Gillis, Diana L.

From: Verne, B. Michael
Sent: Wednesday, August 20, 2014 1:38 PM
To: Gillis, Diana L.
Subject: FW: HSR Filing Question for FTC Compliance Specialist

This is another one that's probably worth posting. Thanks

From: [redacted]
Sent: Wednesday, August 20, 2014 9:50 AM
To: Verne, B. Michael
Subject: RE: HSR Filing Question for FTC Compliance Specialist

Thank you very much.

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[redacted]

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From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Wednesday, August 20, 2014 9:49 AM
To: [redacted]
Subject: RE: HSR Filing Question for FTC Compliance Specialist

All correct

From: [redacted]
Sent: Wednesday, August 20, 2014 9:48 AM
To: Verne, B. Michael
Subject: RE: HSR Filing Question for FTC Compliance Specialist

Michael:

Thanks for that prompt reply.

Just so I understand – let's assume, for sake of argument, that:

- 60% of the LLC interests in Company B are valued at $65M for the initial closing (which assumes a total enterprise value for B of $108.33M (i.e., $65M divided by .60));
- At closing, we have the formulaic methodology in place to determine the price to purchase the additional 20% interest over some future period of time (say, 3 years), which is based upon B's future performance; however,

due to such methodology (which based on future performance), the parties do not know for sure at closing what the other 20% will be worth;
- The purchase of such remaining 20% is not an option on A's part to purchase, but rather an obligation to purchase over some pre-determined schedule over, say, 3 years;
- Then, for purposes of determining the value of the transaction (which as you mentioned would be the fair market value of the aggregate 80% interest), we would take 80% of the total enterprise value above ($108.33M), which would be $86.66M (which satisfies the size of the transaction test and thus, requires this transaction to be reportable now as an acquisition of 80% of the non-corporate interests in B).

Also, is the inclusion of the second step (the acquisition of the other 20% interest) in the HSR filing simply based upon the fact that the transaction would be reported as a stepped transaction covering 80% of B's interests?

Let me know if my analysis above is correct. Thanks.

[redacted]

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[redacted]

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Wednesday, August 20, 2014 9:20 AM
To: [redacted]
Subject: RE: HSR Filing Question for FTC Compliance Specialist

You are not able to file on a non-reportable transaction (60% valued at less than $75.9 million), however, we take the position that if you have a stepped transaction with a commitment to consummate the second step (as opposed to a bona fide option which may or may not be exercised in the future), and the two steps in aggregate would exceed the size of transaction test, you are required to file notification before consummating the first step. The second step would then be covered by the same filing, whenever it occurs. If the purchase price for the second step is undetermined, the value of the transaction would be the fair market value of 80% of the LLC's interests.

From: [redacted]
Sent: Tuesday, August 19, 2014 5:56 PM
To: Verne, B. Michael
Subject: HSR Filing Question for FTC Compliance Specialist
Importance: High

Michael:

I am a corporate lawyer at Stradley Ronon, and I have been practicing for about 30 years. In the olden days, I used to talk to Patrick Sharpe; but, I pretty certain he has retired, and usually I have other lawyers in our office making inquiries

to the FTC compliance specialists. It turns out that my normal helpers are on vacation, although one of them suggested that I contact you (as one of the experienced hands at the FTC).

Thus, I was hoping to set up a time with you tomorrow to discuss the following potential acquisition that one of our clients is looking at. This proposed transaction encompasses the acquisition of membership interests in an LLC (the acquisition of non-corporate interests).

The general facts, as I currently understand them, are as follows:

- Company A is the acquiring person, and it is part of a group of companies where the UPE has annual net sales or total assets in excess of $151.7M.
- Company B is a domestic LLC, which is a holding company owning 100% of the LLC interests in another domestic LLC that is the operator of a non-manufacturing, service business in the US. No one "controls" Company B, so B is the UPE on the acquired person side.
- Company B has annual net sales in excess of $15.2M. So, the size of the parties test will be satisfied.
- Company A is proposing to acquire more than 50% of the LLC interests in Company B from the owners of Company B, so A will "control" B, as a result of such acquisition.
- Two different acquisition structures are currently being considered and negotiated by the parties, with the end result that A will own 80% of B's LLC interests (and thus, will have the right to 80% of B's profits and its net assets in dissolution).
- Proposed Acquisition Structure 1 is easy to determine for HSR purposes because:
  - A will buy 80% of B's LLC interests for a price that is in excess of $75.9M, even though such price may be paid as follows: (i) a portion paid at closing and (ii) the balance over a 2 – 3 year period after closing, where the unpaid outstanding balance of the purchase price is known at closing and is paid over such 2 – 3 year period, with accrued interest.
  - This proposed structure is reportable, since (i) the size of the person test is met, (ii) the size of the transaction test is met, and (iii) A will "control" B as a result of the acquisition of these non-corporate (LLC) interests in B.
- The harder alternative structure is Structure 2 because:
  - At the initial closing, A will buy 60% of B's LLC interests for a price that is NOT in excess of $75.9M, although there will be an obligation on A's part to buy an additional 20% of B's LLC interests over a 2 – 3 year period of time, with the price for such additional 20% to be determined pursuant to a formulaic approach (tied principally to B's performance post-closing). So, the price for such additional 20% LLC interests in B will not be known at the initial closing, although the parties certainly expect that the aggregate price for such 20% interest will, when combined with the price for the original 60% acquisition, exceed $75.9M (in fact, it could be higher than $100M in the aggregate for the combined 80% stake, depending on how B performs after closing).
  - In looking at the aggregation rules (801.13(c)(1); 801.10(d)), it is very likely that at some point during the time after the initial closing when the additional 20% LLC interest is acquired, the aggregate value of such LLC interests will exceed $75.9M, which will then satisfy the size of the transaction test and require a filing at some point in the future; however, our client (Company A) does not want to have the expense (and potential risk of non-expiration of the waiting period, however slight that risk may be) of filing the HSR premerger filing **after** the initial closing when the aggregation rules trigger a filing upon the occurrence of one of the post-closing acquisitions of a portion of this additional 20% stake.
  - **So, my question is this** – in order to avoid such filing requirement after the initial closing of the 60% interest, can the parties nevertheless file a premerger filing before consummating such initial 60% acquisition (even though the size of the transaction test has not yet been met) and then rely on Section 802.21 to exempt the subsequent acquisition of the 20% interest (assuming, of course, that such subsequent acquisition is fully completed within 5 years of when the waiting period on the original HSR filing expired)?

Let me know if you have any time tomorrow (Wed, June 20) to discuss this. Thanks very much in advance for your consideration.