801.2

Verne, B. Michael

From: [redacted]
Sent: Tuesday, April 19, 2011 7:49 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: RE: HSR hypothetical

Mike:

Thank you for the quick feed back in your email below on the HSR issues we have raised. Based on that input, here is a more detailed hypothetical to help us confirm that the proposed transaction is not HSR reportable and would not be viewed as a transaction or device for avoidance under 16 C.F.R. § 801.90.

Proposed Transaction

There are a series of related funds (the "Funds"), all of which are limited liability companies, that have invested in a corporation ("Corporation"). Each fund is its own ultimate parent for HSR purposes – there is no person with the right to half or more of the profits or half or more of the assets upon dissolution of any of the funds. Several of the Funds have been formed with the sole purpose of investing in the Corporation and all of these Funds have a common managing member (there also are a couple of related Funds that would intend to invest in other opportunities as well). These Funds serve to pool the investments of a number of small investors that on their own generally would not be large enough to invest directly in the Corporation.

One of the Funds that solely exists to invest in the Corporation, Fund A, would trigger an HSR filing obligation if Fund A made any further investments in the Corporation. There is another round of financing coming up for the Corporation in which a newly issued class of preferred voting securities in the Corporation will be offered. In order not to trigger an HSR filing, consideration is being given to not making any further investment through Fund A in the Corporation. In that scenario, to allow the investors in Fund A that are interested in the next round of financing for the Corporation to make further indirect investments in the Corporation, consideration is being given to the two following options.

Option 1: In this scenario a new Fund, Fund E, would be created to make further investments in the Corporation and Fund E would only be open to investors from Fund A. Under this option, Fund E would be the only Fund through which Fund A investors would be permitted to make further investments in the Corporation. Fund A has over a 100 investors, and it is very unlikely that all would chose to invest in this next round of financing (whether permitted through Fund A or Fund E). Further, you can assume that the individual investors' respective ownership percentages of Fund E would not all mirror the ownership percentages in Fund A since each of the many individual investors will need to make a decision on the amount of money to put in.

Option 2: Unrelated to HSR, there has been consideration by the company that gets paid a fee to manage the Funds to create a new Fund for new investors to invest in the Corporation. It is unclear at this stage whether this new Fund will be created because permission is needed

from the Corporation. If this new Fund is created, in lieu of creating Fund E for the investors from Fund A, consideration is being given to letting the investors in Fund A make further investments in the Corporation through this new Fund. While new investors (those who do not already have any investment in the Corporation through any of the affiliated Funds) would have to invest a certain minimum amount to participate, such a minimum would not apply to the investors who had already put money into Fund A during prior financing rounds for the Corporation. In Option 2, while the existence of some type of new Fund would not be solely for HSR purposes, the using of this new Fund for further investments by Fund A investors would be done in order not to trigger an HSR obligation that would arise if Fund A made further investments in the Corporation.

Under either option 1 or 2, you can assume that the new Fund would not subsequently be transferring or selling shares of the Corporation to Fund A such that Fund A would not end up holding the shares of the Corporation acquired by the new Fund.

The new Fund would not have the same HSR ultimate parent as Fund A. The Funds would have the same managing member but would not be commonly controlled for HSR Act purposes. While as a practical matter the managing member would generally vote all shares in the managed funds the same way, this would not necessarily always be the case. Because Fund A would own different series of the Corporation's preferred stock than the new Fund with different rights, preferences and privileges (also, different per share purchase prices), the managing member's fiduciary duty to each fund could result in different votes on certain shareholder matters under certain circumstances.

Conclusions

Can you please confirm that our following understanding is correct:

(1) Whether option 1 or 2 is pursued, based on the above facts, the acquisition of shares in the Corporation by the new Fund would not be a transaction or device for avoidance under 16 C.F.R. § 801.90.

(2) The acquisition by the new Fund of shares of the Corporation would not be HSR reportable assuming that this Fund is its own ultimate parent and would not hold in excess of $66 million in voting securities of the Corporation.

(3) The new Fund would be considered independent of Fund A assuming that the two funds are not commonly controlled for HSR Act purposes and assuming that (1) there is no agreement for the new Fund to transfer the shares of the Corporation that it acquires to Fund A and (2) the new Fund does not, in fact, subsequently transfer shares of the Corporation to Fund A.

(4) The acquisition by the new Fund would not be considered a sham even if the members of Fund A and the new Fund are the same where all of the investors in each Fund do not all hold the same ownership percentage in each fund.

* * *

Please let me know as soon as possible if you disagree with any of the conclusions discussed above. Thank you for your assistance in this matter.

Best regards,

[redacted]

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Friday, April 15, 2011 12:27 PM
To: [redacted]
Cc:
Subject: RE: HSR hypothetical

Here's Compliance's take on it.

In our view, it is ok to create a new entity to make the acquisition even if the reason for doing so is to avoid HSR **so long as** it is truly a new, independent entity. Although it would be created for the purpose of avoiding the filing obligation, you still have to look at the substance of the transaction and if the substance is a separate entity, then it is ok.

However, if the members of Fund A all participate in the same propositions of the new entity, it would probably be viewed as a sham and an acquisition by A. If the new entity is designed just to hold the shares until after A files and the waiting period expires, after which A will acquire the shares from the new entity, then this could be viewed as an acquisition by an agent of A (see SCI) or a step transaction (see Beazer). The same analysis would hold if existing entities are used to hold the shares until A files and observes the waiting period. If the going-in plan is for A to acquire the shares after the waiting period, then this is an acquisition by A now whether it uses already existing entities or newly formed entities to acquire the shares.

Bottom line: This looks like it is being done for the purpose of avoiding, but without know many more details (essentially seeing how it plays out in the future) we can't determine whether the substance of the transaction is a violation or not.

So if you are bringing in new investors it looks like you're OK

From: [redacted]
Sent: Thursday, April 14, 2011 3:47 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: RE: HSR hypothetical

Mike,

We will plan on calling you at 10 a.m. tomorrow if that works. We are generally flexible tomorrow morning such that if there is a better time for you we also are happy to talk at a different time.

Thanks.

1) As I advised earlier, the formation of a new fund to make an acquisition is not in and of itself a device for avoidance, unless the new fund has the same members, pro-rata, as the existing fund that originally was going to make the acquisition, and the new fund was formed for no purpose other that avoiding a HSR filing. Beyond that, we have no way of knowing what will happen post-consummation, so cannot advise on that aspect of avoidance.

2) agree

3) agree

4) see 1

4/20/11