801.2(d)

Verne, B. Michael

From: [redacted]
Sent: Thursday, October 13, 2005 10:08 AM
To: Verne, B. Michael
Subject: HSR Questions - Rules 801.2 and 801.40

We would appreciate your comments about whether the following proposed transaction is subject to the notification and waiting period requirements of the HSR Act, and, if so, how to report same. We describe below our preliminary analysis with respect thereto.

1. Company A is a privately held C-corp with approximately 15 shareholders, none of which controls A. Some of A's voting securities are owned by two private equity funds (PEF1 and PEF2, or PEFs) which are noncorporate entities whose general managers are controlled by the same person. A has total assets of approximately $50M and 2004 sales of approximately $80M.

2. Companies B and C are privately held C-corps with five or six shareholders each, and each is controlled by the same individual shareholder. B has total assets of approximately $25M and 2004 sales of $70M, and C has total assets of $10M and 2004 sales of approximately $45M. The individual shareholder who controls B and C may have other investment assets, but the amount thereof is not yet known (although the amount of such assets does not appear relevant for reasons discussed below).

3. A, the controlling shareholder of B and C, and one or both of PEF1 and PEF2 have entered into a letter of intent (LOI) to form company D as a C-corp to serve as a holding company that will own companies A, B, and C as wholly-owned subsidiaries.

4. One or both of PEF1 and PEF2 (or other PEFs whose general managers or general partners are controlled by the same person as PEF1 and PEF2), will contribute their voting stock in A and approximately $20M in cash to D, and will receive voting stock in D.

5. A's other shareholders will contribute their voting stock in A and will receive up to 25 percent of the value thereof in cash and the balance of 75 percent in voting stock of D. No single shareholder (treating PEF1 and PEF2 as a single person for this purpose) will receive stock in D (and/or cash and stock in D) with a value in excess of $53.1M, although collectively the shareholders of A will receive in excess of $53.1M in cash and stock in D.

6. The LOI provides that the shareholders of B and C will contribute their stock in B and C, and will receive approximately $80M in cash, and that the controlling shareholder of B and C also will receive stock in D with an approximate value of $10M. The controlling shareholder in B and C will receive cash and stock in D with an approximate total value in excess of $53.1M. No other shareholder of B or C will receive cash in excess of that amount.

7. The PEFs will arrange for D to borrow approximately $100M in senior debt, but we assume at this point that there will be no guarantees for this debt by D's shareholders, any of the PEFs, their general managers/partners, or the person who controls same.

8. The PEFs may (and we assume for present purposes will) have the right to designate 4 of 7

directors for D's board. No single person (treating all PEFs as a single person for this purpose) will own 50 percent or more of D's voting securities, or will have the right to receive 50 percent or more of D's profits or its assets upon dissolution.

9. None of A, B, or C engage in any manufacturing.

10. Based on our review and analysis of the HSR Act and the FTC Premerger Notification Rules, it appears that, pursuant to Rule 801.2(d)(2)(iii), (i) the transaction should be treated as a consolidation, (ii) that A, and B and C together (because they have the same UPE), are to be treated as both acquiring and acquired persons, and (iii) that each is deemed to be acquiring all of the voting securities of the other.

11. We also have reviewed Rule 801.40 but presume that it does not apply given the statement in Rule 801.40(a) excepting from that rule the formation of a joint venture or other corporation in connection with a merger or consolidation.

12. Considering first A's deemed acquisition of B and C, it appears that the transaction will be reportable if (i) the purchase price is determined in the parties' agreement or A's board estimates in good faith that the fair market value of the voting securities of B and C exceeds $53.1M, (ii) the size of person tests are satisfied, and (iii) no exemption applies.

It appears from the facts described above that the purchase price for the Stock of B and C is determined in the parties' LOI ($90M), and that the size of person test of 15 USC 18a(a)(2)(B)(ii)(II) would be satisfied, in that A has total assets and annual net in excess of $10.7M, and B and C collectively have annual net sales in excess of $106.2M.

13. Considering B and C's deemed acquisition of A, it appears that the transaction will be reportable if (i) the purchase price is determined in an agreement of the parties or the controlling shareholder of B and C, or the boards of B and C, estimate in good faith that the fair market value of the voting securities of A exceeds $53.1M, (ii) the size of person tests are satisfied, and (iii) no exemption applies.

The LOI does not address the terms for the contribution of A's stock, so the price for same is not yet determined. It appears from the facts described above that the size of person test of 15 USC 18a (a)(2)(B)(ii)(III) would be satisfied, in that B and C collectively have annual net sales in excess of $106.2M, and A has total assets and annual net sales in excess of $10.7M.

14. Based on the above statement of facts and analysis, we conclude that A, and the controlling shareholder of B and C, must file for A's deemed acquisition of the voting securities of B and C, and that these parties also may need to file as to the deemed acquisition of A by the controlling shareholder of B and C if the size of that deemed transaction exceeds $53.1M.

15. We also conclude that neither D nor the PEFs need file, in that the PEFs do not control A and thus are not A's UPE, and, pursuant to Rule 801.2(d)(2)(iii), neither D nor any UPE of D is deemed to be the acquiring or acquired person with respect to the consolidation. Additionally, although the PEFs will contribute cash and receive voting stock of D (in addition to the voting stock of D that they will receive for contributing their voting stock in A), the size of this transaction is below $53.1M.

16. We understand that A, and the controlling shareholder of B and C, need only file one Form each, and that only one filing fee will be paid, even if both deemed acquisitions of the other exceed the size of transaction threshold. Please confirm same. Also, we understand that, pursuant to Rule 803.9(b), a single filing fee would be paid based on the greater of the two sizes of transaction.

Please advise if you agree with our understanding that (i) the transaction described above is to be treated as a consolidation in accordance with Rule 801.2, (ii) that A, and the controlling shareholder of B and C, will be subject to the notification and waiting period requirements of the HSR Act with respect to A's deemed acquisition of B and B, (iii) that these parties may have to file with respect to the controlling shareholder's deemed acquisition of A if the size of transaction test is satisfied, in which case both parties will file as both acquiring and acquired persons, and (iv) that D and the PEFs do not have any filing obligation. Also, please confirm that any party filing in both capacities may file a single form, and that a single filing fee would be paid based on the greater of the two sizes of transaction.

I would be glad to discuss this matter at your convenience. Please advise as to when you may be available to do so.

[redacted]

Agree
B
10/13/05