802.51

Verne, B. Michael

From: [redacted]
Sent: Tuesday, March 17, 2009 11:42 AM
To: Verne, B. Michael
Subject: HSR Reportability Question

Mike:

Good morning. Below is a description of an HSR reportability question that I was hoping to discuss with you. In that regard, I will give you a call to discuss this further, but I wanted to set out the facts and circumstances for your consideration in advance of the call.

Company A and Company B are foreign persons. They intend to form a joint venture (that will be the equivalent of a corporation) into which they will each contribute various entities and partial interests in entities. The joint venture, Company C, will be organized under foreign law and will be a foreign issuer. One of the entities, Company D, that will be contributed to the joint venture has US revenues and assets in excess of the thresholds set forth in Rule 802.51 (b). The other controlled entities being contributed (e.g., entities E, F, G and so on -- there are several entities being contributed) do not hold or have US assets or revenues. Further, Companies A and B each will contribute its respective 36% interest in Company D to Company C, such that Company C will hold 72% of Company D. (The public owns the remaining 28% interest.) Company A and Company B will make their contributions to Company C, and each will receive 50% of the voting securities of Company C in return. However, they will hold their 50/50 interests in Company C only as an interim step. Immediately after formation of Company C, the contribution of the entities and interests, in exchange for their 50/50 interests, Companies A and B will distribute their respective interests to their respective shareholding entities, which consist of a number of foreign entities (at least 10 shareholders each). In the final step of the formation, therefore, there will be numerous shareholders (at least 10) of Company C, but no shareholder will control Company C.

The specific question is whether Rule 802.51(b) applies to this transaction and exempts it from reportability. While Companies A and B will obtain control of Company C, that control will only be an interim step in the acquisition. The final step of the formation is that multiple entities (foreign persons) will hold interests in Company C but no foreign person will control

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Company C.

We also note further that a filing was made with respect to the formation/acquisition of Company D by Companies A and B. Three years ago, they filed to cross the 25% threshold. Specifically, they noted in their description of the transaction that, upon the formation of Company D (to which each contributed various entities), each would obtain just under 45% of the voting securities of Company D, and, through a shareholder agreement, each would be entitled to nominate half of the members of the governing boards, independently or jointly. Certain shares of Company D were sold to the public, resulting in public ownership of 28% of Company D, and reducing the holdings of each of Companies A and B to 36% apiece, with contined equal board control. The parties received early termination of the waiting period.

In conclusion, Company C, a foreign issuer, will not be controlled by any of the foreign person shareholders upon its formation, except only as a interim step. Moreover, Company D, the only entity being contributed to Company C that has or holds US revenues and assets, when formed by Companies A and B, was reported by Companies A and B.

Thanks in advance for your consideration.

I don't think you can apply continuum to the intermediate step of the formation of C and the acquisition of its voting securities by A and B because the ultimate step – the transfer of C voting securities to the foreign shareholders is not reportable. The acquisition of C voting securities is clearly not exempt under 802.51 because D has US assets > $65.2 MM. I think the only way to get around this is if when C is formed, it issues its voting securities directly to the shareholders rather than to A and B in the interim step. I don't think this raises avoidance issues because the substance of the transaction is the acquisition by numerous foreign persons of <50% of a foreign issuer. I don't know if this is possible – it's probably structured like this for tax purposes or to satisfy some jurisdictional requirement in the foreign country that C is being formed in.

3/17/09