

801.2

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, August 25, 2009 10:04 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR Questions - Separate Bankruptcy Proceedings with Trust/Conservatorship

Dear Mike -

Welcome back! I hope you had a great vacation.

[REDACTED], and I are working on acquisitions in connection with two bankruptcy proceedings. We have questions regarding who should file HSR as the acquired person(s), whether one or two filings are required, and if two filings are required, what are the relevant announcement of bankruptcy dates for purposes of Section 802.63.

The current factual background is as follows. Please assume that the size-of-person test is met in all instances.

Company A and several of its subsidiaries currently are in bankruptcy in Delaware. The Delaware proceeding was filed in May 2008. Holders of A debt, which is secured by the assets of A and its subsidiaries, will form a special acquisition vehicle (SPV) to acquire A's assets out of bankruptcy pursuant to a plan of reorganization in exchange for partial cancellation of A's debt obligations. The SPV will be controlled by Investor X, one of the debtholders. Investor X acquired most of A's debt post-announcement of A's intention to file bankruptcy. The post-announcement debt that will be extinguished for A's assets is in excess of \$65.2 million. The proportional value of A's assets relating to the post-announcement debt to be extinguished is in excess of \$65.2 million.

In December 2007, prior to the filing of the Delaware bankruptcy proceeding, A's New Jersey subsidiary (NJ Sub) was placed into a trust/conservatorship by the New Jersey authorities upon their denial to NJ Sub of an operating permit/license. The assets of NJ Sub are part of the security for A's debt, but NJ Sub is not a party to the Delaware proceeding. A retains a beneficial interest in the assets in the trust/conservatorship -- A will receive a portion of any sale proceeds. In April 2009, subsequent to the filing of the Delaware bankruptcy proceeding, the trustee/conservator placed NJ Sub into bankruptcy in New Jersey. The SPV intends to acquire the assets of NJ Sub through a credit bid in a 363(b) proceeding that will extinguish additional A debt. The amount of A's debt acquired by X after the announcement of NJ Sub's bankruptcy that will be extinguished in exchange for NJ Sub assets is in excess of \$65.2 million. The proportional value of the NJ Sub assets relating to the debt acquired after the announcement of the New Jersey proceeding is in excess of \$65.2 million.

(1) Will one or two HSR filings be required?

It seems to us that NJ Sub could be considered a separate HSR person from A, and thus two HSR filings will be required with NJ Sub and A the acquired persons, respectively. Even though A retains an interest in NJ Sub through the trust/conservatorship arrangement, this arrangement, as well as the fact that NJ Sub is part of a separate bankruptcy proceeding, could operate to sever the chain of control with A. In the alternative, if you prefer to treat NJ Sub as included in person A, we would file one HSR for both acquisitions, with A as the acquired person.

(2) If two HSR filings are required, who should file as the acquired persons?

It seems to us that A, as the debtor-in-possession, is the acquired person in connection with the acquisition in the Delaware proceeding and that the trustee/conservator should file for the NJ Sub as the acquired person in connection with the acquisition in the New Jersey proceeding.

(3) If two HSR filings are required, what is the relevant post-announcement of the intention to file bankruptcy date

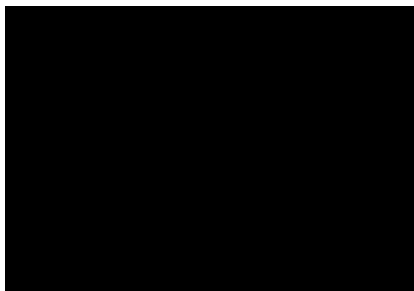
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for purposes of the "vulture fund" exception to the exemption in Section 802.63?

If separate HSR filings are required, it seems to us that each proceeding should have a separate date. In connection with the Delaware proceeding, the relevant date would be the public announcement of A's intention to initiate bankruptcy proceedings. In connection with the New Jersey proceeding, the relevant date would be the public announcement of the trustee/conservator's intention to initiate bankruptcy proceedings involving NJ Sub.

[REDACTED] and I are available pretty much any time today or tomorrow to discuss the transactions in greater detail. We also can try to answer any questions you may have via email. As always, thanks so much for your help!

Best regards,



1) 2 FILINGS
2) AGREE
3) AGREE
BW
K. WALSH CONCOM
8/26/09

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