801.1(b)

Verne, B. Michael

From: [redacted]
Sent: Monday, April 11, 2011 7:54 PM
To: Verne, B. Michael
Subject: HSR Analysis

Mike:

I hope all is well. Please let me know whether my analysis of the transaction described below is correct.

Facts:

Two companies, W (our client) and M, want to enter into a JV to purchase, indirectly, an interest in a Delaware limited liability company (A) that was formed in 2007 to develop and operate wind farms. A currently operates four wind farms. The interest in A to be purchased by JV currently is owned by an en entity controlled by M (M Affiliate) and is a minority interest in A. The purchase would be effected in three related contemporaneous transactions.

In Transaction 1, W and M would invest in a dormant LLC presently controlled by W. W would amend and restate the operating agreement of JV and would invest $27 million for class B membership interests, while M would invest $36.6 million for class A and class C membership interests. M would also lend to the JV $226 million.

In Transaction 2, M Affiliate would transfer a majority of its (minority) interest in A to two LLCs (1 and 2), which are presently dormant LLC subsidiaries of M.

In Transaction 3 – JV Co would acquire a 99% interest in each of 1 and 2 from an affiliate of M with the proceeds of the capital contributions and the loan. When the dust settles, 1 will have an investment of $243 million in A and 2 will have an investment of $46 million in A. Collectively, 1 and 2 will own 49% of A's class B membership interest, but ultimately would not have the right to 50% of A's profits or assets upon dissolution.

Each of the class B interests and the class C interests in JV are entitled to a stated rate of return which would accumulate if not paid currently. Income of the JV received from its investment in A would first be used to pay principal and interest on the loan from M. Once the loan is repaid in full, available cash, if distributed by the Board of JV, would be paid in the following priority: (i) first to the accumulated return to the Class C interests; (ii) second to the accumulated return on the Class B interests; (iii) third, 85% to the Class B interests and (iv) the remainder to the Class A interests. I understand that, based on current cash flows from A, the parties expect the loan to be repaid sometime in year 2 which means there will be a few months beginning in year 2 in which the Class C and Class B returns are expected to be paid before W becomes entitled to exercise the put.

In liquidation proceeds are paid in the following priority: (i) liquidation expenses, (ii) accumulated return on the Class C interests, (iii) accumulated return and return of capital to Class B interests, (iv) return of capital to Class C interests, (v) 85% of remainder to Class B interests, and (vi) remainder to Class A interests. The parties expect that structure would remain in place for approximately 3 years, after which W can "put" its interests in A to M. Various events, generally within the control of M, would allow W to exercise its put prior to 3 years.

Analysis:

Stage 1 – W has no filing obligation because its purchase of a $27 million membership interest falls below the size of transaction test. Furthermore, although W's acquisition of class B (preferred) interests will entitle it to 85% of the assets/profits, the waterfall is structured such that W will exit within 3 years. Moreover, W is not expected at this time to receive payments until middle of year 2. Accordingly, W does not "control" JV; rather, M controls JV.

Stage 2 – Because M controls JV, its purchase of membership interests in LLC 1 and 2, which were dormant downstream subsidiaries of M, is exempt under 802.30.

Stage 3 – Because M will not be acquiring control of A, that acquisition is not subject to HSR either.

Many thanks.

AGREE
B
4/12/11

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