801.1(b)

Verne, B. Michael

From: [redacted]
Sent: Thursday, February 01, 2007 4:23 PM
To: Verne, B. Michael
Subject: Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") Questions

Mike:

Thank you for taking the time to speak with me last week. I am writing to confirm the advice you provided. The factual background that I provided you has changed a little, but I do not believe that the changes affect the analysis. The facts and the analysis are set forth below. I also raised as Issue 3 below a point that we did not discuss at length, but on which I would appreciate your advice.

Background

A newly formed corporation ("Company A"), which is wholly owned by another newly formed corporation ("Company B"), which itself is wholly-owned by a newly formed limited liability company ("LLC C"), intends to acquire all of the voting securities of an unrelated corporation ("Target"). The purchase price for Target's voting securities will be greater than $239.2 million. LLC C has two classes of membership interests: (i) a class issued to private equity fund investors (the "Funds"), that are limited partnerships or limited liability companies, and issued to certain members of Target's management ("Class I"), and (ii) a class issued to a management incentive plan (the "MIP") that will be created at the closing for the benefit of certain members of Target's management and that will be owned by another limited liability company in which the participating members of management will have an ownership interest ("Class II").

Class I interests will entitle the holders to (i) a return of their equity investment plus a preferred percentage return (anticipated to be around 8% per annum), before any distributions of profits or assets upon dissolution are made to Class II, and (ii) after the MIP receives any amounts that may be due on account of the Class II interests, share on a pro rata basis in any profits or assets then remaining available for distribution.

Class II interests entitle the MIP to the right to share in up to 15% of the future appreciation of the business whether realized through a recapitalization or the sale of the business. The actual percentage represented by Class II will be determined based on certain performance standards being satisfied in the future (e.g., the internal rate of return on the Class I interests). It is possible that if the holders of the Class I interests do not receive their preferred return in full, or if the performance standards are not satisfied, that the MIP will not receive any distributions in respect of its Class II interests.

The current ownership of the membership interests of LLC C (excluding the MIP's interest of up to 15%) is as follows:

Fund 1	49.8325%
Fund 2	45.0115%
Fund 3	2.5854%

Fund 4 0.2076%

Management 2.3631%

None of the Funds holds interests in LLC C entitling it to 50% or more of the profits or assets upon dissolution of LLC C. Some of the Funds may have common general partners. The capital contributions to LLC C will be made in the same percentages.

Analysis

Issue 1: Is LLC C its own ultimate parent entity?

Rule 801.1(a)(3) provides that "[t]he term ultimate parent entity means an entity which is not controlled by any other entity." Rule 801.1(b) further provides that "[t]he term control...means: ... (ii) In the case of an unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity".

You confirmed that since none of the members of LLC C would have the right to 50 percent or more of the profits or assets upon dissolution and therefore none acquired "control" under the HSR Act, LLC C was its own ultimate parent entity. You also confirmed that the fact that the Funds may have common general partners did not affect the determination of the ultimate parent entity.

Issue 2: Is the formation of LLC C a reportable event under the HSR Act?

Rule 801.50 provides in relevant part that "upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a consolidation), a person is subject to the requirements of the Act if it acquires control of the newly-formed entity." As discussed above, no member is acquiring "control" of LLC C under the HSR Act. Moreover, LLC C's only asset prior to Company A's acquisition of the voting securities of Target will be cash, which is an exempt asset pursuant to Rules 801.21 and 802.4. Therefore, the formation of LLC C is not a reportable event.

With respect to Companies A and B, because each is wholly owned by LLC C, either directly or indirectly, its formation is not reportable pursuant to Rule 802.30(b).

Issue 3: If any member of LLC C (before accounting for the MIP's interest of up to 15%) held interests in LLC C entitling it to 50% or more of the profits or assets upon dissolution, would LLC C still be its own UPE?

I do not believe that we discussed this issue at length, but I wanted to confirm whether your interpretation was the same as mine. Assuming that the Class II interest would potentially share in both profits and assets upon dissolution, while no amount would be payable on account of the Class II interests immediately after the consummation of the transaction and it is unknown whether all or any portion of the performance benchmarks associated with the Class II interests would be met, I believe that a fair interpretation of Rule 801.1(b) would require the parties to include the Class II interests in the calculation of the percentage interests in the profits and assets upon dissolution of LLC C, because the economic rights associated with the Class II interests need to be given effect. Assuming that my interpretation is correct, in the above situation, the relative Class I percentages would be diluted by the 15% interest associated with the Class II interest and the fully diluted percentages would then be used to determine whether any member held interests entitling it to 50% or more of the profits or assets upon dissolution.

Thank you again for your consideration and assistance in this matter. If you do not believe this note reflects the facts discussed on our telephone conversation, or if I have misstated the advice you gave, or in the case of Issue 3 if you disagree with my interpretation, please contact me as soon as possible.

Sincerely,

[redacted]

[redacted]

Agree
Bruce
2/1/07

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