801.10

Verne, B. Michael

From: [redacted]
Sent: Tuesday, April 26, 2011 10:12 PM
To: Verne, B. Michael
Subject: HSR Question - Size of Transaction Test

Mike,

I write with a question regarding the calculation of the "size-of-transaction" for an acquisition of 100% of the voting securities of a target company, determined based on 801.10(a)(2), where the nominal purchase price is above the HSR thresholds, but where adjustments in computing the value of the voting securities to be acquired, may make the acquisition not-reportable or may impact the filing fee if the acquisition is reportable. My question relates to whether it is appropriate to reduce the nominal purchase price for certain categories of expense in computing the "acquisition price" for HSR purposes.

First, I understand that the following should not be included in the acquisition price based on previous informal staff opinions:

- Repayment of Company Debt: The acquisition price should be reduced by any repayment from the deal proceeds of outstanding debt of the company, even if the debt is owed to the parent company, as explained in Informal Staff Opinion 0805010 (May 16, 2008).

- Transaction Expenses: The acquisition price should also be reduced by any transaction expenses to be paid from deal proceeds, because they are not viewed as consideration that is being paid to the shareholders, but are merely the cost of getting the deal done, as explained in the same Informal Staff Opinion 0805010.

- Change of Control Payments to Employees: Because these payments are to compensate current employees and are either compensation for services rendered or retention payments, they can be excluded from the acquisition price, as suggested in Informal Staff Opinion 0706005 (May 5, 2007).

I write to ask about two other adjustments and whether they should also be excluded from the size of transaction calculation.

- Tax Adjustment Amounts: These amounts represent taxes that accrue to the target company prior to closing, including for a spin-off immediately before closing. Because the tax adjustment amounts are for taxes that accrue to the target company and not to the shareholders, it would appear that these amounts should be excluded from the acquisition price. Like the amounts above (company debt, transaction expenses, and payments to employees), these payments will reduce the deal proceeds paid to the shareholders.

- Preferred Stock Accrued Dividends: The accrued dividends for preferred stock are a liability insofar as in the event of liquidation of a company, the target company would be required to pay such dividends as a liquidation preference. Such liability, however, would not survive an acquisition, insofar as the stock is convertible and receives compensation in such acquisition. Moreover, the merger agreement defines the "merger consideration" for the preferred stock to include the accrued dividends and such consideration will be distributed on a per share basis.

Please let me know if it is appropriate to adjust the acquisition price by these amounts. If it would be useful for us to discuss these issues, I would be pleased to do so. I am forwarding this inquiry by email without calling in advance because I will be on an airplane on Wednesday morning, and time is of the essence in the matter. I can be available on Wednesday afternoon, however, if clarification of any of the above would be useful.

AGREE - BOTH CAN BE EXCLUDED
BM
4/27/11

Thanks, as always, for your time.