802.4

Verne, B. Michael

From: [redacted]
Sent: Friday, March 07, 2008 6:24 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: RE: Purchase Price Determination

Thank you for your response. I left you a voicemail, but since we have not connected today, I will respond by email.

Basically, the base purchase price assumes there will be no cash in the Target at closing, however, if there is a cash balance at closing, the Target has two options, it can either (i) distribute the cash prior to closing (which means the purchase price would NOT be increased by the amount of cash because there would be none); or (ii) the purchase price would be increased by the amount of the cash - i.e., the buyer would pay the sellers cash for the cash on the balance sheet of Target. Either way, the sellers get cash at closing - either from the Target or from the buyer. However, from an HSR perspective, the first scenario would result in no filing and (unless cash is excluded from the calculation of the purchase price adjustment because it is an exempt asset) the second scenario would result in a filing because it would increase the purchase price above the threshold.

So, we wanted to confirm that we could exclude cash from the calculation of the purchase price adjustment, regardless of whether it came from the Target (i.e., a distribution was made) or the buyer (i.e., the buyer paid cash to the sellers to offset the case in the Target at closing) because cash is an exempt asset under Rule 801.21.

However, your response seems to indicate that reliance on Rule 801.21 may not be appropriate here because it only applies in an acquisition of assets and this is an acquisition of noncorporate interests. However, informal interpretation 2212007 seems to indicate that perhaps cash could be an excluded asset in other transactions as well - in that case, a merger - so we wanted to seek clarification.

With respect to Rule 802.4, although it may apply here because we are acquiring noncorporate interests, given the amount of debt involved and the fact that cash may be the only exempt asset, it is likely that there will still be in excess of $63.1 million **gross** assets (net of cash) which (as I understand it) is the test under Rule 802.4.

However, when valuing noncorporate interests under 801.10(d), it is my understanding that you do not need to include the debt being paid at closing as part of the purchase price (which results in more of a **net** asset or equity value - similar to valuing voting securities), so the result under Rule 802.4 (even excluding cash) is inconsistent with the determination of the purchase price as we have set out in our memo (which was intended to comply with Rule 801.10(d)) because it includes the debt.

I hope this explanation is helpful. If you have any other questions, please do not hesitate to call or respond by email.

Regards,

[redacted]

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Friday, March 07, 2008 8:21 AM
To: [redacted]
Subject: RE: Purchase Price Determination

You would not be able to exclude the cash adjustment if you decide not to dividend out the cash prior to closing. You can exclude any cash for paying off debt or that is used for transaction expenses. If you determine that, including the cash adjustment, the acquisition price exceeds $63.1 MM, you may still be exempt under Section 802.4. If the fair market value of the assets of the Target (other than cash) does not exceed $63.1 MM, the transaction is exempt. If it does exceed $63.1 MM, a filing is required. Let me know if you have any other questions.

BM
3/12/08