

Verne, B. Michael

801.13

From: [REDACTED]
Sent: Tuesday, May 26, 2009 3:39 PM
To: Verne, B. Michael
Subject: Aggregation of "Assets" in Simultaneously Executed License Agreements

Mike,

Hoping all's well with you. I'm dealing with a pair of transactions and am trying to make sure that I'm applying 801.13 correctly with respect to whether or not the value of the "assets" (of both licensing transactions) should be aggregated. The two agreements described below, although being simultaneously executed between the same parties, are independent such that neither agreement's closing is in any way conditioned on the other's closing.

- Agreement #1 has the necessary elements to render the license grant an "asset" (exclusivity even as to the grantor, the grant of manufacturing rights, etc.) and will be valued by the acquirer in excess of the size-of-transaction threshold such that an HSR filing will be triggered.
- Agreement #2 claims, in its terms, to be granting exclusive licenses. However, although the licenses are termed exclusive, the precise compounds over which the exclusivity will be granted have yet to be identified and likely will not be identified for a number of years. Treating the grants as "assets", the value of what is conveyed under Agreement #2 would fall below the size-of-transaction threshold.

This leads to two separate lines of questions:

(1) Does the fact that both agreements were executed at the same time require both of their values to be aggregated and for both to be referenced in the same HSR filing that will address Agreement #1's grant? Does this change at all given that Agreement #1 is "subject to the requirements" of the HSR Act, and that a waiting period on it will be observed?

(2) If aggregation is required, and both agreements must be referenced in the same HSR filing, are the parties allowed to "close" the acquisition of the license under Agreement #2 during the pendency of the waiting period? My assumption is that yes, given that the only acquisition to be consummated at that point would be one that is below threshold (namely the acquisition under Agreement #2). The only moment that the acquirer will hold in excess of the size-of-transaction threshold will occur when the "assets" of Agreement #1 are conveyed – which will only occur when the HSR waiting period expires or is terminated.

Please let me know if you need any more details on the above, and thanks in advance for your thoughts.

[REDACTED]

[REDACTED]

5/27/2009

Our view is that aggregation is required and both should be reported. On your second point, we have taken the position that if assets (as contrasted with a filing for voting securities) are the subject of the filing, none of them can be acquired prior to observing the waiting period, even if the assets to be acquired are less than the size-of-transaction threshold (see PNPM #231). I don't see why that should be any different for exclusive licensing agreements.

BM
5/27/09

K-WALSH CONCURS