 49% owned directly by Company A. Accordingly, Company A is not deemed to control Newco under 16 CFR 801.50, and the formation of Newco would not require an HSR notification.

At your earliest convenience, please send us confirmation that the above accurately reflects our conversation. Thank you again for your time.

AGREE

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