

801.11

Verne Michael

From: [REDACTED]
Sent: Friday, January 16, 2004 8:02 PM
To: Verne Michael
Subject: Question regarding HSR interpretation (7269-014)

Importance: High

Mr. Verne:

I am working on a transaction (my firm represents the seller) in which one of the [REDACTED] offices represents the buyer, and the applicability of the HSR statute is uncertain. [REDACTED] of [REDACTED] [REDACTED] who is working with the M&A attorneys on this matter, suggested that I contact you or Nancy Ovuka at the PNO to get your thoughts on the following issue, and I'd appreciate your help. I have a working knowledge of HSR basics (as an M&A attorney), but not enough depth to feel comfortable about this issue. If you feel uncomfortable responding via email, please feel free to call me.

In the proposed transaction, the seller would sell assets to a buyer that is a totally new entity with no assets and no business history. Buyer would fund the acquisition of my client through acquisition funding that should come in contemporaneously with the acquisition, and has no controlling person that would constitute its parent for HSR purposes. The seller's "ultimate parent entity" is large enough that it probably meets the \$100 million assets/revenues size of person test, and the deal size exceeds the \$50 million size of transaction test but is not large enough to make the size of persons tests irrelevant (i.e., it is below \$200 million). Under section 801.11(e)(1) of the HSR regulations, it appears that the cash used in the acquisition will be deducted from the buyer's assets for purposes of measuring whether it has \$10 million in assets, if the buyer entity does not have "a regularly prepared balance sheet." If that is the case, buyer won't meet the \$10 million assets or sales test.

I am trying to understand how to interpret "regularly prepared" in the context of an entity that is brand new. My interpretation is that the new entity would not have a regularly prepared balance sheet, and therefore 801.11(e)(1) would apply. [REDACTED] has referred me to an ABA Antitrust Section publication, Premerger Notification Practice Manual paragraphs 141 and 142, which I am hoping to obtain. I am wondering if there is something authoritative you can direct me to, or if there is an established interpretation within the PNO, on this issue.

Many thanks for your time.

Regards,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

AGREE - A NEWLY - FORMED
ENTITY DOES NOT HAVE
A REGULARLY PREPARED BALANCE
SHEET.

B. Michael
1/20/04

Direct: [REDACTED]