

**Verne, B. Michael**

---

**From:** [REDACTED]  
**Sent:** Monday, May 12, 2008 11:05 AM  
**To:** Verne, B. Michael  
**Subject:** HSR Inquiry

Mike:

I hope you had a nice weekend.

I was hoping to get your views that the transaction described below is not subject to HSR reporting requirements. For purposes of analysis, assume that the size-of-person test is met.

Buyer and Seller are parties to an agreement which granted Buyer an option to acquire all of its operating assets and assume the liabilities associated with the operating assets.

The agreement was structured so that if Buyer were to exercise the option, as consideration for the assets, Buyer would (a) forgive certain debt for which Seller is the obligor to Buyer (approximately \$41.1 million, including accrued interest), (b) pay off revolving credit and term loans secured by a mortgage on a building and associated real property held by Seller (approximately \$28 million) and (c) assume certain accounts payables and other liabilities (approximately \$15.5 million). The total value of these three items is approximately \$84.6 million (which exceeds the size of transaction test).

In connection with entering into the agreement, Buyer's management had determined that it was not efficient to tie up its capital in real estate. Accordingly, even though Buyer was committed under the agreement to purchase the building and associated real estate, Buyer has been exploring a sale and leaseback arrangement involving the building and associated real estate should it decide to exercise the purchase option under the agreement. Also, between the execution of the agreement and the present, Buyer underwent a leveraged buyout. As part of the LBO, Buyer is subject to certain debt covenants and is precluded without lender consent from entering into a sale and leaseback transaction after the consummation of the transaction, but can assume a lease obligation arising from a sale and leaseback transaction completed prior to the closing of the purchase.

Because of these debt covenants, even though Buyer has given notice to Seller of its intention to exercise the option, the parties are contemplating restructuring part of the transaction whereby Seller will enter into a true third party sale of the building and associated real property for approximately \$28 million. The proceeds would be used to retire the revolving credit and term loans secured by the mortgage. In connection with the sale of the building and associated real property, Buyer would enter into a lease of the building and associated real estate with the new third party owner under which Buyer would have primary liability for the lease obligations.

Immediately thereafter, Buyer would exercise its option and acquire all of Seller's operating assets and assume the liabilities associated with the operating assets. The consideration for the assets would still be the forgiveness of the debt discussed above (approximately \$41.1 million) and Buyer would still assume certain accounts payables and other liabilities (approximately \$15.5 million). The total value of these items is approximately \$56.6 million (less than the size of transaction test). Since the sale and leaseback transaction is occurring separate of, albeit related to, the immediately subsequent purchase of Seller's operating assets and the assumption of the liabilities associated with the operating assets, we have not included that the sale and leaseback transaction's value to determine whether the size of transaction test is satisfied. (See Informal Interpretations 96 and 97 of the Premerger

Notification Practice Manual).

Accordingly, due to the restructuring of the transaction because of limitations placed on the Buyer as a result of the debt covenants, it appears as if the size of transaction test will not be met and that no HSR filing is required. We note that HSR applicability played no role in the decision to restructure the transaction as outlined above.

We welcome your thoughts as to whether you agree with this analysis. If you have any questions, please give me a call.

Regards,

[Redacted signature block]

AGREE THIS IS NOT REPORTABLE

BM 5/12/08

[Redacted] P mail server made the following annotations on 05/12/08, 10:05:32:

-----  
IRS Circular 230 Disclosure: To comply with certain U.S. Treasury regulations, we in that, unless expressly stated otherwise, any U.S. federal tax advice contained in th communication, including attachments, was not intended or written to be used, and ca used, by any taxpayer for the purpose of avoiding any penalties that may be imposed taxpayer by the Internal Revenue Service. In addition, if any such tax advice is us to by other parties in promoting, marketing or recommending any partnership or other investment plan or arrangement, then (i) the advice should be construed as written i with the promotion or marketing by others of the transaction(s) or matter(s) address communication and (ii) the taxpayer should seek advice based on the taxpayer's parti circumstances from an independent tax advisor.

\*\*\*\*\*  
This e-mail is sent by a law firm and may contain information that is privileged or If you are not the intended recipient, please delete the e-mail and any attachments immediately.

\*\*\*\*\*