

Verne, B. Michael

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From: [Redacted]
Sent: Monday, November 16, 2009 2:29 PM
To: Verne, B. Michael
Cc: [Redacted]
Subject: HSR Question

[Redacted] and I are working on a proposed transaction and would appreciate your advice on an HSR question which has arisen. The facts are as follows:

Factual Circumstances

My client, Company A, is proposing to enter into a transaction with Andrew's clients, the current members (the "Existing Members") of Company B (which is an LLC). The purpose of the transaction is for A at some point to acquire all of the membership interests in B. However, the parties do not agree on the valuation to be placed on B and therefore propose to spread the acquisition out over several years so that ongoing performance can be evaluated.

In step one, A would acquire 55 percent of the membership interests in B for a purchase price of less than \$65.2 million (the "Initial Purchase"). This Initial Purchase would give A control of B for HSR purposes because A would obtain a right to more than fifty percent of B's profits and more than 50 percent of B's assets on liquidation after payment of debts.

The term sheet then sets forth three possible scenarios concerning a sale of the remaining 45 percent of membership interests in B (the "Subsequent Purchase(s)"). First, it gives the Existing Members "put" rights whereby they (acting collectively) can require A to purchase all of the Existing Members' interests on any of four dates falling between June 30, 2011 and November 30, 2014 at prices in accordance with price formulas in the term sheet. Second, A is given certain "call" rights where it has the option to acquire all of the Existing Members' interests on any of six dates falling between December 31, 2010 and December 31, 2013 in accordance with price formulas in the term sheet. Finally, the term sheet provides that if on January 31, 2015, the Existing Members remain equity holders of B (i.e., none of the put or call rights has been exercised), a buy/sell process shall be triggered pursuant to which an independent third party shall determine the fair market value of the membership interests then held by the Existing Members, and A shall be required to buy and the Existing Members will be required to sell all such membership interests at the value so established. Under any of these three scenarios, the aggregate amount paid by A for the Initial Purchase and the Subsequent Purchase(s) would at some point exceed \$65.2 million.

Question

Our question is whether this transaction should be viewed as:

a. A purchase of the entire company for an undetermined acquisition price, in which case A should make a fair market valuation of what a third party buyer would pay now to acquire all of B (which valuation, if above \$65.2 million, would require a current HSR filing, but no filings for the Subsequent Purchase(s) because control would be obtained in the Initial Purchase); or

b. A purchase of control in connection with the Initial Purchase but for a value below \$65.2 million, with no HSR filing being necessary for the Initial Purchase because it is below the HSR transaction threshold, and no HSR filing being required for the Subsequent Purchase(s) because A would already have obtained control of B in connection with the Initial Purchase?

Thank for your your assistance.

[Redacted signature block]

DJ
11/18/09

a) (IF IT IS A CERTAINTY THAT AT SOME POINT B WILL BE ACQUIRED IN ITS ENTIRETY, WE VIEW A SINGLE TRANSACTION WITH MULTIPLE CLOSINGS AS REQUIRING A FILING UP FRONT THIS CAN BE DISTINGUISHED FROM A BONA FIDE OPTION THAT IS NOT CERTAIN TO BE EXERCISED WHEN WE WOULD COME OUT WITH