

801.1 (c)
801.2**Verne, B. Michael**

From: [REDACTED]
Sent: Thursday, May 21, 2009 5:28 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Reportability of Sale/Leaseback Transaction

Hello Mike-

We wanted to ask you to confirm our analysis of an HSR reportability question related to a sale-leaseback issue. While a few of the informal opinions on the FTC's website appear to indicate that such transactions would not be reportable, we were unable to find an example directly on point.

Facts

We represent a company that owns, as an incidental part of its main business, a fleet of forty-three oceangoing tugs and barges used for hauling cargo between U.S. ports. Our client proposes to sell these vessels to a buyer and then lease the substantial majority (32) of them back through an arrangement called a "long term time charter" which is common in the industry. The reason for the sale/leaseback arrangement is that, due to specific maritime regulations governing the operation of vessels in the coastwise trade, our client cannot continue directly to operate the vessels, but needs to continue receiving their services in order to fulfill ongoing supply obligations to unrelated third parties. The sale will be structured so that the leaseback arrangement will be a condition to (and occur concurrently with) the closing of the agreement to sell the vessels.

This will be an arms-length transaction to an unrelated third party buyer which will be selected in an auction process. Both buyer/lessor and seller/lessee will exceed the statutory size-of-person thresholds. Our client has had the vessels appraised by an independent appraiser at about \$75M. However, given that as a condition to the sale the vessels must remain in their current service (instead of some other, perhaps more lucrative, use) through the leaseback, it is not clear whether the stated purchase price would satisfy the HSR size-of-transaction threshold.

Under the leaseback agreement, the only rights the buyer/lessor will acquire are (a) legal title to the vessels and (b) the revenue stream from the lease. The seller/lessee will maintain the exclusive authority to direct their use. The initial term of the lease would be five years, renewable depending on then-current business conditions. In addition, in the event certain contracts that the seller/lessee has with unrelated third parties for the supply of cargo to be carried by the vessels are not renewed when their terms expire, the vessels used for carrying that specific cargo would "roll off" the long term time charter, and would revert to the exclusive control of the buyer/lessor. Whether these "roll-offs" occur will depend on when the underlying supply contracts expire and whether they are renewed. Two of the vessels are assigned to fulfill supply contracts set to expire in six months. The remainder of the vessels covered by the long term time charter are evenly divided between those assigned to contracts which will expire in three and a half years and those assigned to contracts that will expire in five years. The lease will also specify that in the event the seller/lessee breaches its obligations under the lease, exclusive control of all the vessels will revert to the buyer/lessor. Finally, as noted above, eleven of the forty-three vessels will not be covered by the leaseback from the beginning. The buyer would assume exclusive control of these vessels immediately upon closing of the transaction.

Discussion

By our reading of prior PNO interpretations (see Informal Staff Opinions 0806007, 0006009 and 9011010), where a sale and leaseback transaction is a bona fide arm's length sale and lease transaction, the PNO characterizes it as the acquisition of a revenue stream by the buyer, deeming the seller to be maintaining beneficial ownership of the assets. Under this analysis, sale and leaseback transactions are not generally reportable.

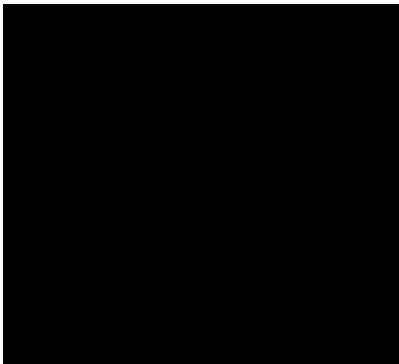
Based on this interpretation, we have reached the following conclusions about the specific fact pattern proposed here:

5/26/2009

1. Provided the fair market value, as determined in good faith by the board of directors of the buyer, of the eleven vessels to be acquired at closing that are not subject to the long term time charter arrangement (and therefore of which the buyer assumes exclusive control immediately upon closing) is not greater than \$65.2 million, no filing would be required for the initial sale/leaseback transaction. The PNO would characterize this initial transaction as (a) the acquisition of assets valued at less than the statutory size of transaction test and (b) the acquisition of a revenue stream, where beneficial ownership of the assets subject to the long term time charter remains with the seller/lessee.
2. Even if the sale/leaseback transaction were characterized as a sale of assets, the transaction would still not be reportable if the buyer/lessor's board determined in good faith that the fair market value of the assets being acquired in the transaction, including those assets subject to the long term time charter and those not included in it, and including whatever fair market value it assigned to the lease in its calculations, is not greater than \$65.2 million.
3. If the initial transaction is not reportable pursuant to the analysis in point 1. above, then if any vessels "roll off" the long term time charter (or in the event the seller/lessee breaches the lease), the buyer/lessor would need to determine, for the vessel(s) for which it acquired exclusive control, the fair market value of (a) such vessels at that time, and (b) pursuant to 801.13(b), any vessel(s) of which the buyer/lessor acquired control in the preceding 180 days. If the sum of (a) and (b) exceeds the then-current HSR size-of-transaction threshold, then the parties would be required to notify the transaction and observe the waiting period at that time. Similarly, an HSR filing would be required if the parties did not renew the lease after five years and the buyer/lessor's board determined that the fair market value of the vessels at that time exceeded the then-current statutory size-of-transaction threshold.

We would appreciate it if you could confirm this analysis is correct as soon as possible.

Best regards,



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1. Agree this is a non-reportable sale/leaseback arrangement
2. Moot
3. Not sure I understand this. If we take the position that beneficial ownership never passes from the lessor to the lessee, why would a filing be required for the "roll off" or breach by the lessee of the arrangement?

BW
5/27/09