802.50

Verne, B. Michael

From: [redacted]
Sent: Tuesday, March 09, 2004 1:45 PM
To: Verne, B. Michael
Subject: HSR Issues with respect to acquisition of foreign entity

Dear Mike:

I am writing to confirm our discussions yesterday regarding an acquisition of interests in a foreign entity. For ease of further discussion, I have numbered the following paragraphs:

1. As we discussed, although the target entity is denominated a "corporation" and has equity shareholders that vote for many matters other than directors, the equity certificates being acquired do not allow the holder to vote for directors. Rather, the company's directors are appointed by the existing directors. Accordingly, this entity currently does not have "voting securities" for HSR purposes.

2. Following the acquisition presently under consideration, the target's board size will be increased from four to five directors, two of the present four directors will resign, and the acquiring person will have a right to nominate the remaining three directors. However, this "nomination right" does not carry with it an obligation on the part of the non-resigning directors to accept the nominations of the acquiring person. Moreover, even if there was such a legal obligation on behalf of the remaining directors to appoint the acquiring person's nominees, this would not convert the certificates of the entity into "voting securities" for HSR purposes. Therefore, these rights of nomination do not affect the conclusion that the certificates being acquired are not "voting securities".

3. As a result, the interests being acquired as described above are considered to be "partnership interests" for HSR purposes. Acquisition of these "partnership interests" would not be reportable for HSR purposes, unless and until, at the earliest (i) 100% of such interests will be held following an acquisition (subject to the potential applicability of 16 C.F.R. § 802.50, discussed further below), or (ii) the proposed changes for acquisitions of non-corporate interests (the "Proposed Changes") are implemented (which I understand is expected to occur toward the end of this summer, soonest). If the acquisition is consummated even one day prior to implementation of the Proposed Changes, it will be judged under the current rules, and not subject to any second guessing under the Proposed Changes.

4. The current expectation is that the acquisition of these "partnership interests" will be effected through a tender offer. Although the acquiring person hopes to acquire 100% of the partnership interests, and "minority squeeze out rights" may become available once a certain level of partnership interests are tendered (the "minimum condition"), it is not assured that (i) the acquiring person will reach the minimum condition, or (ii) even if the minimum condition is reached, that the acquiring person

will choose to implement those "squeeze out" rights to actually reach a holding of 100% of the partnership interests (except perhaps via a subsequent merger, discussed below). Accordingly, although we did not discuss this issue in our call yesterday, I believe it would not be a "gun jumping" or "avoidance" problem (under 16 C.F.R. § 801.90) for the parties to proceed to acquire all partnership interests that are tendered short of 100%, subject to the need to evaluate and file HSR as needed before a holding of 100% is reached.

5. In the event 100% of the partnership interests will be held prior to the Proposed Changes coming into effect, the transaction is analyzed as an acquisition of 100% of the partnership's assets, consistent with long-standing interpretations of the PNO. In this situation, however, 16 C.F.R. § 802.50 would exempt the acquisition of any partnership assets held outside the U.S., if those non-U.S. assets resulted in sales in or into the U.S. in the partnership's last fiscal year of $50 million or less. If the fair market value of the remaining (U.S.) assets, aggregated with the fair market value of any 50% or greater shareholdings in U.S. issuers held by the partnership, is $50 million or less, the transaction would then fail the "size of transaction" test and be non-reportable. In this regard:

a) Minority shareholdings in foreign issuers would be disregarded entirely (neither being assets nor reportable secondary acquisitions, if the acquiring person is a foreign person), and minority shareholdings in US issuers would be considered only to the extent qualifying as a potentially reportable secondary acquisition (the value of any such secondary acquisitions not counting toward "size of transaction" on the principal acquisition of 100% of the partnership interests), and

b) I understand that although fair market value is the requisite test for size of transaction in this scenario rather than book value, the acquiring person is allowed to conclude that book value constitutes fair market value, assuming that conclusion is reached in good faith.

6. The acquiring entity (the "Purchaser") may itself have both majority and minority stakeholders, but I expect that such ownership has no impact on the foregoing analysis (i.e., if the Purchaser's UPE is a 70% owner of the Purchaser, that does not mean that when the Purchaser acquires 100% of the partnership interests, the acquiring person holds only 70% - rather, the acquiring person is deemed to hold the entire 100% on behalf of the Purchaser).

7. At some point following acquisition of 100%, or nearly 100%, of the partnership interests, the "partnership" may be merged into the Purchaser (the "Merger"). Although at the time we spoke, I thought that following any such Merger, the "partnership" might be the surviving entity and arguably could have "voting securities" (in the sense of the combined entity's structure allowing shareholders to elect supervisory directors), in fact when and if this occurs, the Purchaser will be the surviving entity, and the partnership will cease to exist as a separate company. The Purchaser's shareholders, which will then include any remaining minority shareholders of the partnership, will have the right to elect directors of the Purchaser,

which will then own 100% of the assets and liabilities of the partnership by operation of law. However, I expect you will agree that this post-Merger voting right in the surviving corporation's shares has no impact on the conclusion that the acquisition of the underlying partnership interests by either the Purchaser originally or in the Merger is not a reportable "voting securities" acquisition for HSR purposes. One of several scenarios will result:

a) If the merger occurs before implementation of the Proposed Changes:

i) and 100% of the partnership's assets have already been acquired (by virtue of Purchaser acquiring 100% of the partnership interests), there is nothing more to acquire via the Merger,

ii) and something short of 100% of partnership interests have been acquired via the tender offer - such that Purchaser is first going to 100% as a result of the Merger - the analysis would proceed as above (potentially constituting a reportable asset acquisition, unless size of transaction tests are not met following application of the exemption in 16 C.F.R. § 802.50).

b) If the merger occurs following implementation of the Proposed Changes, I understand that it may entail an acquisition of non-corporate interests, but provided that at least 50% of the partnership interests have been acquired before the Merger, would expect this to qualify for the revised "intra-person exemption" (as currently proposed). I would also like to discuss the possible application of the exemption in 16 C.F.R. § 802.50 to the post-Proposed Changes scenario.

Please advise if you disagree with any of the foregoing. As always, thank you for your time.

Sincerely,

[redacted]

AGREE
B. Michelson
3/9/04

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