

801.10

Verne, B. Michael

From: [REDACTED]
 Sent: Tuesday, November 24, 2009 11:30 AM
 To: Verne, B. Michael
 Cc: [REDACTED]
 Subject: HSR analysis question

Good morning Mike.

Would you please let us know whether you agree with the following analysis?

Company A and Company B meet the size of parties thresholds under the HSR. Company B is an LLC controlled by a husband+wife UPE. Company A plans to acquire 100% of LLC interests of Company B for approximately \$187.5 million through the following acquisitions that will occur at the same time:

- An acquisition of a controlling (just over 50%) LLC interest in Company B from a husband+wife UPE;
- An acquisition of all the shares of a C Corp (not controlled by a husband+ wife UPE) whose sole asset is a noncontrolling (41%) LLC interest in Company B; and
- Acquisitions of the remaining noncontrolling LLC interests from two individual unrelated holders.


Only the first acquisition would be reportable under the HSR. The acquisition of C corp's shares would be exempt under 802.4, because its sole asset is an HSR exempt minority interest in the LLC. The two acquisitions from minority holders would be exempt as acquisitions of noncontrolling LLC interests. Do you agree?

While all the transactions will occur simultaneously, the reportable value of the transaction seems to depend on the order of the individual purchases. If Company A acquires the controlling LLC interest first, it would pay the filing fee based on the portion of the total purchase price attributable to that controlling interest. Its subsequent acquisitions of the remaining, noncontrolling LLC interests in Company B would be exempt under 802.30.

However, if Company A acquires the noncontrolling interests first (these acquisitions would be exempt), and then acquires the controlling interest, it would have to aggregate the value of all interests held as a result of the last acquisition under 801.10(d) and pay the filing fee based on the entire purchase price.

Given that all the transactions will occur simultaneously, are the companies free to order the acquisitions in such a way as to have the acquisition of the controlling LLC interest occur first and determine the filing fee accordingly (i.e. based on the portion of the total purchase price attributable to that controlling interest)? There would be an HSR filing in any event; the only issue is the filing fee amount.

Many thanks in advance,


 11/24/09

[REDACTED]

[REDACTED]

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The value of the transaction hinges on what agreements have been entered into and whether the three steps are conditional on one another. If so, we would look at it as an acquisition of 100% of the interests in B and the value would be \$187.5 MM. The acquisition of C-Corp would be exempt under 802.4, so not separately reportable.

When agreements have been entered into to acquire 100% in contemporaneous steps, you can't break out each step and analyze it separately. That would be akin to saying that you have entered into agreements with 20 shareholders to acquire 100% of the voting securities of a closely-held corporation for a total of \$200 MM, but the transaction is not reportable because each shareholder is only selling 5%, valued at \$10 MM.