802.4

Verne, B. Michael

From: [redacted]
Sent: Saturday, June 04, 2011 9:49 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: Confirmation--Exemption 802.4/802.50

Mike,

Thank you for taking the time Friday, May 27, 2011, to discuss whether a Hart-Scott-Rodino ("HSR") Act filing will be required in connection with a proposed transaction, an acquisition of the voting securities of a company with substantial foreign assets. As we discussed, we believe, and you confirmed, that an HSR filing will not be required under the facts described below.

Company A proposes to acquire all of the voting securities of Company B for consideration of approximately $320 million in stock and cash. The parties believe that the proposed acquisition is exempt under Rule 802.4 because Company B and its subsidiaries do not have non-exempt assets with a fair market value over $66 million. Company A has determined that Company B and its subsidiaries have (1) cash and cash equivalents of approximately $25 million (exempt under Rule 802.21), (2) assets located outside the U.S. that did not generate sales in or into the U.S. over $66 million in the most recent fiscal year (exempt under Rule 802.50) and (3) remaining assets located in the U.S. with a fair market value of approximately $14 million, consisting of: approximately $8 million of tangible assets and $6 million of intangible assets.

Description of Company B's Business and Assets:

Company B is a corporation incorporated in the U.S. Company B has a subsidiary (Sub A) that is incorporated outside the U.S. and contracts with foreign third party manufacturers located outside the U.S. for the manufacture of certain products outside the U.S. Once manufactured, pursuant to a distribution agreement between Sub A and a distributor, Sub A sells the product to a distributor overseas who then distributes the products to other foreign third party manufacturers that incorporate Company B's product into other products to be resold to customers. The distributor does not control Sub A and is not an affiliate of Sub A.

The title to and risk of loss on these products passes from Sub A to the distributor outside the U.S. A small portion of the products are sold by Sub A to Company B who then sells to U.S. distributors who then distribute to other manufacturers who incorporate the product into other products and/or directly to U.S. customers.

Company B has an agreement with a technology product company (Company Z), an unaffiliated third party, pursuant to which Company B, through Sub A, is permitted to sell products that foreign manufacturers that work for Company Z ultimately incorporate into its products. Neither Company B nor Sub A are parties to the agreements between Company Z and its manufacturers. The agreement between Company B and Company Z permits, but does not require, the products to be sold into the U.S. However, Company B knows that some of its products, including the products sold initially outside the U.S., will eventually be incorporated into other products that are sold into the U.S. The products manufactured in Company B's business are not designed in a way that they can only be sold into the U.S.

The tangible consolidated assets of Company B consist of approximately $8 million of inventory, property and equipment located in the U.S., approximately $31 million of inventory, property and equipment located outside the U.S. and approximately $25 million of cash and cash equivalents (foreign and domestic). The majority of the value of Company B's consolidated assets are intangible assets consisting of intellectual property, including patents, registered mostly in the U.S. with some registered abroad, and contract rights. Company B owns the intellectual property but has transferred the foreign rights to Sub A.

HSR Analysis

The parties believe that all sales of Company B's subsidiaries that are completed outside the U.S. do not constitute "sales in or into the U.S." and only the sales directly to U.S. distributors/customers by Company's B and/or its subsidiaries constitute sales in or into the U.S. In accordance with informal interpretation 216 in the Premerger Notification Manual, beneficial ownership in the non-U.S. customer sales passes outside the U.S., and even though Company B knows that some of its products are eventually incorporated into other products that are sold in the U.S., Company B cannot require its products to be incorporated and sold into the U.S. by the third parties and Company B's products are not designed in a way that they can only be sold in the U.S. Approximately 97.3% of Company B's consolidated revenues for the last fiscal year ($78 million) were generated from sales outside the U.S. and approximately 2.7% were to U.S. customers ($3 million).

Company A is in the process of determining the fair market value of the intangible property, including the goodwill associated with the intangible property. Company A is conducting its fair market valuation following informal interpretations of the Premerger Notification Office, including interpretation 0411005, that allocate the value of intangible assets as foreign or domestic according to the source of Company B's revenues, foreign or domestic. Accordingly, Company A will determine the fair market value of all Company B's intangible property and goodwill associated therewith and then allocated the value between the U.S. and abroad based on the source of Company B's revenues, 97.3% to foreign ($78 million) and 2.7% to U.S ($3 million). Assuming that the fair market value of the intangible assets is the purchase price ($320 million) less the tangible assets and cash ($64 million), the total value of the intangible assets would be approximately $256 million, and 3% of that would be approximately $6 million.

In conclusion, Company B and its subsidiaries do not have non-exempt assets with a fair market value over $66 million because:

(1) approximately $25 million of its assets are exempt under Rule 802.21 as cash and cash equivalents,

(2) approximately $281 million of its assets--consisting of $31 million in inventory, property and equipment and $250 million in intangible assets valued as described above--are exempt under Rule 802.50 because they are located outside the U.S. and did not generate sales in or into the U.S. over $66 million in the most recent fiscal year and

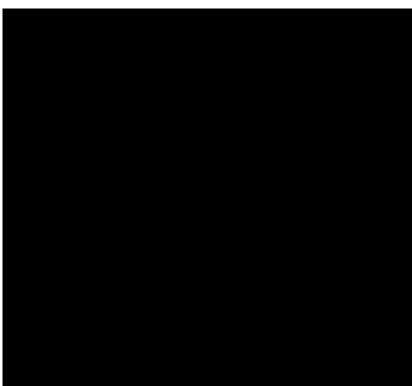
(3) the fair market value of the remaining assets located in the U.S. is approximately $14 million, and includes $8 million in inventory, property and equipment and $6 million in intangible assets valued as described above.

You agreed with our analysis that this transaction was exempt under 802.4.

At your earliest convenience, please send us confirmation that the above accurately reflects our conversation. Thank you again for your time

Regards,

AGREE
BM
6/6/11



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