801.10

Verne, B. Michael

**From:** [redacted]
**Sent:** Wednesday, February 20, 2008 4:17 PM
**To:** Verne, B. Michael
**Subject:** Request for Informal Advice

Dear Mike,

Described herein is a fact pattern that our client seeks advice on in order to determine whether an HSR filing must be made in connection with this transaction.

COMPANY A will purchase all of the voting securities of COMPANY B (a non-publicly traded company) on a "debt-free" basis for a purchase price of approximately $8 million with contingent future payments (similar to an earn-out or milestones) of a maximum of approximately $12 million. In a separate transaction, Company A will acquire the loan agreement between COMPANY B and BANK from BANK for approximately $64.7 million. COMPANY B is not a party to the second transaction. The purpose of structuring the two transactions in this manner is for COMPANY A, who is believed to be in a better negotiating position than COMPANY B, to negotiate with BANK to forgive approximately $13 million in debt before accepting $64.7 million as a payoff for the current loan agreement, where the actual outstanding value if approximately $77 million. Thus, there is a valid business reason for the structure of this transaction. As we have discussed in another matter recently, ordinarily the assumption of liabilities is required to be included in the acquisition price only in asset acquisitions and not in stock transactions. While the fact pattern in this case is akin to Interpretation 91 in the 4th Edition of the Premerger Practice Manual, there are at least two differences that may be important to the analysis; thus we seek informal advice on whether the money paid by COMPANY A to acquire the loan agreement from BANK must be aggregated into the transaction.

(1) COMPANY A itself is acquiring the loan agreement, whereas in Informal Interpretation 91 a third party lender took over the debt; and (2) Cash payments made by COMPANY A to COMPANY B are capped at a maximum of $20 million, including the maximum value of all potential future contingent payments. However, since there are contingent payments involved in this transaction and the stock is not publicly traded, must COMPANY A do a fair market valuation because the acquisition price is "not determined?" If COMPANY must do a fair market valuation, should the valuation be done on the same basis as the two transactions described above such that COMPANY A should do a fair market valuation of the shares of COMPANY B on a debt free basis, or must we do the fair market valuation in some other way that must also take account of the separate payment made to acquire the loan agreement from BANK?

Please let me know your thoughts on the above and whether you have any additional questions regarding facts that may be relevant to the analysis. In advance, we greatly appreciate your assistance in this matter.

Best regards,

[redacted]

I would view this a two separate transactions that do not need to be aggregated. Since you can determine that the maximum acquisition price for B's voting securities is below the size of transaction threshold, there is a determined acquisition price and a fair market valuation is not required. So the acquisition of B stock is not reportable. I don't think that A's acquisition of the loan agreement from the bank is reportable either. Because A is acquiring the right to repayment of the loan, and will control the entity that owes the payment on the loan, I would view this as a wash. A essentially will owe money to itself as a result of the two transactions. I don't see anything reportable here.

BN
2/20/08