

801.10

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, September 21, 2011 5:57 PM
To: Verne, B. Michael
Subject: HSR question concerning debt pay-off

Mike -

I hope that you are doing well. I am writing to request your thoughts on a transaction, which is described below. I appreciate your time and look forward to hearing from you.

A number of years ago, B incurred bank debt, in part in connection with the acquisition of several businesses. Over the last 3 years, B refinanced a portion of the debt and now carries, in addition to approximately \$95 million of senior debt owed to a third-party bank, subordinated debt in the amount of approximately \$155 million, which is owed to three Lender LLCs. Mr. X is the UPE of B and also is the UPE of the three Lender LLCs.

Company B is planning to form a new holding company (H), and the shareholders of B will exchange their B shares for shares in H, so that B will continue as a wholly owned subsidiary of H. H will assume all of B's subordinated debt. The senior debt will remain with B.

H will then create two new wholly owned subsidiaries (HSUB-1 and HSUB-2). B will contribute various assets to each of HSUB-1 and HSUB-2, and will retain certain assets.

H will then sell 100% of the LLC membership interests of HSUB-1 to Company C and will sell 100% of the LLC membership interests of B to Company A. H will continue to hold 100% of the LLC membership interests of HSUB-2.

A will pay \$185 million to acquire B. C will pay \$95 million to acquire HSUB-1. It is the intention of the all the parties that the proceeds from these two transactions will pay off both the bank debt and the subordinated debt, so that the shareholders of H will receive net proceeds of approximately \$30 million in the aggregate for the LLC membership interests of B and HSUB-1. A and C will receive the LLC membership interests of B and HSUB-1, respectively, free of any debt or liens.

Although it is not clear which transaction will close first, we believe that the acquisition price for the LLC membership interests of B and HSUB-1 will be determined at the time of the transactions, and that there are no circumstances under which the acquisition of B by A or HSUB-1 by C is subject to the reporting requirements of the HSR Act.

If the acquisition of B closes first, the acquisition price of the membership interests of B will be \$0 and the acquisition price of the membership interests of HSUB-1 will be \$30 million. Of the \$185 million purchase price for B, \$95 million will be used to pay the senior debt and \$90 million will be applied to the subordinated debt. Of the \$95 million purchase price for HSUB-1, \$65 million will be used to pay the remaining outstanding subordinated debt. The acquisition price for the membership interests of C will be \$30 million.

If the acquisition of HSUB-1 closes first, the acquisition price of the membership interests of HSUB-1 will be \$0 and the acquisition price of the membership interests of B will be \$30 million. All of the \$95 million purchase price for HSUB-1 will be applied to the subordinated debt. Of the \$185 million purchase price for B, \$95 million will be used to pay the senior debt and \$60 million will be used to pay the remaining outstanding subordinated debt. The acquisition price for the membership interests of B will be \$30 million.

Even though Mr. X is the UPE of H, B, HSUB-1 and the three Lender, LLCs, the funds used to pay off debt owed by B, H, and/or HSUB-1 to the three Lender, LLCs are not included in the acquisition price for the LLC membership interests of B or HSUB-1.

For these purposes, please assume that A has determined that the fair market value of the LLC membership interests of B is less than the current \$66 million size-of-transaction threshold, and that C likewise has determined that the fair market value of the LLC interests of HSUB-1 is less than the current \$66 million size-of-transaction threshold.

It is our view that, even though the parties are aware that this structure would result in not having to file an HSR

Premerger Notification and Report, the substance of this transaction is nonreportable. It also is our view that the structure is not a device for avoidance under 16 C.F.R. § 801.90 because the underlying transaction is the purchase of noncorporate interests with a purchase price and fair market value that does not meet the size-of-transaction threshold. Finally, we believe this conclusion is consistent with Premerger Notification Practice Manual Interpretation 91.

Thank you, as ever, for your time and assistance. Please let me know if you agree with these conclusions. We would be happy to provide any additional facts you may need for your consideration.

Best regards -



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I agree that the transaction is not reportable. On the advice of our Compliance shop, we no longer give advice on whether a particular structure is a device for avoidance because we have no way of knowing the intent of the parties. That's a call that you and your client will have to make.

BM
9/22/11