

801.40

Nancy M. Ovuka

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From: [REDACTED]  
Sent: Wednesday, March 12, 2003 3:45 PM  
To: Nancy M. Ovuka  
Subject: Spin-off transaction

Nancy,

Below is a description of the transaction we discussed yesterday. Sorry it took me a while to get this to you. I needed to run it by the transactional lawyers to make sure I was stating everything accurately.

Company A has various subsidiaries. Pursuant to the planned deal, Company A will sell certain of the subsidiaries to certain existing shareholders of Company A and then Company A will be sold to Company B in its entirety. The sale of Company A to Company B is definitely reportable and an HSR will be filed.

To accomplish the spin off of the subsidiaries, certain shareholders of Company A will form Newco, a corporation. Newco will be its own ultimate parent entity. Newco will then purchase the subs to be spun off either at once or in a series of transactions over a couple of months. As consideration for the voting securities of the subs, Newco will give Company A notes payable that are guaranteed by Newco shareholders. These notes will be payable at the closing of the deal between Company A and Company B. Thus, at the time of the purchase of the first of the subs, Newco will have no assets or revenues and the value of the transaction will be less than \$200 million. Thus, the transaction will not be reportable. Newco will, in total, purchase voting securities of various issuers controlled by Company A of approximately \$60-65 million. If those purchases are considered part of the same transaction, then Newco does not meet the size of the person test and the deal would not be reportable. If the purchases are considered separately, Newco may exceed the size of the person test at the time of some of the closings, but none of the individual transactions exceeds the \$50 million threshold.

Thanks  
[REDACTED]

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Advised writer that value of notes payable <sup>3/13</sup> must be included in Newco's size so that Newco does have assets at formation. However, because none of the shareholders will receive in excess of \$50MM of Newco stock, the formation of Newco would not meet the size of transaction test. The subsequent acquisition of the subs by Newco should be treated as one transaction to which 801.11(c) would apply.

NMO

MV concurs