801.1(c)

Verne, B. Michael

From: [redacted]
Sent: Monday, May 23, 2011 2:35 PM
To: Verne, B. Michael
Subject: HSR Questions

Dear Mike,

We are analyzing a series of related transactions to see if an HSR filing is required, and if it is, whether we need to submit one or two HSR Premerger Notification Forms for the two acquired persons involved in the transaction. I have several questions regarding the application of the HSR Regulations, which I set forth by topic in three sections below.

I. Determination of Percentage of Voting Securities Held By Grantors of a Revocable Trust

Some of the shares in the acquired entities are held through a revocable trust (the "Trust"). The trust has three grantors (Persons 1, 2, and 3), which are all adult siblings. Each grantor receives equal amounts (*i.e.*, one-third) of the net income earned from the property of the Trust (*e.g.,* shareholdings in the companies subject to the acquisition). Upon the death of a grantor, the income of that grantor will be paid per stirpes to the descendant of that grantor.

Interpretation A: My understanding of Section 801.1(c)(4) is that all of the holdings attributable to the Trust are attributable to each grantor. For example, if the Trust holds 45 percent of the voting securities of Target X and Persons 1 and 2 each separately (and directly) hold 10 percent of the voting securities of Target X, then Persons 1 and 2 would each hold 55 percent of the voting securities of Target X (for HSR purposes) and would therefore each be UPEs of Target X. I believe one of my colleagues confirmed this interpretation of the regulations with you fairly recently.

Interpretation B: However, Informal Interpretation #0506010 provides that each Person would be deemed to hold 1/3 of the voting securities of the trust. See http://www.ftc.gov/bc/hsr/informal/opinions/0506010.htm. Using the example above, each Person 1 and Person 2 would hold for HSR purposes 25 percent of Target X ((1/3 x 45 percent) + 10 percent = 15 percent + 10 percent = 25 percent).

Please confirm which interpretation above is correct: A or B?

II. Aggregation of Voting Securities

Company A proposes to acquire Target X, Target Y, and Target Z for $70 million. Person 1 is the UPE of Target X, Target Y, and Target Z. Person 2 is the UPE of Target X and Target Y (but not Target Z because Person 2 holds less than 50 percent of the voting securities in Target Z). The acquisition value of Person 1's shares is $40 million and Person 2's shares is $30 million.

My question is whether Company A's acquisition of (a) Person 1's voting securities in Target X, Target Y, and Target Z and (b) Person 2's voting securities in Target X and Target Y are treated as one transaction. My understanding is that they would be treated as one acquisition for the reasons stated below. See http://www.ftc.gov/bc/hsr/informal/opinions/0404015.htm. Under 801.14(a), Person 1's voting securities in Target X, Target Y, and Target Z would be aggregated, and Person 2's voting securities in Target X and Target Y would be aggregated. Under 801.13(a), the voting securities of each target company that is part of the acquisition would be aggregated (*e.g.,* Person 1 and Person 2's voting securities in Target X would be aggregated). Taken together, all of voting securities to be acquired by Company A from Person 1 and Person 2 in the target companies are aggregated and would be treated as one acquisition for HSR purposes.

Assuming this is correct, an HSR filing is required because the size-of-persons test and size-of-transaction test

(greater than $66 million) are met for this transaction. Please confirm that we need to prepare two separate HSR filings for Person 1 and Person 2 and not a combined form for both parties. Please also confirm that only one filing fee is required. This is not a Section 803.9(a) situation because there are two acquired parties that are involved in the acquisition and not two acquiring parties.

III. Foreign Holdings

Target X is a U.S. company with assets and sales in the United States. Target X owns 99 percent of the voting securities in a non-U.S. company, Subsidy X. Subsidy X has no sales in or into the United States and owns no assets in the United States. Can we exempt the value of Subsidy X (even though it is an indirect acquisition by Company A through Target X) in determining the value of the transaction?

If we cannot exempt the value of Subsidy X in determining the value of the transaction, would the the answer change if Target X was only a U.S.-incorporated holding company with no assets or sales in the Untied States?

* * *

Please feel free to call or email me should you need further clarification regarding fact pattern described above.

Thank you,

[redacted]

[redacted]

[redacted]

[redacted]

---

1. We are inclined to go with the 2005 interpretation. It makes sense to us to attribute 1/3 to each of the grantors since they each get 1/3 of the income of the revocable trust.

2. We agree with this analysis. Person 1's holdings of X, Y and Z and Person 2's holdings of X and Y should be treated as one $70 million transaction. You don't need to do two forms if you break out the relevant portions, i.e., "as to Person 1 and as to Person 2". Only one filing fee is required.

3. No – the value is the full value of Target X, including the value of Sub X. The answer would change if Target X had no US assets or sales, because the transaction would be exempt under § 802.4.

BM
5/25/11