801.1(b)
801.11(c)

Verne, B. Michael

From: [redacted]
Sent: Thursday, December 20, 2007 6:08 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 as well as to request confirmation of our interpretation on one other issue. The facts and the analysis are set forth below.

Background

Persons A, B and C (Person C is an LLC) are forming a limited liability company ("Company X") for the purpose of purchasing assets (the "Assets") and assuming certain liabilities of an unrelated third party ("Company Y"). The ownership of common membership interests of Company X (being those interests that will generally share in the economics of Company X including with respect to profits and the distribution of assets upon dissolution) will be 30%, 30% and 40%, respectively, as of the time of the acquisition of the Assets. Company X will obtain certain financing to allow it to consummate the acquisition of the Assets and will provide the financing source ("Company Z") with a preferred membership interest (the "Preferred Interest") in Company X that will entitle Company Z to the return of its financing plus a percentage return (anticipated to be approximately 12%). The terms associated with the Preferred Interest will provide that upon the repayment of the financing and the payment of the percentage return, the Preferred Interest will be extinguished and the holder thereof will no longer be entitled to receive any amount from Company X.

Company X's sole asset immediately prior to the acquisition of the Assets will be cash, a substantial portion of which will be used to purchase the Assets or for transaction expenses (in any event Company X will have less than $12 million of cash that will not be used for purposes of the acquisition of the Assets).

Issue 1: Is Company X 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 the Preferred Interest should not be included for purposes of determining the ultimate parent entity of Company X because it does not entitle the holder to share in the future economics of Company X, but rather entitles it only to the receipt of a fixed amount. The remaining membership interests in Company X will be held by persons A, B and C in such proportions that at the time of the acquisition of the

Assets none of them will have the right to 50 percent or more of the profits of Company X or the right in the event of dissolution to 50 percent or more of the assets of Company X. Under such circumstances, no member "controls" Company X under the HSR Act and Company X is its own ultimate parent entity.

Issue 2: Does Company X fail the "size of party" test

The HSR Act provides in Section §18a (a)(2)(B) that no filing is required if the acquiring person will hold an aggregate amount of voting securities and assets of the acquired person less than $239.2 million but more than $59.8 million unless each of the acquiring person and the acquired person satisfy the "size of party" test. In the present situation, the acquired person is engaged in manufacturing and has total assets and annual net sales in excess of $119.6 million. Company X is a newly formed entity that has no sales and its only asset is cash a substantial portion of which will be used to acquire the Assets or for transaction expenses. Company X has neither a regularly prepared balance sheet nor a statement of income and expense.

Company X is its own ultimate parent entity, does not have a regularly prepared balance sheet nor any prior sales, its sole asset is cash and it will use a substantial portion of the cash to acquire the Assets and for transaction expenses (in any event, Company X will have less than $12 million of cash that is not to be used for the acquisition of the Assets or for transaction expenses). Pursuant to Rule 801.11(e)(1)(ii), Company X's cash is ignored for purposes of determining the size of the party. By ignoring such cash as an asset, Company X has no material assets (in any event, less than $12 million) and thereby fails the size of party test. Since the assets that will be acquired have a value less than $239.2 million, the size of party test applies and is not satisfied. Under such circumstances, no filing is required under the HSR Act.

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 2 if you disagree with my interpretation, please contact me as soon as possible.

Sincerely,

[redacted]

AGREE WITH BOTH.

B

11/2/08

[redacted]