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801.50**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Wednesday, August 04, 2010 11:08 AM  
**To:** Verne, B. Michael  
**Cc:** [REDACTED]  
**Subject:** Whether Proposed Asset Transfer Satisfies the Size-of-Transaction Test

Dear Mr. Verne:

We have a question concerning whether our client's proposed joint venture with a non-profit corporation (the "Non-Profit") will result in a reportable acquisition under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). In connection with the proposed transaction, which is described in more detail below, our client Company A will acquire certain real estate assets owned by the Non-Profit that we believe are exempt from the HSR Act reporting requirements pursuant to HSR Rule 802.2(d). If we are correct in that conclusion, the value of the non-exempt assets transferred as a result of the acquisition would not exceed the current \$63.4 million notification threshold and, thus, the acquisition of such non-exempt assets would also be exempt from the reporting requirements of the HSR Act.

### **The Proposed Transaction**

Company A seeks to enter into a joint venture with the Non-Profit. The parties' agreement contemplates the following series of concurrent steps:

(1) The Non-Profit and Company A would create a joint venture in the form of a new limited liability company to be known as Service Company, LLC ("ServiceCo"), which would be a for-profit entity. Both the Non-Profit and Company A would have an equity interest in ServiceCo, but the governance of ServiceCo would be controlled by the Non-Profit. Company A's equity interest in ServiceCo would entitle it to receive more than 50 percent of ServiceCo's profits.

(2) The Non-Profit and ServiceCo would enter into agreements under which ServiceCo would provide a range of administrative and operational support services to the Non-Profit, while the Non-Profit would continue to fulfill its mission while maintaining its non-profit status.

(3) In exchange for its equity interest in ServiceCo, the Non-Profit would contribute and/or license to ServiceCo certain operational assets, including tangible personal property, contracts, business arrangements and certain proprietary data necessary for conducting the administrative and operational support services contemplated by the services agreements.

(4) In exchange for its equity interest in ServiceCo, Company A would contribute to ServiceCo approximately \$25 million.

(5) ServiceCo would immediately distribute the \$25 million to the Non-Profit.

(6) For an aggregate purchase price of approximately \$40 million, the Non-Profit would sell to Company A certain real estate assets and other property associated with the Non-Profit, including housing facilities used in connection with the Non-Profit's mission, office space used by the Non-Profit,

buildings used in fulfillment of the Non-Profit's mission and retail space.

(7) The \$40 million purchase price would be paid to the Non-Profit, and Company A would lease the real estate assets to ServiceCo under a long-term lease on standard commercial real estate market terms. ServiceCo would then sublease the real estate to the Non-Profit, as needed, under a long-term sublease on standard commercial real estate market terms.

The foregoing transaction steps would result in an aggregate payment to the Non-Profit of \$65 million.

### **Application of the HSR Act**

Viewed in the aggregate, the proposed transaction could be considered an acquisition by Company A of certain assets of the Non-Profit for \$65 million. Assuming that the size-of-person test has been met, the parties would have a reporting obligation under the HSR Act. We believe, however, that some of the assets being acquired are exempt from the requirements of the HSR Act. In particular, Section 802.2(d)(1) of the FTC's HSR rules relating to the acquisition of office and residential property states that:

In an acquisition that includes office or residential property, the transfer of any assets that are not office or residential property shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

The parties commissioned an independent third party to determine the fair market value of the real estate to be transferred from the Non-Profit to Company A. The transferred real estate includes the following:

- Housing Facilities – properties that are used as residences in connection with the fulfillment of the Non-Profit's mission (approximate value of \$3.4 million); and
- Non-Profit Offices – buildings used primarily as office space by the Non-Profit (approximate value of \$22.2 million).

Given that these properties are used exclusively as either residential or office purposes and would represent an aggregate value of \$25.6 million if treated as being transferred in a separate acquisition, we believe their acquisition is exempt under HSR Rule 802.2(d).

With the exclusion of these exempt properties from the calculation of the size-of-transaction, the value of the non-exempt assets transferred as a result of the proposed transaction would be approximately \$39.4 million, well below the current \$63.4 million notification threshold. Consequently, the parties would not have a reporting obligation under the HSR Act.

Please confirm whether you agree with our analysis of the proposed transaction. If you require any additional information, please advise and we will provide it to you. Thank you for your time and consideration of this request.

Best Regards,



I think you have two separate transactions here:

1) A acquires real property from Non-Profit for \$40 million – does not satisfy size of transaction test

A subsequently leases the real property to ServiceCo, which subleases the property to Non-Profit – Neither entering into a lease or sublease is an acquisition.

2) Formation of ServiceCo – It doesn't appear that A will be acquiring membership interests of ServiceCo valued in excess of \$63.4 million. Non-reportable.

  
8/23/10