

801.10

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, February 22, 2011 8:54 PM
To: Verne, B. Michael
Subject: Confidential: Request for Informal Interpretation

CONFIDENTIAL

Michael --

I hope you had a chance to enjoy the holiday weekend.

I am writing to confirm whether the Premerger Notification Office would agree that the following transaction is not subject to notification under the Hart-Scot-Rodino Antitrust Improvements Act of 1976, as amended, and the regulations adopted thereunder. In brief, the issue presented is whether an acquisition of membership interests with a stated purchase price in excess of the size of transaction threshold is nevertheless not reportable because substantial portions of the purchase price or cash on hand at the target will be used to pay off the target's debt and transaction expenses for the deal, such that the acquisition price pursuant to § 801.10 will be below the value of the HSR size of transaction threshold of \$66 million when the deal closes after February 24, 2011.

Individual X holds approximately 65% and individual Y holds approximately 35% of the membership interests of A, an LLC. X and Y also own membership interests in comparable percentages, either directly or indirectly, of service-related business B. B functions on a closely integrated basis with the business of A. The percentage ownerships of membership interests stated in this paragraph correspond to each entity's (including each individual's) percentage interest in the profits of the entities in which each holds membership interests and the percentage of the assets of each LLC to which the holding entity (individual) is entitled upon dissolution. Therefore, X is the ultimate parent entity ("UPE") of A and B.

C has agreed to buy all of the outstanding membership interests of A and B pursuant to a Membership Interest Purchase Agreement among A, B, X, Y, Z and C for \$73 million. While the parties have not allocated the purchase price between the membership interests of A and B to date, as demonstrated below the aggregated value of the transaction will be below \$66 million as of the closing date after February 24, 2011 and therefore the transaction is not reportable under the HSR. Prior to or commensurate with the closing, substantial portions of the purchase price — either directly by payment from acquiring firm C or indirectly by distribution using the proceeds held by Z — will be used to pay off debt and other expenses of Z. In Informal Interpretation 805010 (May 15, 2008), the PNO agreed with the writer's statement that "the PNO views it as a general rule that the seller's transaction expenses are not included in the size-of-transaction test, regardless of whether the buyer reimburses the seller for these expenses, or the seller pays these expenses from the deal proceeds," and that this view applies in acquisitions (such as here) of non-corporate (membership) interests that result in a change of control. In essence, these expenses may be excluded from the calculation of the value of the transaction under 16 C.F.R. §801.10. They are viewed as costs of getting the deal done rather than payments to the holders of membership interests. *Id.* The same interpretation — confirms that amounts of proceeds paid by the buyer for the pay-off of debt owed by the target or by the seller from deal proceeds should be subtracted from the value of the transaction as well under §801.10. *Id.*

Based on the foregoing, the following categories of debt and expenses should be deductible from the \$73,000,000 purchase price to determine the value of the transaction under 16 C.F.R. §801.10:

· Debt directly related to A or B's business	\$25,800,000
· Early termination fee for	\$ 640,000
· Banker fees	\$ 1,900,000
· Employee Bonuses	\$ 2,500,000

Subtracting these selling expenses and the debt pay-off amount would leave the value of the transaction at approximately \$42,160,000. The parties have further agreed, however, that C will pay a positive working capital adjustment currently reasonably estimated, in good faith, to be valued at closing at \$16.5 million. Since there is a reasonable basis for the value of this working capital adjustment, it is our understanding that the PNO expects such a working capital adjustment to be added back into the value of the transaction which would mean the acquisition price would be determined at \$58,660,000 under §801.10, still well below the \$66 million reporting threshold. See Informal Interpretation 0601011 (January 12, 2006). Indeed, even if there were no selling expense deductions above in connection with the proposed transaction other than the debt to be paid off, the acquisition price would still fall well below \$ 66 million.

Finally, I note that Z is an corporation whose voting securities are held in the same percentages by X and Y pre-closing as they hold membership interests in A and B. Z holds certain assets relating to A's business which assets will be assigned to A before the closing in an exempt, intraperson transaction. Z's only remaining assets at closing will be its interest in escrow funds held back relating to the transaction. Z will be dissolved after the closing, and any remaining economic value will be distributed to its shareholders X and Y. Therefore, Z has no HSR relevance for this transaction.

Based on the forgoing, please advise whether the PNO agrees that there is no HSR filing obligation attached to the transaction described above.

Best regards,

AGREE
 BW
 2/23/11

 In compliance with IRS and other applicable tax practice standards, any advice in this message (including attachments) is not intended or written to be used, and it cannot be used, for the purpose of avoiding tax penalties or for the purpose of promoting, marketing or recommending to another party any tax-related matters.

Additionally, the contents of this message, together with any attachments, are intended only for