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Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, June 13, 2006 11:11 AM
To: Verne, B. Michael
Subject: Size of Person: Newly Formed Entity

Dear Mike:

I have a question regarding application of the Size of Person test to a newly formed LLC that is the Acquiring Person in a proposed transaction. The Acquiring Person proposes to indirectly (through another newly formed LLC) acquire two sets of assets from the same Seller UPE. As a newly formed entity, the Acquiring Person does not have assets or sales exceeding \$11.3 million prior to the acquisitions. The value of each set of assets alone does not exceed \$56.7 million, but the aggregated value of the two sets of assets does exceed \$56.7 million.

I understand if the two sets of assets are acquired (i.e., closed) simultaneously, no HSR filing would be required as the Acquiring Person does not meet the Size of Person test. However, it is possible the closings may not occur simultaneously (they may occur approximately one month apart). As a newly formed entity, the Acquiring Person does not yet regularly prepare balance sheets. If a balance sheet is prepared following closing of the acquisition of the first set of assets, that balance sheet would reflect the value of those assets and the Acquiring Person would then meet the Size of Person test for the second acquisition of assets. However, it is uncertain at this time whether a balance sheet will actually be prepared in between the first acquisition and the second acquisition (if they do not occur simultaneously).

For purposes of calculating Size of Person, is there a standard or accepted period of time after which a balance sheet is presumed to have been prepared (or should have been prepared)?

Thanks!

[REDACTED]

There is no specified period of time, but an excessive delay could raise avoidance issues. See # 187 in the Premerger Notification Practice Manual.

Busch
6/13/06