

Clark-Coleman, Sheila

From: [REDACTED]
Sent: Friday, June 06, 2008 11:50 AM
To: Clark-Coleman, Sheila
Cc: [REDACTED]
Subject: HSR question

agree one filing A acquiring B

RW concurs -

Thank you very much for talking with us yesterday concerning our HSR issue. Because the fact situation is somewhat complex, I thought it would be helpful to send a short email laying out the transaction in greater detail.

Company A is the UPE of five LLCs (V, W, X, Y and Z). It and its LLCs have entered into a series of agreements with a corporation, Company B, providing for the following:

1. A, V, and W will contribute cash to B in exchange for common stock of B (B is its own UPE).
2. X, Y, and Z will be merged into subsidiary LLCs of B. In exchange, B will issue common stock to the owners of X, Y and Z (for all of which A is the majority owner).
3. When the transactions are completed, A will be hold, directly or indirectly, a majority of the voting securities of B, making it the UPE of B. B will continue to exist in its present form, with its pre-transaction stockholders now holding a minority of its voting securities.

Because A will be acquiring common stock in B that exceeds the size of transaction test, we believe that A will be an "acquiring person" and B will be an "acquired person". Our question is whether B should also be regarded as an "acquiring person", and A an "acquired person" with respect to the LLC entities (X, Y, and Z) that are being merged into B subsidiaries. If this is the case, then we understand that this part of the transaction must be identified as a distinct acquisition and a separate filing fee will be payable.

If B were to remain its own UPE after the transaction is completed, then it seems clear that it is an acquiring person with respect to X, Y and Z. However, given that A is becoming the UPE of B, our question is whether B is an "acquiring person" under Section 801.2(a). As we understand the section, the LLCs will be deemed to be owned by A, the new UPE of B, and A owned the LLCs prior to the transaction. A will not be acquiring any new assets as a result of this part of the transaction.

In a previous informal staff opinion 0711016 (11/20/07), the fact situation addressed involved Company A acquiring the stock of Company B for cash and stock of Company A. The parent of Company B became the majority shareholder of Company A as a result. The letter stated that there was only one reportable transaction, with the parent of Company B as the acquiring person and Company A as the acquired person. This was the result "...because, at the end of the day, the Parent of Company B is the only UPE that holds voting securities that it did not hold prior to the transaction, and therefore is the only acquiring person under Sec. 801.2(a)." The acquisition of Company B stock by Company A was not reportable.

We also note that this analysis seems to underlie the result in Example 2 found in Section 801.2(f)(2). Here A contributes a manufacturing plant to an LLC in exchange for a controlling interest. A's acquisition of the controlling interest is reportable (with A as the acquiring person and the LLC as the acquired person). However, the acquisition of the plant by the LLC is not reportable because A is acquiring control concurrently of the LLC and thus retains control of the plant.

In our situation, because Company A will be the UPE of Company B following completion of the transactions, the acquisition of the LLCs by Company B would not seem to be reportable. However, we may have overlooked some step in the analysis or oversimplified the issues. Please let us know your thoughts and feel free to contact us to discuss or raise questions. My direct line is [REDACTED] may be reached at [REDACTED]

Many thanks again for your time and help.

6/6/2008