801.50
802.30

[redacted] [redacted] [redacted]

January 25, 2008

VIA ELECTRONIC MAIL

Mr. B. Michael Verne
Federal Trade Commission
Premerger Notification Office
600 Pennsylvania Avenue, NW
Room 303
Washington, D.C. 20580

Re: Hart-Scott-Rodino Act Informal Interpretation

Dear Michael:

Thank you for taking the time to speak with me yesterday regarding our HSR question. This letter summarizes the facts we discussed and the basis upon which we concluded that a transaction structured as described below would not require notification under the HSR Act. In addition, I have added a new variant of the transaction that has arisen since our conversation, and explained why we do not believe it leads to a different conclusion. I trust you will let me know if you disagree.

Assumed Facts

Buyer intends to complete what amounts to a leveraged buyout of Target, a corporation that is engaged in manufacturing; assume, for purposes of analysis, that the size-of-person test is satisfied. Prior to the transaction, Buyer has no interest in Target or any other entity contained within the same HSR person as Target. The transaction involves the following steps:

1. Target creates 2 new LLCs — Holding LLC and OpCo LLC. Target initially holds 100% of the membership interests in Holding LLC, and Holding LLC holds all 100% of the membership interests in OpCo LLC. (Seller, the natural person who is the UPE of Target, is thus the UPE of both LLCs.)

2. Target transfers all of its existing assets and liabilities to OpCo LLC, making it solely a holding company. (Note that I do not believe we explicitly discussed this, although I do not believe it affects the analysis in any material way.)

3. Buyer pays approximately $35 million in cash consideration to Target, in exchange for interests in Holding LLC.

4. OpCo LLC then borrows an additional approximately $35 million from Lender, and uses that cash both to refinance its existing debt and to redeem membership interests in Holding LLC from Target, such that Buyer's percentage interest in Holding LLC is increased. Although Buyer is responsible for arranging the transaction between OpCo LLC and Lender, it is neither providing any of the financing nor guaranteeing any of OpCo LLC's obligations to Lender.

As a result of these steps, it is intended that Buyer will hold approximately 80% of the membership interests in Holding LLC, while Target (and thus the natural person Seller) will retain approximately 20% of the interests.

Analysis

It is clear that, as a result of the transaction — regardless of whether it is viewed as the formation of a new LLC (subject to Rule 801.50) or a simple acquisition of non-corporate interests in an existing LLC — Buyer will gain control of Holding LLC (and thus OpCo LLC). Since we have assumed that the size-of-person tests are satisfied, the question of reportability depends on whether, as a result of the transaction, Buyer will hold at least $50 million (as adjusted) of non-corporate interests in Holding LLC.

You confirmed that, since Buyer is neither providing any of the financing for OpCo LLC's loans, nor guaranteeing them, there is no need to aggregate the $35 million in debt financing with Buyer's $35 million equity purchase. Therefore, pursuant to Rule 801.10(d), the value of the non-corporate interests held by Buyer as a result of the acquisition is equal to the acquisition price of the interests, which is assumed here to be $35 million. This is essentially the same result as was reached in Informal Interpretation #0404012 (April 15, 2004) for the buyout of an incorporated entity.

Subsequent to our conversation, our client has asked about another variant of the transaction structure, in which, instead of using the proceeds of OpCo LLC's borrowing to redeem interests in Holding LLC, the funds remaining after the refinancing of OpCo LLC's existing debt would be distributed to Target via an extraordinary dividend or profit distribution. Given that our conclusion yesterday was based on the fact that Buyer had not provided or guaranteed the debt financing (which still holds true under this scenario), there seems to be no reason why the result would differ based on the use of the funds. That is particularly true where, instead of a redemption — which would be an acquisition of non-corporate interests, albeit one

that is exempt pursuant to Rule 802.30 — the funds are simply paid out as a dividend, and no voting securities or non-corporate interests are transferred.

Finally, although we did not explicitly discuss this, you may assume that there would be an adequate business reason for either structure of the transaction (both in terms of tax consequences and Buyer's limited outlay of cash) such that no avoidance issue is implicated.

Based on those facts (other than as to the new extraordinary dividend variant), you agreed that Buyer does not have an obligation to file notification under the HSR Act. If I have misunderstood your advice or you have any concerns regarding the analysis above, please call me at [redacted] as soon as possible to discuss this matter, as we have a client who is contemplating relying on our advice that such a transaction is non-reportable in the near future. Similarly, if you believe the variant scenario leads to a different conclusion, please let me know.

Thank you again for your assistance and willingness to discuss this matter.

Sincerely,

[redacted]

Agree
B
11/25/08