

From: [Shaffer, Kristin](#)
To: [REDACTED]
Cc: [Walsh, Kathryn E.](#); [REDACTED]
Subject: RE: HSR Question
Date: Wednesday, July 13, 2016 9:55:00 AM

[REDACTED]

If there is a reasonable basis for estimating the contingent portion(s) of the consideration, then the acquisition price can be determined. If, however, the contingent portion(s) is/are too speculative, then the buyer must determine the FMV. See PNPM 54, 55. The mark-up should not be counted as additional consideration.

Best regards,
Kristin

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From: [REDACTED]
Sent: Tuesday, July 12, 2016 4:21 PM
To: Walsh, Kathryn E.
Cc: [REDACTED]
Subject: RE: HSR Question

Hi Kate,

I have a question as to how to value a potential asset transaction. Assume that company A is selling its assets (regulatory files, applications and approvals, IP, including technology know-how and specific trademarks, tradenames and goodwill) for a non-patented product (the "Product") to company B. Company B will pay as consideration \$10m upfront, a contingent \$10 milestone payment and royalties based on worldwide sales for 10 years. In addition, for 4 years, company A will act as a toll manufacturer of the Product while company B completes technology transfer and regulatory approvals. In addition for 4 years, Company B will purchase a related product from company A. Company B will pay company A a 15% mark-up on its COGS for the toll manufacturing and the other product.

1. As to the \$10m upfront, the \$10 milestone payment and royalties, I understand that this consideration is "undetermined" and the buyer must make a good faith valuation 60 days before filing or closing.
2. My question is whether the 15% mark-up for COGS should be considered additional consideration to include in the valuation of the size of the transaction.

Thanks,