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801.2(e)**Verne, B. Michael**

From: [REDACTED]
Sent: Wednesday, August 25, 2010 5:40 PM
To: Verne, B. Michael
Subject: Rollover Equity & Purchase Price Deductions

Mike—

I would appreciate your HSR guidance with respect to the following situation:

Our client ("Company A") is a private equity group that manages three funds which own most of the membership interests of a limited liability company ("OpCo"). Each of the funds is its own ultimate parent entity. Management of OpCo owns most of the remaining minority interest in OpCo (the rest of the minority interest is held by a bank affiliate as described below). Another company ("Buyer") proposes to purchase the membership interests in OpCo for an aggregate purchase price of \$66 million (as described below, the \$66 million will also be used to pay off debt and to make payments to holders of appreciation rights and for other transaction expenses).

To effect the purchase, Buyer will form a shell limited liability company ("NewCo"), which will acquire the membership interests in OpCo. Management will be required to "roll over" \$2.6 million of its OpCo equity into NewCo by exchanging their OpCo equity for membership interests in NewCo. In essence, management will be required to continue to have an equity interest in OpCo, albeit indirectly through an entity whose sole assets are the membership interests in OpCo. The percentage interest of each individual member of management in NewCo will increase or decrease slightly (compared to his or her percentage interest in OpCo immediately prior to the transaction). In any event, Buyer will be controlling NewCo.

In addition, the three funds of Company A are similarly required to "roll over" \$3 million of their OpCo equity into NewCo. It is not yet known how the "roll over" equity will be divided among the three funds. It may or may not be proportionate. If it is proportionate, then the percentage interest of each of the funds in NewCo will be significantly less than their respective percentage interests in OpCo immediately prior to the transaction. Further, if Buyer is able to raise sufficient money for the purchase, the three funds may be able to avoid having to "roll over" their equity. However, that is not likely to be known until closer to the closing.

Further, at closing, a portion of the purchase price would be used to pay off directly the outstanding debt of OpCo. At the time of the negotiations when the outstanding bank debt was first put in place, OpCo was interested only in obtaining loaned funds, which resulted in a \$25 million term loan and a \$5 million revolver. However, the lender also expressed an interest in one of its affiliates investing \$1 million for 4.9% of OpCo equity. As a result, one of the equity holders of OpCo is an affiliate of the lender. The lender is in the business of making commercial loans. In other words, the equity deal was a small side deal in connection with the lender conducting its normal business of making loans. In private equity deals, this was not unusual at the time.

In addition, at closing, certain members of management, most, but not all, of whom are equity holders, will be entitled to a payment based on an appreciation rights plan. The payments under the appreciation rights plan will be made from the purchase price. The appreciation rights are not "non-corporate interests."

I have the following questions based on the situation described above:

1. Based on Informal Staff Opinion 0501012 and Premerger Notification Practice Manual (4th ed.) Int. # 19, I would conclude that the "roll over" equity of holders whose percentage interest is staying the same or decreasing would be exempt pursuant to Section 7A(c)(10) and can be deducted from the purchase price for HSR purposes. Is that still correct?
2. The author of Informal Staff Opinion 0501012 points out that the transaction he or she describes could be structured in two different ways which would have, in essence, the same economic result, but the "Recapitalization" structure would not require an HSR filing while the "Acquisition" structure would. You indicated that the rollover would be exempt under Section 7A(c)(10) as long as the rollover shareholders hold the same percentage or less of Newco. However, this still leaves the anomaly that, if the transaction had been structured

as a "Recapitalization," then it would not be reportable under the HSR Act, even if the resulting percentage interest of the rollover shareholders would have increased. Has the position of the FTC changed such that there is no distinction for HSR purposes between the "Recapitalization" and the "Acquisition" irrespective of any change in percentage interest?

3. With respect to the pay off of the outstanding debt, given that the lender is a bona fide commercial lender, can this debt be deducted from the purchase price for purposes of the SOT test even though an affiliate of the lender owns a small portion of the equity of OpCo?

4. I understand that transaction expenses that will be paid at closing can be deducted for purposes of the SOT test, but was not certain whether such deduction was still permissible where the expenses are being paid to the equity holders. With respect to the payment to the holders of appreciation rights, can the amount of all such payments be deducted from the purchase price for purposes of the SOT test even though some of the holders are also holders of membership interests in OpCo? Some of the holders of membership interests in OpCo who are also entitled to a payment under the appreciation rights plan will be receiving only membership interests in NewCo in exchange for their membership interests in OpCo (in other words, these holders will retain all of their equity in OpCo, albeit indirectly after the transaction). Does this affect the HSR analysis since they are not, in essence, selling their membership interests?

Please let me know if you have any questions regarding the foregoing. As usual, the client is hoping to resolve this issue as soon as possible. Any help that you can provide will be greatly appreciated!

Best regards,

[REDACTED]

[REDACTED]

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1. The acquisition of the rollover interests would be exempt for the members of management and the funds, however, I think the point is moot unless one is receiving 50% or more. You can't deduct the value of the rollover interests from the acquisition price for OpCo.

2. I think our position has evolved somewhat in the past few years. See #4 below

3. Yes

4. All of the transaction costs can be excluded no matter who they are being paid to. We would view this as the acquisition by A of 100% of OpCo with a backside acquisition under § 801.2(e) of NewCo interests by the holders of interests in OpCo

A handwritten signature in black ink, appearing to be the initials 'BW' followed by a long horizontal flourish.

8/26/10