

-----Original Message-----

From: [REDACTED]  
Sent: Wednesday, May 03, 2006 12:42 PM  
To: Verne, B. Michael  
Subject: HSR Question

801.21  
801.40

Mike:

I wanted to get your thoughts on the following transaction:

Fund I LP is a private equity fund and a \$100 million person. It is an established entity with regularly prepared balance sheets and operating subsidiaries. Fund II LP is a newly formed private equity fund that has no regularly prepared balance sheet and has only \$60 million in cash.

Fund I and II form NewCo, a corporation. Fund I contributes \$40 million in cash for a minority interest. Fund II contributes \$60 million in cash for a majority interest. NewCo is therefore a partial subsidiary of Fund I. NewCo has only the cash contributed by Funds I and II and no regularly prepared balance sheet.

NewCo and Company A will merge in a reverse triangular merger for \$100 million in cash, as a result

of which Company A will be a partial subsidiary of Fund II.

My questions --

1 -- Is the formation of NewCo a reportable event? I would particularly appreciate guidance regarding the interplay of 801.21 and 801.40, and the application of interpretations 175, 184, 251, 274 of the Premerger Notification Practice Manual.

2 -- Is the merger of NewCo into Company A, so that Company A becomes a partial subsidiary of Fund II, a reportable event? What is the applicability of interpretations 142, 145, 146 and 182 here?

3 -- How would NewCo's size and the value of the shares received by Funds I and II be analyzed if Funds I and II were not contributing cash and were instead contributing (1) voting securities; (2) assets; (3) loans; or (4) loan guarantees? Interpretations 119, 148, 179.

Thank you for your help.

[REDACTED]

SEE RESPONSE ON  
NEXT PAGE

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Verne, B. Michael

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To: [REDACTED]  
Subject: RE: HSR Question

1 - The formation of Newco is not reportable because all it holds is cash. Section 802.4 exempts the formation because of its inclusion of assets described in Section 801.21 in the non-exempt asset category. 175, 184, 251, & 274 are all being amended for the 4th edition of the manual.

2 - The merger of Newco and Company A is not reportable. Neither A nor its UPE Fund II have a regularly prepared balance sheet; the only asset of Newco and Fund II is the cash to make the acquisition; and the size of transaction does not exceed \$200 million (as adjusted). 142, 145, 146 and 182 are all still correct. I think 182 is being amended to reference the availability of the 802.4 exemption in an all cash formation.

3 - The value of the shares of Newco acquired by Fund I and Fund II is always the FMV of those shares, whether the contributions to the formation are cash or v/s and assets. That usually means that the value of the shares of Newco is the same as the value of that which is being contributed unless liabilities are also being contributed to the formation. Loan guarantees do not come into play in determining the value of the Newco shares.

The size of Newco will be the total value of the voting securities, assets, loans and loan guarantees. However, in applying the 802.4 exemption to determine whether Newco has in excess of \$50 MM in non-exempt assets, any non-controlling minority interests in voting securities and the loans and loan guarantees are not counted. And of course and assets that would be exempt if acquired directly can also be excluded.

119 is still correct, but note that it is talking about future commitments of capital, not loan guarantees like you have. 148 and 179 are still correct.

B. Michael  
5/3/06