

801.1 (j)

Verne, B. Michael

From: [REDACTED]
Sent: Monday, January 23, 2012 3:51 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: "engaged in manufacturing"

Dear Michael,

Thanks for speaking with us on Friday, January 20. This his email is to confirm our discussion.

As we explained, our client is considering purchasing another company ("Target"). Whether the transaction is reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act") depends upon whether Target is "engaged in manufacturing" for purposes of the size-of-person test in Section 7A(a)(2) of the Act. Target sells products that would be classified as a manufactured product under the North American Industry Classification System ("NAICS") product codes. Seller does not, however, own or operate any manufacturing facilities. Rather, it utilizes contract manufacturers to produce the products to the Target's specifications. The contract manufacturers procure the bulk of inputs for the product on their own, though Target does occasionally supply the contract manufacturers with some raw materials (primarily packaging materials, which are also purchased from third parties). Target has previously made filings with the IRS under which it classifies its business using the NAICS manufacturing code for the products in question.

We understand that you agree with our view that Target is not "engaged in manufacturing" for purposes of the size-of-person test under the Act. This is consistent with interpretation 2 of the Premerger Notification Practice Manual, Fourth Edition, which, you explained, continues to represent the views of the FTC Premerger Notification Office ("PNO"). We further understand from our discussion that the fact that Target has classified its business using NAICS manufacturing codes in IRS filings would not change this conclusion. You explained that while the Census Bureau may consider a company to be engaged in manufacturing if it uses a contract manufacturer, the PNO does not.

We would greatly appreciate it if you could confirm that this email accurately summarizes our discussion, or let us know if you have any comments. Thank you for your assistance.

Best regards,

[REDACTED]

[REDACTED]

AGREE -
BM
1/24/12

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