

7A (c)(10)

802.30

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, January 10, 2008 12:00 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: FW: size of transaction question

Hi, Mike -

I am hoping to get your thoughts on determining the size of transaction in the following scenario:

Company A, a foreign person for purposes of the HSR Act, is purchasing 100% of the voting securities of Company B, also a foreign person. The mechanics of the purchase will work as follows:

1. Before closing, Company B will increase its capital by JPY 8.0 billion/\$73.2 million by issuing 10 million new shares to the shareholders of Company B (the "Sellers") (the "Sellers' Capital Contribution"). We understand that this will not be reportable by reason of 16 C.F.R. 802.30 and/or 7A(c)(10) or possibly for other reasons.
2. At closing, the Company A will pay a "transfer price" of JPY 10 million/\$91,500 to the Sellers (the "Buyer Transfer Price").
3. Company A will contribute additional capital and Company B will issue new shares to Company A to increase capital by JPY 7.6 billion/\$69.55 million (the "Buyer's Capital Contribution"); none of the Buyer's Capital Contribution will be paid to the Sellers. Both the Sellers' Capital Contribution and the Buyer's Capital Contribution are contemplated as part of the agreement between the parties and the Buyer's Capital Contribution must occur within two months of closing.
4. Company B currently has about JPY 27.2 billion/\$248.9 million of net third-party interest-bearing debt outstanding. The Sellers' Capital Contribution will be used, in part, to pay off a corresponding amount of debt of Company B after closing. The Buyer's Capital Contribution will also be used to pay off such third-party debt of Company B. The amount of the Seller's Capital Contribution, the Buyer's Capital Contribution and the Transfer Price will still not be enough to pay off all of Company B's debt so Company A will take control of a company with a substantial amount of third-party debt.

Questions

The first question is whether the Transfer Price should be aggregated with the Buyer's Capital Contribution for purposes of determining the size of transaction. It appears that since the Transfer Price and the Buyer's Capital Contribution are contemplated by the same agreement, occur close in time and are viewed by Company A as part of a single transaction (one would not occur without the other), the PNO would presumptively aggregate these amounts to determine whether the \$59.8 million threshold is exceeded. If there is a clear business reason for bifurcating the Transfer Price and the Buyer's Capital Contribution, the presumption may be able to be rebutted and the Buyer's Capital Contribution in exchange for additional shares

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would be exempt pursuant to 16 C.F.R. 802.30. Do you agree with this methodology?

Assuming the Transfer Price and the Buyer's Capital Contribution were aggregated, the second question is whether that the transaction is not reportable for failure to meet the size of transaction test. When the third-party debt of Company B being assumed or paid off by Company A is subtracted from the purchase price, you are left with a transaction value of \$0 for HSR purposes, rendering the transaction non-reportable. Would you please let me know if you agree?

Many thanks (as always),

[REDACTED]

[REDACTED]

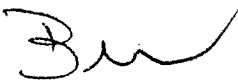
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Point #1. This would not be 802.30 unless the new shares are going to a controlling shareholder. If the new issue of stock is pro-rata to all shareholders, 7A(c)(10) would exempt it.

1. First question - If the Buyer's Capital Contribution is being used to pay off debt and not going the shareholders of B, it would not be aggregated with the Transfer Price. 802.30 would cover a subsequent issue of new stock to A if it already holds 100%.

Second question - moot


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