

801.10

Verne, B. Michael

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Sent: Tuesday, June 08, 2010 5:52 PM
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Subject: Hypothetical

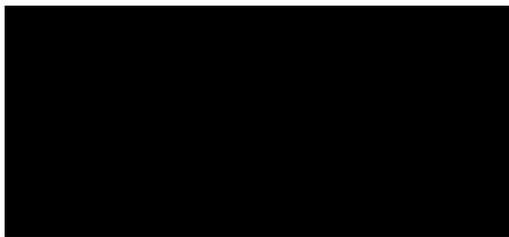
Company A is an existing corporation with five subsidiaries. It has a great deal of debt. It is 60% owned by Company C.

Newco LLC is being formed, for cash, and it will take on debt of \$425 million and raise an additional \$400 million through the sale of "equity" interests to investors. No one "person" will be acquiring 50% or more of the LLC as part of its formation so, for that reason, as well as Rule 802.4, its formation will not be subject to the filing requirements of the HSR Act.

The Newco then will acquire the five subsidiaries from Company A. In exchange, it will pay Company A 2.5% of its own "equity", valued at \$14 million, and will either pay \$800 million to Company A so that A can retire its existing debt or the Newco will pay off the debt directly itself. The Purchase Agreement will value the equity of the subsidiaries at \$14 million.

Under Interpretations 88 and 91, as well as a host of others on the website, I believe that the money used to retire the debt--all of which is related to the entities being acquired-- should not be treated as consideration for the acquisition of the five subsidiaries--one of which is an LLC--and that the transaction, as a result, using the valuation approach mandated by Rule 801.10, would not satisfy the size of transaction test.

Your views?



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I don't think that you can say that the acquisition price is determined for the acquisition of the five subs. I agree that the \$800 million being used to retire debt is not part of the acquisition price, but I think you need to do a FMV of the voting securities of the 5 subs to determine the size of transaction. See the attached chart under the "Neither A nor B is publicly traded column". In your transaction Newco is A and the 5 subs are B. The LLC interests are treated the same as non-publicly traded voting securities. It may well be that the fair market value of the voting securities of the subs is \$14 million, but that has to be determined. You can't rely on a stated value of the LLC interests in the agreement.

<http://www.ftc.gov/bc/hsr/stockforstock.shtm>

BW
6/9/10