801.90

From: [redacted]
To: FTC.SERIUS("mverne@ftc.gov")
Date: Tue, Oct 3, 2000 10:06 AM
Subject: HSR Inquiry

Could you let me know about the following situation? Thanks.

Company A will buy certain production assets from Company B. Independent appraisers are valuing the assets, but they are expected to be in the $7-10 million range. It is expected that the Board of Company A will adopt this FMV.

In addition to the asset purchase, Company A will enter into a separate Supply Agreement with Company B and Company B's parent, giving Company A the right to sell to Company B and B's parent's all of the latters' requirements (a requirements contract). As an inducement to enter into the Supply Agreement, Company A will be paying to Company B consideration. This consideration will be in the $32-35 million range. They call this consideration a "prebate."

I am told that this structure was developed for tax reasons and was not motivated at all by HSR considerations. It would seem to me that assuming that the structure is not motivated by HSR evasion concerns, and thus there is no 801.90 issue, there should be no reportability. It should not be reportable because there is only one set of assets being purchased and the FMV of those assets will be less than $15 million. The supply agreement is not an asset, and thus consideration for the purchase of the assets and the prebate for the supply agreement (essentially a signing bonus) should not be aggregated.

What do you think? I can be reached at [redacted]

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[redacted]

Voice: [redacted]
Fax: [redacted]

[redacted]

AGREE -

B. Michael Verne
10/4/00