

801.40  
801.11  
801.1(b)**Verne, B. Michael**

**From:** [REDACTED]  
**Sent:** Thursday, November 04, 2010 12:41 PM  
**To:** Verne, B. Michael  
**Subject:** LBO Acquisition - Rules 801.40, 801.21, 802.4, 801.11(e)(1)

Please confirm the conclusions stated below based on the assumed facts stated therein, including in particular that (i) formation of Newco is exempt from the requirements of the HSR Act, (ii) for Alternative 1, Newco's acquisition of A is subject to the requirements of the HSR Act, and F1 as the ultimate parent entity of Newco and A as the acquired person are required to file HSR Forms, and (iii) for Alternative 2, Newco's acquisition of A is not subject to the requirements of the HSR Act, no party is required to file HSR Forms for same, and F1 and Newco would not be subject to the requirements of the HSR Act in connection with F1's exercise of the contingent right to expand the size of the board and designate additional directors of Newco as described below.

1. Four private equity funds (F1, F2, F3, F4) will form a new joint venture corporation (Newco) to acquire 100 percent of the voting stock of an existing corporation (A) through a merger of Newco with and into A with A surviving, in consideration for cash payments to the shareholders of A in a total amount of \$170M.

2. Newco will be capitalized with \$100M in nonrecourse debt from third-party sources (i.e., the debt is not guaranteed by the owners of Newco), and equity contributions of (i) \$50M by F1, (ii) a total of \$25M by F2, F3, and F4, and (iii) a total of \$17M of rollover equity by the existing owners of A.

3. Each of the Funds has total assets and annual net sale in excess of \$100M (as adjusted; now \$126.9M); A does not engage in manufacturing and has total assets of approximately \$95M, of which less than \$1M is cash.

4. The formation of Newco is covered by Rule 801.40 but is exempt pursuant to Rules 801.21 and 802.4, in that F1, F2, F3, and F4 will contribute cash and no other assets to Newco. *ALSO NO FUND IS TAKING BACK > \$63.4M IN NEWCO VLS.*

5. Alternative 1.

(i) F1 will acquire 50 percent or more of Newco's voting stock and/or will have the power presently to designate 50 percent or more of Newco's directors, and thus will control Newco under Rule 801.1(b)(1) and (2) of the FTC Premerger Notification Rules.

(ii) F2, F3, F4, and the existing owners of A each will acquire minority interests in voting stock of Newco; none of these persons will have the power presently to designate a majority of Newco's directors, and none will receive voting stock of Newco valued in excess of \$50M (as adjusted; now \$63.4M).

(iii) The acquisition of A by Newco is subject to the requirements of the HSR Act. The size of person tests are satisfied by A and by F1, which will control Newco. The size of transaction for the acquisition of A is \$170M and exceeds the minimum size of transaction threshold of \$50M (as adjusted; now \$63.4M).

(iv) Newco's acquisition of A is not exempt under Rule 802.4 because A holds non-exempt assets in excess of \$50M (as adjusted; now \$63.4M), and no other exemption applies to Newco's acquisition of A based on the facts described above.

(v) F1 will file an HSR Form as the UPE of Newco; A will file an HSR Form as the acquired person; the other owners of Newco will not file HSR Forms, as their acquisitions of Newco voting stock do not satisfy the minimum size of transaction threshold.

6. Alternative 2.

(i) F1, F2, F3, F4, and the existing owners of A each will acquire less than 50 percent of Newco's voting stock. Each of these persons may have rights to presently designate one or more directors of Newco, but none of these persons will have the power presently to designate a majority of Newco's directors. Thus, none of these persons will control Newco under Rule 801.1(b)(1) and (2).

(ii) F1 will have contingent rights under the Bylaws of Newco to expand the size of the Board and designate one or more additional directors of Newco subsequent to closing. If F1 exercises this right, it will have the power to designate a majority of the directors of Newco and thus would control Newco under Rule 801.1(b)(2).

(iii) The acquisition of A by Newco is not subject to the requirements of the HSR Act: Newco would not satisfy the size of person test by virtue of Rule 801.11(e)(1), in that all of Newco's assets would be cash held for the acquisition of A, which are excluded under that Rule for purposes of determining Newco's total assets.

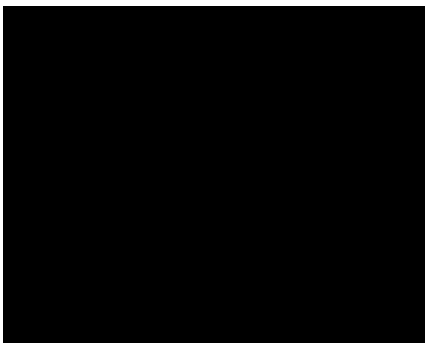
(iv) Additionally, some or all of the Funds and former owners of A may determine that their respective acquisitions of Newco voting stock do not exceed the minimum size of transaction threshold of \$50M (as adjusted; now \$63.4M), based on the transaction prices stated in the merger agreement or based on a fair market valuation of same.

(v) None of the parties would file HSR Forms for Newco's acquisition of A.

(vi) F1 will not be subject to the requirements of the HSR Act in connection with the exercise of its right to expand the size of the Board and designate one or more additional directors of Newco as described above in subpart (ii), because F1 will not acquire any assets or voting securities of Newco at that time.

ASSUMING NO 801.90 ISSUE

Ben  
11/4/10



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