

From: [Shaffer, Kristin](#)
To: [REDACTED]
Cc: [Walsh, Kathryn E.](#)
Subject: RE: HSR Query - Rule 801.40
Date: Thursday, September 22, 2016 10:53:00 AM

[REDACTED]

Since this transaction involves the merger and consolidation of multiple entities, 801.40 does not apply. Please see PNPM #46, which describes how to analyze simultaneous consolidations.

Best regards,
Kristin

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From: [REDACTED]
Sent: Wednesday, September 21, 2016 2:31 PM
To: Walsh, Kathryn E.; Whitehead, Nora
Subject: HSR Query - Rule 801.40

Dear Kate and Nora:

I write to request your confirmation that a potential transaction contemplated by our client and described below is properly characterized under 16 C.F.R. § 801.40.

FACTS

The transaction will occur in multiple stages, all set to happen simultaneously or nearly simultaneously with one another.

- Individual A will form a wholly-owned U.S. Holdco (“Holdco”) and hold 100% of its shares.
- Immediately following Holdco’s formation, it will enter into a Merger Agreement whereby Company A, Company B and Company C, each of which is its own ultimate parent entity, will merge with and into Holdco.
- Pursuant to the Merger Agreement, shareholders of each of these entities (Companies A, B and C) will receive Holdco shares back.
- On the same day that Holdco acquires these three entities, “Investor” will make a cash investment in Holdco of approximately \$100,000,000 and also contribute certain of its businesses to it (valued at approximately \$70,000,000). Investor will receive Holdco shares valued in excess of \$78.2 million in return for these contributions.

From its creation, Holdco will be a shell corporation formed solely for the purpose of holding the assets of Companies A, B and C and the contributions (cash and contributed businesses) of Investor. Holdco will not hold any other assets or undertake any business prior to its acquisition of Companies A, B, and C and the contribution of cash and certain businesses of Investor, other than to be a party to the merger and investment agreements.

ANALYSIS

Given that Holdco is being formed solely for the purpose of holding the assets resulting from the merger among Companies A, B and C; the formation of Holdco and merger of Companies A, B and C occurs contemporaneously; and, the fact that the investment by Investor takes place at the same time that Holdco will acquire Companies A, B, and C, I believe the transaction would be viewed as falling under 801.40, with (assuming all other jurisdictional triggers are met) only those shareholders receiving Holdco shares valued in excess of \$78.2 million potentially triggering a filing obligation and no "acquired person" filing being required.

I believe this interpretation is further supported by the following Informal Interpretations, in their evaluation of the application of 801.40 and of the continuum theory:

Informal Interpretation 0704004 (April 11, 2007), *available at*:

https://www.ftc.gov/sites/default/files/documents/informal_interpretations/0704004-informal-interpretation/0704004.pdf

Informal Interpretation (0702017) (February 26m 2007), *available at*:

<https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/0702017>

Thank you in advance for your guidance on this topic,

Best regards,

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