

Verne, B. Michael

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From: [REDACTED]  
Sent: Monday, October 19, 2009 1:56 PM  
To: Verne, B. Michael  
Cc: [REDACTED]  
Subject: HSR Question

Mike—

We would appreciate your thoughts about the reportability under the HSR Act of the following acquisition structure:

Company A proposes to acquire 80% of the outstanding membership interests of Company B, a limited liability company, for \$60 million. This acquisition will result in Company A "controlling" Company B for purposes of the HSR analysis. The acquisition of the membership interests is not expected to be pro rata among the members of Company B. Company A wants those members of Company B who are also employees of Company B to retain a significant portion of the outstanding membership interests, and, as such, those members who are also employees will not be selling, on a percentage basis, as much membership interests as the other members.

The \$60 million purchase price comprises \$55 million in cash and the conversion of a \$5 million note into equity. As part of the conversion of the note into equity, outstanding interest will be forgiven. The loan represented by this note will be made once a letter of intent between the parties is executed with respect to this contemplated transaction and will accrue interest at a low market rate. The interest portion that is forgiven is not expected to be material, since the acquisition is expected to occur as soon as possible after execution of the letter of intent. The \$60 million purchase price is subject to a working capital adjustment, but it is not expected that such adjustment will have a material effect on the purchase price. In any event, we believe that the acquisition price is determined and is less than \$65.2 million, the current SOT threshold.

In connection with the foregoing acquisition, Company A and the remaining members of the Company will enter into a new operating agreement. This operating agreement will provide that, on or after the third anniversary of the closing of the acquisition described above (i.e., the acquisition of 80% of the outstanding membership interests of Company B), Company A can exercise a call option to acquire all of the remaining 20% of the membership interests at a purchase price to be determined at that time by an independent investment bank or similar valuation expert firm to be agreed upon by the parties. This operating agreement will also provide that, on or after this same third anniversary and at the option of a majority in interest of the remaining 20% of the membership interests, the remaining members will sell to Company A all of the remaining 20% of the membership interests at a purchase price to be determined pursuant to the same process as described above for Company A's call option. Neither Company A nor the remaining members are required to purchase or sell the remaining 20% unless one of these options is exercised.

We believe that the foregoing acquisition structure is not reportable under the HSR Act. The value of the first acquisition does not exceed the SOT threshold (and the grant of the options described in the prior paragraph is not reportable) and, if either of the options described above is exercised and the remaining 20% is acquired, this subsequent acquisition would be exempt as an intra-person transaction pursuant to 802.30. We have been told that there are valid business reasons (including accounting reasons) for setting up the acquisition structure as described above (in particular, not acquiring 100% of the membership interests at the initial closing) and that this is not a device for the avoidance of an HSR filing.

Please let us know if you agree with the analysis set out above. If you need any additional information, please do not hesitate to contact me.

As always, thanks very much for your help.

AGREE -  
BM  
10/20/09