801.90

Verne, B. Michael

From: [redacted]
Sent: Friday, October 14, 2005 12:00 PM
To: Verne, B. Michael
Subject: Question re: 801.90

Hi Mike.

I am writing to seek your guidance as to whether the following transaction could be construed as a device for avoidance under 16 C.F.R. §801.90.

Funds affiliated with A and B are planning to acquire 100% of the voting securities of C. The value of 100% of the voting securities of C is greater than $53.1 million but less than $212.3 million, so the size-of-person threshold test would apply. If Newco is its own ultimate parent entity ("UPE"), it would not satisfy the $10.7 million portion of the size-of-person threshold test and the acquisition of C would not be reportable.

Initially, A and B envisioned the transaction as follows.

1. A and B form Newco as a "C" corporation, capitalize it with approximately $45 million, and are issued Preferred A and common stock.

2. Newco forms a wholly owned subsidiary, Newco I, and contributes the $45 million into Newco I, along with shares of Newco Preferred B and common stock together representing 19.9% of Newco's equity.

3. Newco I buys 100% of the stock of C from the C shareholders under a stock purchase agreement. The purchase price is $62.5 million plus 19.9% of Newco stock.

4. Under this structure, all shareholders would be shareholders of a single company, Newco, which would own 100% of Newco I, which in turn would own 100% of C.

Initially, A and B assumed that the common and preferred stock of Newco would have rights to vote for Newco directors, but that the parties would enter into a voting agreement under which everyone would agree to vote their shares to elect to the Newco board two directors designated by the funds affiliated with A, one director designated by the funds affiliated with B, one director designated by the former C stockholders who will become Newco stockholders, and three independent directors.

Under these original plans, Newco would be its own UPE once it acquires C and the stockholders of C acquire shares of Newco stock in exchange for their shares of C stock. However, one of the A funds ("A Fund I"), not under common control with the other A funds under HSR "control" tests, would be the UPE of Newco just before the acquisition of C because it would hold just over 50% of the voting securities of Newco after step #1 described above. If A Fund I is the UPE of Newco before Newco acquires the stock of C, the size-of-person test would be satisfied and the acquisition of C would be HSR reportable.

Cognizant of this outcome, the parties realized that they could accomplish their objectives with respect to the acquisition of C and the composition of the Newco board through other means which would not result in A Fund I being the UPE of Newco before the acquisition of C. Specifically, the funds affiliated with A and B are considering the following (hereafter, the "Alternative Structure").

1. Funds affiliated with A and B form Newco and collectively contribute $45 million to Newco. The A funds would receive 100% of Newco Class A Preferred shares and 66 shares of Class A Common. The holders of the A Preferred shares would have the right to vote as a class for two of Newco's seven directors. The holders of the Class A Common shares would have ½ vote per share. The B funds would receive 100% of Newco Class B Preferred shares and 33 shares of Class B Common. The holders of the B Preferred shares would have the right to vote as a class for one of Newco's seven directors. The holders of the Class B Common shares would have one vote per share. The Class A Preferred and Class B Preferred shares would be convertible into Class B Common shares at the option of the holders at any time. The Class A Common shares would convert into Class B Common Shares upon the conversion of any of the Preferred.

2. Newco forms a wholly owned subsidiary, Newco I, and contributes the $45 million into Newco I, along with shares of Newco Class C Preferred and Class B Common representing 19.9% of Newco's equity.

3. Newco I buys 100% of the stock of C from the C shareholders under a stock purchase agreement. The purchase price is $62.5 million plus 100% of the Newco Class C Preferred shares and shares of Class B Common representing 19.9% of the total Common Stock. The holders of the Class C shares voting as a class would have the right to elect one of Newco's seven directors. (At the time of the acquisition of C, only three of Newco's seven authorized director seats would be filled.) Like the Class A and B Preferred shares, the Class C Preferred shares would be convertible

into Class B Common Stock at the option of the holders.

4. After the acquisition of C, the holders of Class A and B Common Stock voting together as one class would elect three independent directors of Newco to fill the remaining vacancies.

Mike, I have two questions for you. First, assuming that A Fund I will hold less than 50% of the voting securities of Newco under the Alternative Structure, please confirm that under the Alternative Structure described above, Newco would be considered its own UPE at the time it acquires C even though the A funds collectively will have elected two of Newco's seated three directors, because seven directors will have been authorized.

Second, please advise whether the Alternative Structure could be considered a device for avoidance under 16 C.F.R. § 801.90. Under the Alternative Structure, the A funds collectively would hold 50% of the voting securities of Newco under the 16 C.F.R § 801.12 formula and before Newco's acquisition of C, but A Fund I itself would hold less than 50% of the voting securities of Newco under the 801.12 formula and before Newco's acquisition of C. Although the impetus for the Alternative Structure may be to avoid an HSR filing, the parties would not "undo" the structure post-closing. A Fund I would not hold 50% of the voting securities of Newco pre- or post-acquisition of C, nor would it have the power to elect 50% or more of the authorized directors of Newco pre- or post-acquisition of C.

In short, assuming for the sake of argument, that A and B decide to follow the Alternative Structure in order to avoid an HSR filing, would the parties not be deemed to have engaged in a device for avoidance under the principles of Interpretations ##194 and 195 of the ABA Section of Antitrust Law, Premerger Notification Practice Manual (3d ed. 2003) because the Alternative Structure accomplishes the parties' original plans, including plans related to the structure of the Newco board, and the parties would not undo the structure after the closing with C?

Mike, as always, I appreciate your guidance and look forward to your response.

1) NEWCO IS ITS OWN UPE.
2) THIS DOES NOT RAISE 801.90 ISSUES. N. OVUKA CONCURS.

Best regards,

[redacted]

B Mueller
10/14/05

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