

801.10

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, March 23, 2010 4:20 PM
To: Verne, B. Michael
Subject: HSR Filing Question / Assumption of Liabilities

Dear Mr. Verne,

Further to my voicemail this afternoon, I am writing seeking guidance as to whether the Premerger Notification Office staff would agree with our conclusions below regarding reportability of a proposed transaction.

Our client, "A", is considering the acquisition of target "B" and is currently evaluating whether it will structure the acquisition as a purchase of B's assets and assumption of B's liabilities or as a purchase all of B's outstanding voting securities. Determination of the final structure will primarily depend on various non-HSR considerations (e.g., tax, successor liabilities), but in evaluating the reportability of the potential transaction under the HSR Act, we have determined an asset acquisition would be reportable but an acquisition of B's voting securities would not be. The transaction would satisfy the size-of-person thresholds for reportability.

B's total assets have a fair market value of approximately \$180 million. B currently has approximately \$70 million of trade liabilities and approximately \$110 million of outstanding bank indebtedness, a small portion of which is guaranteed by B's majority owner, "C". None of B's bank lenders hold voting securities of B. The voting securities in B have been pledged by C and B's other stockholders to B's bank lenders, as collateral security for B's indebtedness.

If A determines to effect the transaction by purchasing all of B's voting securities, the acquisition price would be significantly below \$63.4 million and, therefore, not reportable based on our review of the HSR Act and regulations thereunder. Additionally, we understand that neither the fact that C has guaranteed B's indebtedness, nor that the voting securities in B have been pledged to C, would change our conclusion that the transaction, if structured as a purchase of voting securities, is not reportable.

If A, however, determines to effect the transaction by acquiring B's assets and assuming B's liabilities, including the \$180 million of bank indebtedness and other liabilities, the acquisition price would be (x) whatever amount is paid by A for B's assets *plus* (y) the \$180 million of assumed liabilities (Statement of Basis and Purpose 43 Fed. Reg. 33450 (July 31, 1978) states that "assumption of liabilities, if consideration for an acquisition, must all be valued in computing the acquisition price"). We believe that because the acquisition price would exceed \$63.4 million (and because the size-of-the-parties thresholds are exceeded) A's acquisition of B's assets and assumption of its liabilities would be reportable under the HSR Act.

Can you please advise whether the staff would agree with our conclusions above regarding? Thank you in advance for your time and consideration of this matter.

Best regards,

[REDACTED]

AGREE
[Signature]
3/24/10