801.2

**Verne, B. Michael**

**From:** [redacted]
**Sent:** Tuesday, July 14, 2009 2:18 PM
**To:** Verne, B. Michael
**Cc:** [redacted]
**Subject:** HSR Analysis

Mike:

Can you confirm our analysis below?

The asset purchase agreement ("APA") contemplates a single transaction: A will acquire certain assets of B for a purchase price (the "PP") equal to (i) $75mm in cash, (ii) $90mm in voting securities of corporate affiliate or parent of A ("Parent"); and (iii) $65mm in non-corporate interests of a master limited partnership controlled or affiliated with A (the "MLP").

For HSR purposes, I believe the transaction will be viewed in 3 parts:

1. A will acquire B's assets for $75 million cash,
2. B will acquire $90 million in Parent's common stock as a passive investment; and
3. B will acquire an approx. $65 million non-corporate interests in the MLP.

Regarding reportability under the HSR Act, here are my thoughts:

(I) A's acquisition of B's assets is a reportable transaction;

(II) B's acquisition of the Parent stock is also reportable because we assume that the FTC would treat A and B competitors since they are in the same industry and the FTC applies a rebuttable presumption that a competitor's acquisition of stock of another competitor is not "solely for investment purposes" and therefore not subject to the exemption in 802.9 of the regulations. However, assuming the FTC applies the "continuum" theory, we don't believe a separate filing will be required; rather it can be reported in connection with A's asset acquisition provided the steps in this transaction occur at the same closing and are part of the same agreement; and

(III) Provided B will not have control of the MLP as defined in 801.1(b)(1)(ii) of the regulations, the acquisition of the interest in the MLP is not reportable.

Assuming 1 and 2 constitute 1 reportable transaction under the continuum theory, we believe the FTC would require only one filing fee, but please confirm that the PNO will treat 1 and 2 as requiring only 1 HSR filing.

Also, regarding item (II) above, A and B are only competitors in this instance. Once the acquisition of the assets is consummated, we don't believe such entities will be viewed as competitors for antitrust purposes. If that's the case, we think that we may have the "solely for investment purposes" exemption. Further, if B has no intention of holding seats on the BOD and no intent to control in both cases of (II) and (III), does this provide further support for the "investment purposes" exemption?

Many thanks in advance.

1. Agree

2. Continuum cannot apply to B's acquisition of voting securities of Parent because it is subject to § 801.2(e) and therefore separately reportable. " Whenever voting securities or assets are to be acquired from an acquiring person in connection with an acquisition, the acquisition of voting securities or assets shall be separately subject to the act." Continuum applies to multiple transactions moving in the "same direction", not "opposite directions". I'm running your solely for purpose of investment question by some of my colleagues and will get back to you later today.

3. Also agree that the acquisition of a non-controlling interest in MLP is not reportable.

I ran your solely for purpose of investment issue by Marian and she took the position that the exemption is not available. She didn't want to set a precedent for using an exemption based on how the parties would look post-transaction

7/16/09

K. WALSH, K. BEN-, M. BRUNO CONCUR