

801-10

Verne, B. Michael

From: [REDACTED]
Sent: Friday, November 08, 2013 5:09 PM
To: Verne, B. Michael; Walsh, Kathryn
Cc: [REDACTED]
Subject: HSR - Size of the Transaction Threshold Question
Attachments: SKMBT_50113110817020.pdf

We are writing to ask if you agree with our view concerning how the Size of the Transaction threshold is applied to our set of facts as described in the attached document. After you have reviewed the attached document, please let me know if you have any questions.

Thank you both for your time and attention to this matter.



AGREE - B [signature]
KW CONCURS 11/12/13

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[REDACTED]

November 8, 2013

[REDACTED]

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

Ms. Kathryn Walsh
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Questions relating to the Size of the Transaction Threshold

Dear Mr. Verne and Ms. Walsh:

We are emailing you in order to seek your view as to whether or not the below-mentioned transaction would be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act").

Proposed Transaction

We are counsel to Company A, which has recently entered into an Agreement and Plan of Merger pursuant to which a wholly-owned subsidiary of Company A will merge with and into Company B, with the result that Company B will continue as the surviving company of the merger and become a wholly-owned subsidiary of Company A. The aggregate purchase consideration under the merger transaction is \$153.35 million in cash plus securities of Company A having a value of approximately \$2.6 million, for a total of approximately \$155.95 million.

For purposes of this email please assume that all parties meet their applicable size of person tests.

Our question to the Premerger Notification Office ("PNO") relates to how the acquisition price is calculated for purposes of determining whether the proposed transaction meets the size of the transaction test when it is contemplated that a portion of the aggregate purchase consideration payable at closing will be used to (i) acquire preferred stock of Company B that does not have voting rights with regard to the election of directors, (ii) pay off certain third-party debt of Company B, and (iii) cancel outstanding warrants of Company B.

[REDACTED]

[REDACTED]

Mr. B. Michael Verne
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Analysis and Conclusions

Preferred Stock: The portion of the purchase consideration attributable to payment for the non-voting preferred stock of Company B is \$25.35 million. This payment amount is based upon the terms of the preferred stock. We believe that this portion of the purchase consideration should not be included in the calculation of the acquisition price for purposes of determining the size of the proposed transaction.

Third Party Debt: The third-party debt of Company B consists of approximately \$43 million of Senior Term Loans made by third party lenders and approximately \$45.7 million of Subordinated Notes held by third party lenders, for a total of \$88.7 million. Approximately \$8 million of this amount is being repaid directly by Company B immediately prior to the consummation of the merger and approximately \$80.7 is being repaid at closing with a portion of the purchase consideration. In both Informal Interpretation Nos. 88 and 91, appearing in the ABA Section of Antitrust Laws' Premerger Notification Practice Manual (4th Edition, 2007), the PNO has indicated that any portion of the purchase consideration that will be used to pay off debt owed to third party lenders should not be included in the acquisition price of a voting securities transaction. Accordingly, we believe that the approximately \$80.7 million of the purchase consideration being used to pay off third-party debt should not be included in the calculation of the acquisition price for purposes of determining the size of the proposed transaction.

Warrants: The cancellation of warrants that do not entitle the holders to current voting rights with regard to the election of directors is an exempt event for HSR purposes as these are convertible voting securities under 16 C.F.R. § 802.31. We believe this question was addressed in FTC Informal Interpretation No. 0603028, dated March 29, 2006, where the staff agreed that the payment for outstanding options and warrants, none of which carried the right to vote for the election of directors, should not be included in the calculation of the acquisition price. Accordingly, we believe that the \$18 million portion of the purchase consideration being paid to the holders of warrants as a part of the proposed transaction should not be included in the calculation of the acquisition price for purposes of determining the size of the proposed transaction.

Based upon the foregoing analysis, we believe that the acquisition price for the purpose of determining the size of the proposed transaction test is approximately \$31.9 million, and therefore less than the current \$70.9 million threshold, because the aggregate purchase consideration of \$155.95 million should be reduced by amounts attributable to repayment of Company B's third-party debt (approximately \$80.7 million), non-voting preferred stock \$25.35 million) and warrants (\$18 million) for purposes of determining the size of the proposed transaction.

Based upon our description of the facts and circumstances as described above, would you agree with our view that this transaction does not meet the current size of the transaction test?

Very truly yours,

[REDACTED]

[REDACTED]