Verne, B. Michael

From: [redacted]
Sent: Tuesday, August 25, 2009 11:47 AM
To: Verne, B. Michael
Subject: HSR Informal Interpretation

Mike -

Following up on our conversation this morning, I wanted to make sure I have the correct Hart-Scott analysis. As you may recall, I presented you with the following facts:

Company A issues and services credit cards. Company B is a retailer with a store-brand credit card, and is getting out of the credit card business. B is selling its credit card business to A, who will operate it for B going forward, including opening new accounts and servicing accounts. The transaction is structured as an acquisition of assets by A. The transaction will take place in three pieces:

Part 1: Accounts. A bank controlled by A will acquire the credit card accounts from a bank controlled by B for consideration of approximately $20 million. This piece of the transaction is subject to a Bank Merger Act filing under 12 U.S.C. sec. 1828(c), and is thus exempt from Hart-Scott filing requirements.

Part 2: Miscellaneous Assets. A will acquire certain miscellaneous assets with a small value pertaining to the credit card business. These are non-exempt and will be valued for purposes of calculating the Hart-Scott size-of-transaction.

Part 3: Receivables. A will acquire from B interests in credit card receivables through a master trust associated with the credit card accounts. These receivables have been "securitized," meaning they have been packaged into securities (called "certificates") that are purchased by investors. The certificates pay the investors an income stream as the receivables are paid. The receivables have been placed in an irrevocable common-law trust that holds them for the benefit of the certificate holders. A is acquiring B's interests and rights in the trust. A will acquire certain certificates that entitle it to a) an income stream from the accounts receivable placed into the trust ("Superior Certificates"), and b) residual income streams that get paid out after all other superior certificate holders have been paid ("Residual Certificates"). The Superior Certificates are sold to various investors, including A. A will be the only holder of Residual Certificates. Each investor certificate, including the Residual Certificates, represents an undivided interest in the trust. The trust holds the receivables for the benefit of all the certificate holders, and the certificate holders are considered beneficiaries of the trust. B presently holds both types of certificates (i.e., certificates entitling it to the income stream from the receivables and certificates entitling it to the residuals), and those certificates will be sold to A. A will also have the right to add credit card receivables to the trust and issue new certificates out of the trust. It will also have the right to remove receivables from the trust to the extent they exceed the amount necessary to support the various certificates. A will pay approximately $95 million for its acquired interests in the trust. The trust holds receivables of several hundred million dollars for the benefit of the various certificate holders.

Presented with these facts, you indicated that A would be deemed to be acquiring control of the trust, because it would have the right to take receivables out of the trust to the extent they exceeded what was necessary to support the certificates. You said this amounted to a reversionary interest in the trust. However, for purposes of determining the size of the transaction, you indicated that the value of the assets acquired would be the fair market value of the "excess" receivables in the trust as of the time of closing; i.e., the value of the receivables in the trust over and above what is necessary to pay the certificates, including the certificates to be held by A. By contrast, you said A would not need to value all the receivables held by the trust for the benefit of all securities holders, nor would it need to value the receivables underlying just its own certificated interests. You also confirmed that the value of the certificated interests to be acquired by A would be exempt as the acquisition of non-voting securities.

Please let me know if you disagree with any part of the above analysis. As always, thank you for your time and assistance.

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AGREE -
B
8/26/09