801.10

From: [redacted]
To: [redacted]
Date: 2/26/02 7:59PM
Subject: Question

Hello Mike. I hope that you are well. I have a question regarding the value of voting securities to be acquired.

Company A and Company B are publicly traded companies. Company A will acquire (through a merger) 100% of the voting securities of Company B. Consideration is a fixed number of Company A shares. I understand that the value of publicly traded securities is the greater of the market price and the acquisition price (if determined). Do I (1) consider the acquisition price to be undetermined since I do not know the value of the Company A shares to be tendered as consideration, (2) consider the acquisition price to be the market price of the Company A shares to be tendered as consideration, or (3) use some other method for valuing the Company A shares and thus determining the purchase price.

Following either of the first 2 approaches, I will not be able to determine the reportability of the transaction any sooner than 45 days prior to consummation. If it is not reportable based on the relevant closing quotation(s) 45 days prior, I can advise my client to proceed to closing without HSR concern (as long as the deal closes within the 45 days or some time after where the lowest close within 45 days has remained sufficiently low). If it is reportable based on the relevant closing quotation(s) 45 days prior, my client may file for a transaction that will become unreportable if the closing quotes drop prior to consummation. I take it that the parties then could consummate during the waiting period, but would lose the filing fee. Correct?

Thanks,

[redacted]

RESPONSE:

Advised that reportability could not be determined until 45 days prior to the scheduled closing. At that point the value of the transaction would be the greater of the market price of B's voting securities or the acquisition price. The acquisition price is determinable because the number of A shares to be used as consideration is fixed, and the value of that consideration can be determined by analogy to § 801.10(c), the market price of the A shares to be used as consideration.

If the value is determined to be $50 MM or less at this point, the closing can occur at any time within the next 45 days without filing. If the value if greater than $50 MM, either the closing must be postponed until the market price declines to a point where the value drops to $50 MM or less, or a filing must be made.

If a filing is made and the market price drops during the waiting period such that the value is now $50 MM or less, the parties may close without observing the remainder of the waiting period, but the filing fee would not be refunded since the transaction was reportable on its face at the time the filing was made.

B. Michael Verne 2/27/02