

Verne, B. Michael

From: [Redacted]
Sent: Wednesday, October 30, 2013 7:51 AM
To: Verne, B. Michael; Walsh, Kathryn
Subject: Valuation/Fee Threshold Question
Attachments: FW: Valuation Question

Mike/Kate –

We have a transaction structured as a merger that is reportable based on valuation but want to confirm that the valuation of less than \$141.8 million we are reporting is consistent with the PNO’s view. The relevant facts are as follows:

- (1) A corp. will acquire approximately 60% of B corp. in a merger transaction. A’s ownership interest in B will be indirect, as described below.
- (2) As consideration, A will pay to B’s existing shareholders a combination of cash and stock in the corporate subsidiary of A that will acquire B (“SubCo”), so that after the merger transaction A will own approximately 60% of SubCo and B’s existing shareholders will own approximately 40% of SubCo. SubCo will own 100% of a corporate subsidiary (“MergerSub”) that will merge with and into B, so that SubCo will own 100% of B as a result of the merger transaction.
- (3) Concurrent with the closing of the merger, B will be recapitalized with a loan from A on commercial terms, the proceeds of which will be used to pay off existing B creditors and to provide B with additional cash that will be distributed to B’s existing shareholders in connection with the merger.
- (4) As a result, A will pay to existing B shareholders an aggregate amount of cash and SubCo equity that is greater than the HSR reporting threshold, but less than \$141.8 million (the “Consideration”), plus the loan amount which when added to the Consideration is expected to exceed \$141.8 million.

We are reporting the transaction value as less than \$141.8 million and submitting the corresponding \$45,000 filing fee on the basis that debt component of the transaction is not considered part of the reportable transaction value under existing PNO informal interpretations. See attached prior correspondence with the PNO relating to a similarly structured transaction where the debt component was not counted as consideration where the loan was to be issued to the target by the buyer and included an amount to be used to cancel or redeem existing outstanding equity interests. In that case the entity was an LLC, but we do not believe that leads to a different result here.

Please let us know if you require additional facts.

Thanks,

[Redacted Signature]

[Redacted Signature]

Verne, B. Michael

From: [REDACTED]
Sent: Monday, October 14, 2013 12:12 PM
To: [REDACTED]
Subject: FW: Valuation Question

[REDACTED]

[REDACTED]

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Thursday, March 18, 2010 10:16 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Valuation Question

I agree with your conclusions

From: [REDACTED]
Sent: Wednesday, March 17, 2010 10:54 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Valuation Question

Mike,

I am following up on our conversation from last Thursday, March 11th, and have copied [REDACTED] counsel for the target, on this email as well. When we spoke, we explained the following facts relevant to the transaction:

- Pursuant to a Unit Purchase Agreement (the "Agreement"), Buyer will acquire a 55% interest in Target, LLC ("Target").
- Under the Agreement, Buyer will pay \$57.7 million (the "Buyer Payment") for the 55% interest that it acquires in Target (the "Buyer Target Interest").
- As part of the transaction, Target will borrow \$75 million, which, along with the Buyer Payment, will be allocated partially to repayment of Target's existing debt (\$37.6 million), with the remainder to be used for working capital and to redeem the equity of the current Target interest holders.
- As a result of the transactions described above, the current Target interest holders will receive total proceeds in the aggregate exceeding \$63.4 million.

We discussed that under informal interpretation no. 0404012, the redemption of the equity of the current Target interest holders by Target, where the acquiring and acquired persons are both Target, is an exempt intra-person transaction by virtue of Rule 802.30.

Although, as a result of the redemption and Buyer's acquisition of the Buyer Target Interest, Target will be controlled by Buyer, the transaction is nevertheless not subject to the HSR Act because the acquisition is valued at \$57.7 million under the applicable informal interpretation, and does not meet or exceed the \$63.4 million size-of-transaction threshold. The proceeds from the new debt that will be paid to the current Target interest holders (approximately \$37.4 million) are not considered part of the transaction value under this analysis.

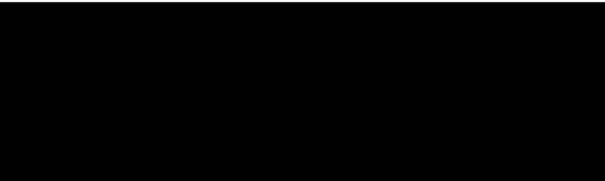
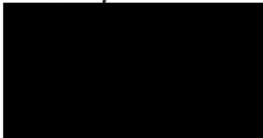
We also discussed whether alternative characterizations of the redemption payments to the member interest holders, as either a distribution or the cancellation of the equity interest, would yield a different result.

You confirmed that our conclusion is consistent with the PNO's interpretation of the HSR Act and its implementing regulations, that the transaction, on the facts described, is not subject to the HSR Act, and that alternative characterizations of the redemption payments as either distributions or the cancellation of equity interests would not change the result for this transaction.

One additional possibility we did not discuss, but that we do not believe would change the result, is that Buyer is also considering acting as the lender to Target for all or part of the \$75 million, with an expectation that the company will try to obtain alternative bank financing at some point post closing. Buyer will be repaid for the loan under normal commercial terms.

Please let me know if I have misstated any of the facts or analysis we discussed.

Thanks,



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We are not sure what the thinking was on the attached interp. It's possible that it hinged on being structured as a redemption or cancellation of shares (not what's happening here). If none of the shareholders were instrumental in the redemption, that portion of the transaction would be exempt under 802.30 and 801.15 would not require that you aggregate it.

With regard to your current transaction, we have pretty consistently said for the last few years that the size of transaction takes into account all consideration going to the shareholders, regardless of where it is coming from.

Bmm
10/30/13

KW CONCURS