801.15
802.30

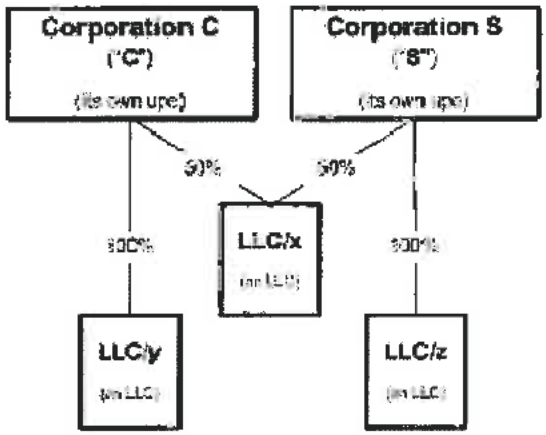
Verne, B. Michael

From: [redacted]
Sent: Tuesday, March 11, 2014 8:01 AM
To: Walsh, Kathryn; Verne, B. Michael
Cc: [redacted]
Subject: HSR Aggregation Question

Kate & Mike:

We are seeking clarification regarding certain HSR aggregation rules (801.13, 801.14, 801.15 and 802.4), as applied to a somewhat unusual structure.

The following diagram illustrates the existing structure (simplified for purposes of this inquiry):



Assume that S formed LLC/x and, sometime after formation, sold a 50% interest to C in a transaction not then reportable under HSR.

Now, the parties are proposing that C sell S a 50% interest in LLC/y for a purchase price greater than $50 million (as adjusted). That transaction may be reportable under HSR.

The parties also are proposing that, in a separate transaction, S sell C a 50% interest in LLC/z. The acquisition price likely will be less than $50 million (as adjusted), but in any case the transaction is expected to be exempted under 802.2(c), via 802.4.

The PNO aggregation tip-sheet states, among other things, that parties should never aggregate controlling interests "in corporations or unincorporated entities that were previously acquired from the same acquired person as in the present transaction." That advice strongly suggests that we should ignore LLC/x entirely when considering the two new transactions.

The wrinkle here, however, is that the tip-sheet (and various PNO informal interpretations) may be premised on the previously-acquired LLC not being included within that acquired person at the time of the new transaction. For example, in PNO # 0406004, the acquiring person acquired 100% of the stock of the first subsidiary in the first transaction and, accordingly, that stock did not constitute voting securities of the acquired person at the time of the second transaction.

Under 801.13(c) and 801.14(c), it would seem that we should not aggregate LLC/x with either pending transaction, notwithstanding that S had retained a 50% interest in it.

Applying those two rules for purposes of S's pending acquisition of 50% of LLC/y, it would seem there should be no aggregation with LLC/z (in case that transaction closed first or concurrently).

2

Applying those two rules for purposes of C's pending acquisition of 50% of LLC/z (under 802.2(c), via 802.4), it would seem there should be no aggregation with LLC/y (in case that transaction closed first or concurrently). 802.4(b) similarly should not require any aggregation.

This same overall analysis, if acceptable, presumably also would apply in the event of any future transactions between the parties.

Please let us know if you agree with this analysis. We'd be happy to discuss by telephone conference, if that would be preferable to you.

Thank you for your assistance.

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This is exactly what we were addressing when we amended § 801.15 to include § 802.30 as an add-on to the form change rulemaking:

The amendment to the aggregation rules in § 801.15 would eliminate the unintended effect of requiring aggregation when exactly 50
percent of multiple subsidiaries have been acquired and additional voting securities of the same person are newly being acquired.

76 FR @42479 (July 19, 2011)

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3/11/14

KW CONCURS