

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, December 04, 2013 10:30 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Request for Confirmation/Clarification of Views Concerning Acquisition of "Exempt" Foreign Issuers and "Non-Exempt" US Issuers Under a Single Agreement -- (Size-of-Transaction; Size-of-Person; 802.51)

Mike:

This email memorializes the facts presented, and the views you expressed in the call you had with me and [REDACTED] on December 3, 2013. We would be grateful if you could confirm or clarify your views in a responsive email. Assuming the accuracy of the facts presented below, the contemplated transaction would not require notification under the HSR Act as a consequence of the failure of the "size-of-person" test.

We presented the following facts:

1. Buyer intends to acquire 100% of the voting securities of five issuers within the same Acquired Person via a single purchase agreement.
2. Three of the acquired issuers are "foreign issuers," as that term is defined by 16 CFR Section 801.1, and two of the acquired issuers are "U.S. issuers," as that term is defined by 16 CFR Section 801.1.
3. The purchase agreement has a specific allocation of the purchase price, and contemplates a simultaneous acquisition of all five issuers. The consideration allocable to the U.S. issuers in the aggregate exceeds \$70.9 million, but is less than \$283.6 million. The consideration for the entire transaction exceeds \$283.6 million and the consideration allocable to the three foreign issuers in the aggregate exceeds \$141.8 million.
4. The three foreign issuers, in the aggregate, had not more than \$70.9 million of sales in or into the U.S. in their most recent fiscal year, and the Acquiring Person has determined in good faith that the fair market value of the U.S. assets of the three foreign issuers does not exceed \$70.9 million.
5. The ultimate parent entity of Buyer is an uncontrolled newco (indeed, the entire acquisition structure is newly formed specifically for this transaction) that will be capitalized with only sufficient funds to acquire the five target issuers and does not have (and will not have prior to closing) a regularly prepared balance sheet.

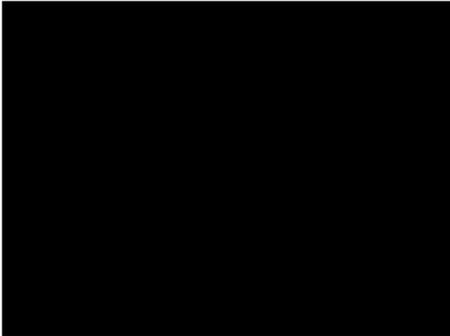
On the basis of the foregoing, you provided the following views:

1. Since the three foreign issuers lack the sufficient nexus to U.S. commerce, the acquisition of the three foreign issuers is exempt pursuant to 16 CFR Section 802.51.
2. When applying a "size-of-transaction" analysis, the parties are permitted to exclude from the transaction "size" the value allocable to the acquisition of the "exempt" foreign issuers. Consequently, the "size-of-transaction" here would be only the consideration allocable to the two U.S. issuers, and would be greater than \$70.9 million, but less than \$283.6 million. Therefore, the transaction would need to satisfy the "size-of-person" test in order to trigger a filing obligation.
3. Since the ultimate parent entity of the Acquiring Person is a newco, and does not have a regularly prepared balance sheet, in determining its "size" for purposes of the "size-of-person" test, one is permitted to exclude, pursuant to 16 CFR 801.11, "all cash that will be used by the acquiring person as consideration in an acquisition of . . . voting securities issued by . . . that acquired person (or an entity within that acquired person) and less all cash that will be used for expenses incidental to the acquisition." Under the Premerger Notification Office's policy, in the case of a simultaneous acquisition of non-exempt and exempt issuers covered by a single agreement, the acquiring person is permitted to exclude not only the cash that it will hold and utilize for the

acquisition of the non-exempt issuers (here, the two U.S. issuers) but the cash that it will hold and utilize to acquire the exempt issuers (here, the three foreign issuers) that would be acquired contemporaneously with the non-exempt issuers. Consequently, since the Acquiring Person will not be capitalized prior to closing with an additional \$14.2 million (beyond the cash necessary to acquire the five issuers), the Acquiring Person's "size" will be less than \$14.2 million.

4. Given the "size" of the Acquiring Person, the transaction will fail the "size-of-person" test and may proceed without a filing obligation under the HSR Act.

Thanks in advance for confirming or clarifying the foregoing.



AGLEE
Bm
12/4/13

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