Haynes, Lanea

From: Walsh, Kathryn E.
Sent: Friday, March 24, 2017 10:50 AM
To: [redacted]
Cc: Kobrick, Stacy; Berg, Karen E.; Carson, Timothy; Gillis, Diana L.; Shaffer, Kristin; Storm, Evan; Whitehead, Nora
Subject: RE: Request for informal interpretation re §802.4 FMV determination

[redacted]

We agree with you on your first point.

On your second point, a FMV must be based on the value of the assets (including intangibles) as an ongoing business, and we will accept any reasonable method of doing so.

Regards,
Kate

From: [redacted]
Sent: Thursday, March 23, 2017 4:02 PM
To: Walsh, Kathryn E.
Cc: [redacted]
Subject: Request for informal interpretation re §802.4 FMV determination

Dear Kate—

I am writing to seek your advice regarding a fair market value (FMV) issue arising under §802.4. The facts are as follows:

- Foreign Person A is acquiring 100% of two Acquired Entities (one U.S. and one foreign) controlled by Person B. The transaction size threshold will be met.

- The Acquired Entities operate a sales/delivery business in a number of countries around the world. Customers generally negotiate on a multi-country basis, and then the products are delivered to the customers in particular countries, including the U.S., on as-needed basis. U.S. deliveries are a small part of the overall worldwide business of the Acquired Entities.

- From a product/delivery point of view, the U.S. portion of the business is self-contained, i.e., the products delivered to customers in the U.S. are virtually all sourced by the Acquired Entities in the U.S. The total revenues from all products delivered in the U.S. was less than $80.8 million in the most recent fiscal year, 2016.

Under exemption rule §802.4, the ultimate issue is whether the fair market value of all assets held by the Acquired Entities exceeds $80.8 million, excluding the value of assets whose direct acquisition would be exempt. We seek your guidance on the application of §802.4 in two areas

First, we have excluded, pursuant to §802.50 (via §802.4), the value of assets held by the Acquired Entities that are located outside the U.S. The reason is that (a) as noted above, the total revenues of *all* products delivered to customers in the U.S. are less than $80.8 million (and therefore foreign assets did not account for more than $80.8 million of such revenues), and (b) we believe that only revenues from product deliveries in the

U.S. count as U.S. revenues under §802.50(a). In other words, if a U.S. company signs a contract to receive product deliveries in Europe, the revenues from such deliveries in Europe do not count as U.S. sales (i.e., "sales in or into the U.S."). Rather, it is only revenues for products delivered in the U.S. that count as U.S. sales. (Accord: Informal Interpretation 0912001)

Second, Person A is engaged in determining the FMV of the U.S. assets pursuant to §802.4. The value of the tangible, noncash assets (principally inventory, accounts receivable, real property leases, supply contracts, office equipment) is quite minimal. The U.S. business also has going-concern goodwill—which represents an intangible asset. However, the value of this goodwill is an embedded part of the overall goodwill of the entire business, U.S. and foreign, being acquired and thus cannot be meaningfully valued directly as a separate U.S. asset.

Person A believes that the appropriate method of determining the value of the U.S. assets to be acquired (including goodwill) would be to look at these assets as comprising an ongoing business, whose FMV can be based on the same metrics underlying the value of the entire transaction as a whole. The cash acquisition price for the entire transaction as a whole—negotiated between unaffiliated parties at arm's length—should represent FMV. This value, in turn, reflects a certain multiple of the gross profit of the entire worldwide business to be acquired. To "transpose" this FMV into the FMV for the U.S. business alone, A would look at the gross profit of the U.S. business alone and then apply the same multiple. We believe the resulting value would be the appropriate measure of the FMV of the U.S. business based on the indicated assumptions and for the purpose of determining whether an HSR filing is required.

Please advise whether you agree with the above analysis. If you have any questions or it would be helpful to discuss any of the issues, please give me a call.

Thanks for your time and consideration.

[redacted]

[redacted]

[redacted]