

801.13(b), 801.14(b)

Walsh, Kathryn

From: Walsh, Kathryn
Sent: Thursday, September 15, 2011 9:49 AM
To: [REDACTED]
Subject: RE: 801.13(b)

Note that all of these views are based on the fact that both agreements have been executed, despite the fact that they are not conditioned on one another. If only one agreement had been executed and there was no certainty that the other agreement would be entered into, the results would be different.

1. If the two transactions close simultaneously, you would aggregate per 801.13(b)(1) and 801.14(b):

801.13 (b) Assets. (1) All assets to be acquired from the acquired person shall be assets held as a result of the acquisition.

801.14 (b) The value of all assets of the acquired person which the acquiring person would hold as a result of the acquisition, determined in accordance with §801.13(b).

2. The advice in 0409006 was based on 801.13(b) prior to its being amended in 2005. We no longer allow portions of an asset deal to be closed while the filing is in the waiting period, unless they are exempt and therefore not part of the filing (e.g., foreign assets). You would aggregate X in the filing for Y.

3. Agree

4. Agree with everything except the last sentence. If the X deal has not closed at the time of the Y filing, the two would be aggregated and reported. The X deal could not close until the expiration of the waiting period.

From: [REDACTED]
Sent: Wednesday, September 14, 2011 2:59 PM
To: Walsh, Kathryn
Subject: 801.13(b)

Kate,

Entities X and Y, both within the same UPE (Company A) propose to sell assets to Company B. Two separate agreements will be executed simultaneously by X and Y and the two transactions will not be conditioned on one another. The assets sale by X is below the size of transaction threshold but the asset sale by Y is above the size of transaction threshold. The size of parties thresholds are met.

My understanding of the application of rule 801.13(b) to this transaction is as follows:

1. If the two transactions close simultaneously, 801.13(b) would not apply and no aggregation would be required. In this scenario, the HSR filing by A and B would only report the acquisition of Y.

2. If the sale of X closes first, again 801.13(b) would not apply and no aggregation would be required. The acquisition of X could close before the expiration of the waiting period for the acquisition of Y. (see informal interpretation 0409006).

3. If the sale of Y closes before the acquisition of X, the filings by A and B would only report the acquisition of Y and the subsequent acquisition of X would not be reportable.

I also understand that, if the two agreements were executed at different times, aggregation of the two transactions

would be required under 801.13(b) only if (a) the agreement with respect to X was executed first and the agreement with respect to Y was executed within the next 180 days or (b) if the sale of X closed within 180 days before the execution of the agreement with respect to Y. In scenario (a), however, even if aggregation was required, the closing of the sale of X could occur before the expiration of the waiting period.

Can you confirm that my understanding is correct?

Thank you in advance.

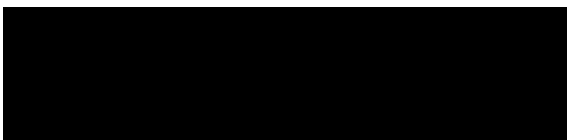
Best,



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