

801-2

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, March 19, 2013 6:57 PM
To: Verne, B. Michael
Subject: HSR Question

Mike--

I am hoping that you can help me with the HSR analysis for the following proposed transaction:

Company A intends to acquire all of the membership interests in Company B, a limited liability company, pursuant to a single agreement in increments over a three-year period for a total purchase price of \$107.5MM (subject to certain adjustments that do not affect the analysis). The acquisition would occur as follows:

- At the initial closing, Company A will purchase 25% of the membership interests held by the current members of Company B for \$26.9 million.
- On the first anniversary of the initial closing, Company A will purchase an additional 8.33% of the membership interests for an additional \$8.95 million.
- On the date that is 18 months following the initial closing, Company A will purchase an additional 16.67% of the membership interests for an additional \$17.95 million.
- On the third anniversary of the closing, Company A will purchase the remaining 50% of the membership interests for the remaining \$53.7 million of the Purchase Price, less any amount outstanding on the Buyer Loan (as defined below) at that time.

At the initial closing, Company A will be contractually obligated to buy all of the remaining membership interests at the times described above, subject only to customary closing conditions. The purchases of the subsequent installments are not optional for either buyer or sellers. There is a put option on the part of the selling members of Company B that, if exercised, would accelerate Company A's obligation to complete the purchase of the final installment of the remaining 50% of the membership interests.

At the initial closing, it is intended that Company A will refinance up to approximately \$38.3MM of debt of Company B by making the replacement loans itself (in the aggregate, the "Buyer Loan"), which will be secured by substantially all of the assets of Company B. The Buyer Loan is expected to be repaid from the selling members' share of the cash flow of Company B over the three-year buy-in period. In effect, this structure allows the selling members of Company B to obtain the full \$107.5MM purchase price, without reduction for the \$38.3MM of debt, over the three-year buy-in period, assuming the share of Company B's cash flow allocable to their remaining ownership interests is sufficient to pay off the debt over that period.

As you will note, unless the selling members exercise their put option, Company A will not own 50% of the non-corporate interests of Company B until 18 months after the initial closing and will not have paid more than \$53.8MM (much less the current \$70.9MM size of transaction ("SOT") threshold) until 18 months after it has reached 50% ownership.

I believe that the HSR analysis would be as follows (we are confirming that the SOP test is also satisfied):

1. No filing is required for the initial acquisition, because Company A will not gain "control" of Company B (and the SOT test is not satisfied).
2. No filing will be required for the first anniversary acquisition, because, again, Company A will not gain "control" of Company B (and the SOT test is not satisfied).
3. No filing will be required for the 18th month acquisition, if the fair market value of the non-corporate interests acquired by Company A in the prior two acquisitions (determined in accordance with 801.10(c)(3)), plus \$17.95 million, does not exceed the \$70.9 million SOT threshold (as the same may have been adjusted and effective at that time).

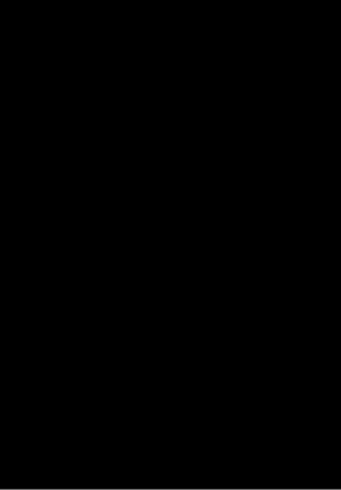
4. No filing will be required for the third anniversary acquisition, because Company A will have already acquired "control" of Company B and can rely on 802.30 as an intraperson transaction.

This analysis assumes, of course, that the put option is not exercised. Although not relevant for this analysis, I included the facts above regarding the Buyer Loan as evidence that the structure is not a "device for the avoidance" of an HSR filing.

Please let me know whether you agree with the foregoing analysis.

Thanks for your time.

Best regards,



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We take the position that in a single agreement with multiple closings you must file up front for the entire acquisition even if some of the steps are outside of the one year period. See the interpretation below:

<http://www.ftc.gov/bc/hsr/informal/opinions/0911009.htm>

Bm
3/20/13

KW concurs