

802.50

Points for HSR Review with PNO Staff
December 28, 2010

Facts of transaction

1. In January 2009, Seller and Purchaser entered into an Asset Purchase Agreement ("APA"). Closing under the APA has not yet occurred.
2. The transaction is structured as an asset sale for a purchase price of \$300M, subject to certain adjustments.
3. Seller is a company organized under the laws of Bermuda, with its sole office in Bermuda. Its sole shareholder, sole employee and ultimate parent entity ("UPE") is a Bermuda resident and citizen of Sweden ("Shareholder"), who recently died. The Shareholder's executor is a Bermuda citizen.
4. Seller's total revenue in its most recent fiscal year, ended March 31, 2010, was approximately \$45.4 million.
5. Purchaser is a Massachusetts LLC based in the US, and is its own UPE. Purchaser is engaged in the business of providing investment management and advisory services to various clients in the US.
6. Seller has been engaged exclusively from without the United States in the business of providing investment management and advisory services to various clients located in the US (the "Business"). Seller is selling to Purchaser substantially all of the assets of the Business.
7. The APA provides that at the closing, Seller will transfer the following assets to Purchaser: (a) all files, documents, instruments, papers, books and records related to the Business, including marketing lists, shareholder files, reports, securities holding information and general business records; (b) all rights to the name of Seller; (c) all investment performance "track record" information belonging to Seller and its Affiliates; and (d) all goodwill of Seller associated with the Business.
8. The assets to be transferred pursuant to the APA do not include Seller's rights under its investment advisory and other contracts with its clients. The APA provides, however, that Seller must use its reasonable best efforts to obtain all approvals necessary for each of Seller's clients to enter into a new advisory agreement with Purchaser no later than the closing pursuant to which Purchaser will provide the services to the client that Seller was previously providing.
9. Since the parties entered into the APA, Seller's client relationships have evolved into three categories:

- Seller's contractual relationships with some clients have remained unchanged. Under these relationships, Seller has remained solely contractually responsible to the client and has received 100% of the fees paid by the clients. Seller engaged Purchaser, as an independent contractor and not as an agent, pursuant to a consulting agreement, to provide various services in support of Seller's servicing of these clients, and for these services Seller paid Purchaser 50% of the fees paid by the client (and thus Seller retained the remaining 50% of these fees – we refer to these below as the "Seller Retained Fees").
 - Clients of Seller representing a substantial majority of Seller's revenues from the Business elected to enter into new, separate, co-advisory agreements with each of Seller and Purchaser. Under those co-advisory agreements, each of Seller and Purchaser has its own, separate contractual responsibilities to the applicable client and each of Seller and Purchaser is paid fees directly by the client. We refer to the fees received by Seller under these arrangements as the "Seller Co-Advisory Fees".
 - The remaining clients of Seller elected to terminate their advisory agreements with Seller and enter into new advisory agreements with Purchaser (we refer to these clients as the "Turned-Over Clients"). In connection with the execution of its new agreements with the Turned-Over Clients, as required by the APA, Purchaser executed and delivered to Seller a promissory note (the "Interim Note") in the amount of \$10,518,424, payable in quarterly installments. Under the terms of the Interim Note, each installment is approximately equal to 50% of the net after-tax cash flow derived by Purchaser during the previous quarter from the Turned-Over Clients and from certain other business activities of Purchaser. We refer to the payments made by Purchaser to Seller under the Interim Note as the "Interim Note Payments."
10. The amount of the Interim Note was calculated by reference to the ratio of aggregate assets under management of the Turned-Over Clients as of January 1, 2009 to the aggregate assets under management of all clients of the Business as of that day.
 11. At the closing, pursuant to the APA Purchaser will deliver to Seller a promissory note in the amount of \$300,000,000, less the aggregate of the Seller Retained Fees, Seller Co-Advisory Fees and the Interim Note Payments.
 12. The Seller Retained Fees and the Seller Co-Advisory Fees were paid to Seller by its clients for services rendered. The funds received by Seller from those sources do not, therefore, represent purchase consideration. The aggregate amount of Interim Note Payments paid to Seller through October 15, 2010, is \$3,797,756. We estimate that the next Interim Note Payment to be paid on January 15, 2011, will be approximately \$540,378.
 13. For tax purposes, the parties stipulated in the APA that the goodwill of Seller associated with the Business was located outside the US.

14. The books and records of Seller are located in Bermuda (principally in Shareholder's home and the Bermuda offices of its accountants), but certain ministerial and clerical records (relating to securities trading records for clients' accounts) are located in the US with an independent service provider.
15. Since 1993, Seller has retained Boston Investor Services, Inc. ("Administrator"), a company located in the United States, to provide administrative services including trade settlement, recordkeeping, research and regulatory compliance services for which Seller pays Administrator monthly and hourly fees. The Administrator is an independent contractor not under common control with, nor an agent of, either the Seller or the Purchaser.
16. The only physical assets of the Seller located in the United States are records (as described above) in the offices of the unaffiliated Administrator. The fair market value of those records is nominal.
17. Prior to the formation of the Purchaser in 2003, the principals of Purchaser provided certain services to Seller on a non-exclusive basis as unrelated independent contractors.
18. In 2006, Seller entered into a Consulting Services Agreement with each of the corporate Principals of the Purchaser, as independent contractors, and not as agents, pursuant to which each of these entities provided certain consulting and research services as designated by Seller regarding potential investments, for which services Seller paid each of these entities a commission equal to 4% percent of Seller's adjusted gross revenues. None of the contracts were between Purchaser and Seller.
19. For two clients, Seller and Purchaser served as co-sub advisors. For Company H, which was originally a client of Seller only, Purchaser and Seller were appointed co-sub advisors in Feb. 2009. For Company C, the same arrangement was entered into in 2010. See the second bullet point under paragraph 9 above.

HSR analysis and request for opinion

20. We would like to confirm that: (a) the upcoming closing on a transaction is exempt under HSR Rule 802.50(a) as an acquisition of foreign assets that generated less than \$63.4 million in sales in or into the United States in the Seller's last fiscal year; and (b) an "interim closing" in May 2010 was not subject to reporting requirements because, to the extent any asset transferred its acquisition price and fair market value were well below \$63.4 million, and for other reasons as well.
21. We understand that contracts for services rendered outside the United States are foreign assets. Informal Opinion # 1003008. Similarly, the goodwill generated from such services should be treated as a foreign asset. By way of comparison, Informal Opinion # 9605014 confirms that where reinsurance services were provided outside the US, the fact that some premiums came from US insurers even on underlying reinsured policies with US insureds, the sales of the reinsurance were not sales in or into the US.

22. We are aware of interpretations regarding intellectual property and goodwill confirming that with respect to such intangible assets, it is acceptable to allocate the “location” of such assets for HSR purposes in a manner inconsistent with tax allocations, and that one acceptable method of allocation is an allocation based on the percentage of goods sold pursuant to the intangible assets either inside or outside the United States (Informal Opinions # 0411004, 0411005). However, for a foreign issuer in a service business selling substantially all its assets, we believe that a tax allocation of goodwill as generated outside the United States, as confirmed by the parties in the APA, is a reasonable method of establishing the location of intangible assets generated from services rendered outside the United States.
23. Informal Opinion # 0709003 is instructive on treatment of foreign investment advisers, even when some of their clients are in the US, and is consistent with the general principle that revenues earned from providing a service are attributed to the location where the services are performed (see Informal Opinion # 9605014 discussed above). Informal Opinion # 0709003 involved whether revenue of a foreign subsidiary of a foreign acquired person were sales in or into the US for purposes of the 802.51 exemption relating to acquisition of the voting securities of a foreign issuer. Subsidiary B3 was incorporated outside the US and its headquarters address and only offices were outside the US, though it was registered with the SEC as an investment adviser. It primarily provided investment advisory services to foreign clients, with some US clients which invest in offshore pooled investment vehicles advised by it acquired either directly or by US feeder funds not within the acquired person. All investment decisions with respect to such pooled investment vehicles were made outside the US, no funds flowed through a controlled US establishment of the acquired person, and the offshore pooled investment vehicles invested primarily in non-US securities. PNO staff agreed that its revenue did not comprise sales in or into the US for purposes of the 802.51 exemption. Similarly, where Seller is a Bermuda investment adviser, its assets, including the track record and goodwill developed rendering investment advice from Bermuda for international investments to US clients, should be deemed foreign assets.
24. The Interim Closing was not reportable because Purchaser merely assumed service obligations under new contracts with third parties which is not a transfer of assets under HSR law. Even if Purchaser’s new agreements with former customers of Seller could somehow be characterized as a transfer of assets, any such “assets” held by Purchaser as a result of the Interim Closing were valued well below \$63.4 million. Alternatively, any transfer is subject to exemption as a transfer in the ordinary course, as Seller continued its investment advisory business outside the United States after the Interim Closing.

AGREE -
Bm
12/29/10