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Verne, B. Michael

From: [REDACTED]
Sent: Thursday, March 13, 2014 2:58 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR Question Regarding Multiple Asset Acquisitions

Mike,

We are representing an acquiring person (the "Acquiring Person") in connection with its potential acquisition of certain exclusive distribution rights and distribution assets from a third party ("Acquired Person"). For legitimate business reasons, the acquisition will be documented in two (2) separate agreements that will be executed simultaneously: an asset purchase agreement (the "Purchase Agreement") and an asset exchange agreement (the "Exchange Agreement"). The transactions contemplated by the Exchange Agreement comprise a tax-free exchange of certain exclusive distribution rights and distribution assets.

The transactions contemplated by the Purchase Agreement and the Exchange Agreement will be consummated in four (4) separate closings covering distinct and separate geographic territories (three under the Purchase Agreement and one under the Exchange Agreement) over an anticipated period of more than six months. Even though the closings may occur over a period of more than six months, we understand that each closing would need to be aggregated with any prior closings under the two acquisition agreements to determine if the transaction is reportable. The transactions contemplated by the Exchange Agreement are conditioned upon the prior consummation of the first closing under the Purchase Agreement. The second closing under the Purchase Agreement will be conditioned upon the consummation of the first closing under the Purchase Agreement and the closing under the Exchange Agreement. The final closing under the Purchase Agreement will be conditioned upon the consummation of the prior closings under the Purchase Agreement.

We understand from the PNO's prior guidance that the exclusive distribution rights are not assets for HSR purposes and the conveyance of the same does not trigger a reporting obligation. We also understand that the sale of the distribution assets would be reportable if the value of the distribution assets transferred exceeds the filing threshold.

The parties agree that the value of the distribution assets to be acquired by Acquired Person from Acquiring Person under the Exchange Agreement will not exceed the \$75.9 million size of transaction test.

(1) Based on the value of the distribution assets to be transferred by Acquired Person to Acquiring Person under the Purchase Agreement and the Exchange Agreement, it is anticipated that the size of transaction test will not be met until the final closing under the Purchase Agreement. Based on prior interpretations (see Interpretation No. 146 from the Premerger Notification Practice Manual, 4th edition), our understanding is that the parties may consummate the transactions contemplated by the first and second closings under the Purchase Agreement and also the transactions contemplated by the Exchange Agreement prior to making a notification filing so long as the aggregate value of the distribution assets transferred at all of such closings does not exceed \$75.9 million?

(2) Based on our review of an informal interpretation dated September 15, 2011 (<http://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1109009>), our understanding is also that if the parties file a notification form before the size of transaction test is met, none of the remaining closings (even if such a closing, when aggregated with the earlier completed closings, would not exceed the \$75.9 million threshold) may be consummated during the waiting period. For example, if the buyer determines that the final closing, together with the earlier closings, would exceed the notification threshold, then is it correct that if notification of the transactions is filed following the completion of the closing under the

Exchange Agreement, then the second closing under the Purchase Agreement could not be consummated until the waiting period has been terminated or expired even if such second closing under the Purchase Agreement, when aggregated with both the first closing under the Purchase Agreement and with the closing under the Exchange Agreement, would not meet the size of transaction test?

Thank you for your time and assistance.

KW / DG CONCUR

MUST AGGREGATE,
FILE & OBSERVE WAITING
PERIOD BEFORE CLOSING
ON ANY.

Bmw
3/14/17

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