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Verne, B. Michael

From: [REDACTED]
Sent: Monday, February 05, 2007 12:48 PM
To: Verne, B. Michael
Subject: HSR Analysis

Mike, following up on our call, the below is the summary of the situation. Please call me at [REDACTED] to discuss. Thanks.

A and B, U.S. corporations, intend to jointly acquire C via a tender offer for 100% of C's shares. C is a foreign issuer with U.S. sales and assets that exceed the 802.50 and 802.51 exemptions.

In order to consummate the transaction, A will form an acquisition subsidiary, A SUB. A will own 100% of A SUB's voting stock. B will lend 50% of the purchase price for C to A SUB and B will get a note in return for this loan.

Issue 1: Is the formation of the acquisition sub and the loan from B to A SUB HSR reportable? No, the formation of A SUB and B's loan to A SUB would not require an HSR filing pursuant to Rule 802.30(b) and because B is not acquiring voting stock or assets in A SUB in return for the loan.

C has six separate business units; after the acquisitions, A will control Business Units 1-3 and B will control Business Units 4-6.

As noted, in order to consummate the acquisition of C, A/A SUB will submit a tender offer to acquire 100% of C's shares. A/A SUB and B will enter into a separate agreement(s) pursuant to which A SUB will transfer the assets of C's Business Units 4-6 to B after A/A SUB acquire the C voting stock. Business Units 4-6 each have assets in the U.S., are independent businesses and the acquisition of each set of assets would trigger a filing requirement. Once Business Units 4-6 are transferred to B, B's note to A SUB (i.e., 50% of the purchase price for C) will be extinguished.

Issue 2: the parties would like to consummate the transactions (i.e., A/A SUB's acquisition of C's shares and A/A SUB's sale of C's assets to B) simultaneously, if possible. Can B file to acquire Business Unit 4-6 from A/A SUB at the same time A files to acquire 100% of C even though A/A SUB would not own Business Units 4-6 at the time of the B's filing? The reasoning in Interpretations 56, 261 and 262 suggests that B can file to acquire Business Units 4-6 from A/A SUB at the same time A files to acquire C even though B's acquisitions are contingent on A/A SUB's acquisition of C.

Issue 3: B does not overlap with Business Units 4-5 so it is likely that B's acquisitions of these Business Units would receive HSR and foreign antitrust clearance relatively quickly. B competes with Business Unit 6, which could result in a review in the U.S. and/or outside of the U.S. Could B file three separate HSRs to acquire Business Units 4-6 from A/A SUB, so there are separate HSR waiting periods for each set of assets and any review of the acquisition of Business Unit 6 does not delay consummation of B's acquisitions of Business Units 4-5? If there are three separate HSR filings, would B pay three filing fees?

[REDACTED]

Issue 1 - I agree that the formation of ASUB and B's loan to ASUB are not reportable events.

Issue 2 - B can file to acquire the business unit at the same time that A/ASUB files to acquire C. A's filing would require a second certification from C and must be accompanied by the attached language.

Issue 3 - B can make three separate filings (assuming each satisfies the size-of-transaction test independently) if each set of assets is in a separate agreement. Otherwise, B would aggregate and report all three in one filing.

Give me a call if we need to discuss further.

BM
2/3/07