

801.10
802.30

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, April 15, 2004 5:17 PM
To: Verne, B. Michael
Cc: Ovuka, Nancy M.
Subject: HSR issue

Mike,

I spoke to you about this issue a couple of weeks ago but did not get back to you. I thought it would be easier if I put it in an email. You mentioned speaking to [REDACTED] about this, so I cc'd her as well. This is an LBO type deal. Company A is forming Merger Sub A and contributing \$35 million in equity. Merger Sub A will merge with B, with B being the surviving company. At closing A will receive a certain amount of B shares (\$35 million/price per share). Also at closing B will borrow funds and use those funds to cancel or redeem the remaining voting securities of B. The amount to be borrowed and paid to redeem the voting securities is app. \$50 million. A is not guaranteeing the loan taken out by B. Assume that this transaction was structured this way for legitimate business reasons.

B's redemption of the voting securities would seem to be covered by 802.30. In Interpretation No. 190, which you referred me to, A has an agreement with B, C, and X whereby A contributes \$100 million to X, which then redeems the shares of B and C. The PNO "looked through" the transaction because A was instrumental in causing the redemption. Here, the redemption is part of the merger agreement, but B is taking out the loan and A is not guaranteeing the loan. Therefore, A is not actually contributing the money (in other words, not paying any consideration for the redemption of the shares). I don't think you can say that A is responsible for the loans of B just because it is the parent -- granted, it affects the value of the company (reduces it). Therefore, it doesn't seem like we should add the value of the redemption to the \$35 million that A is paying for the voting securities of B.

Additionally, to the extent that this interpretation is based on an assumption that you would not structure a transaction this way unless it was to avoid a filing, I don't think that situation exists here. From what I understand, this is a pretty common structure. Therefore, when 802.30 exempts a transaction and there is no evidence that the transaction was structured to avoid a filing, how can you discount application of the rule?

Please let me know your thoughts. Thanks for your help.

AGREE THE \$ 50MM IS NOT
INCLUDED. N. OVUKA CONCURS.

B. Michael
4/15/04

fax [REDACTED]