801.2
801.4

Verne, B. Michael

From: [redacted]
Sent: Thursday, February 16, 2006 5:47 PM
To: Verne, B. Michael
Subject: Follow up on 802.4 question

Mike,

In follow up to our conversation on Tuesday, 2/14 please confirm that you agree with the conclusion and analysis of the fact pattern described below.

Facts

X proposes to purchase all of the membership interests of LLC ("LLC Interests") from Y. The assets of LLC are: 1) common shares of Company A, that constitute less than 50% of its voting securities and are accompanied by the right to elect 2 of 7 directors (the "Shares"); 2) an unsecured, non-convertible promissory note, of approximately $57 million issued by Company B (the "Note") and 3) rights under an exchange agreement, which provide the right to exchange the Note and the Shares for a certain number (a non-control position) of voting securities in a publicly traded investment fund Company C, based on a formula (the "Exchange Interest Rights"). Company A is controlled by Company C since it has the right to elect 4 of 7 directors, holds over 50% voting interest, although less than 50% of the outstanding voting securities on a fully-diluted basis. The purchase price of the Shares is determined by the market value of C's voting securities, less the face amount of the portic of the Note needed to obtain a unit of C's voting securities. The parties did not assign a separate value to the Exchange Interest Rights. The value of the Shares is below the applicable HSR threshold of $53.1 million.

Questions

Would the transactions outlined above including the proposed acquisitions of the LLC Interests, including, the Shares, the Note and the Exchange Interest Rights (the "Transactions") require a notification under the HSR Act?

Conclusion

Based on the facts and assumptions outlined above, the Transactions would not require notification under the HSR Act at the assumed values. However, if the per unit price of C were to vary, a new determination of the purchase price for the Shares must be made and determined to be below the

HSR threshold.

Analysis

1. The Acquisition of the LLC Interests

This transaction is exempt pursuant to Section 802.4 of the HSR Rules. Pursuant to this rule, an acquisition of non-corporate interests whose assets together with those of all entities it controls consist of or will consist of assets whose acquisition is exempt from the requirements of the Act is exempt if the acquired entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than $53.1 million. Since A is not controlled by LLC the value (the Shares is to be excluded and the value of all other assets held by LLC must be below $53.1 million (US) or exempt. The other interests held by LLC are exempt. The Note is exempt pursuant Section 7A(c)(2) of the Clayton Act and the Exchange Interest Rights, constitute convertible voting securities and are therefore exempt pursuant to Section 802.31 of the HSR Rules. Upon conversio there could be reporting requirements and an HSR analysis would need to be made at that time.

2. The Acquisition of the Shares

This is a secondary transaction. The Acquired Person is A, whose UPE is C, and the Acquiring Person is D. The size of transaction test is not met since the value of the Shares is below $53.1 million (US).

3. The Acquisition of the Note

This is a secondary transaction. The Acquired Person is B, whose UPE is C, and the Acquiring Person D. The transaction is exempt pursuant to Section 7A(c)(2) of the Clayton Act.

4. The Acquisition of the Exchange Interest Rights

This is another secondary transaction. The Acquired Person is C, which is its own UPE. The value exceeds $53.1 million (US) meeting the size of transaction test, but is exempt because the Exchan Interest Rights must be exchanged in order to confer voting rights in an issuer - C. Therefore, they would constitute convertible voting securities and the acquisition is exempt pursuant to Section

802.31 of the Rules. Upon conversion there could be reporting requirements and an HSR analysis would need to be made at that time.

Many thanks,

[redacted]

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