801.2(d)

Verne, B. Michael

From: [redacted]
Sent: Tuesday, July 19, 2011 4:34 PM
To: Verne, B. Michael
Subject: HSR reportability of international merger transaction

Mike:

I write for guidance regarding a merger transaction between a US LLC and a Delaware corporation which has no US assets and negligible US sales (<$10K).

Facts: We represent a U.S. LLC (Buyer) that is essentially acquiring all the shares of a Delaware corporation (Target) in a stock-for-stock merger transaction. At the end of the transaction, the owners of Buyer will own 75% of the combined company.

The structure of the transaction is somewhat complicated and involves several essential steps that I will outline below. However, as further discussed below, the form of transaction does not seem to be dispositive given the goal of the HSR regulations (particularly Section 802.4) to apply exemptions consistently regardless of the form of the transaction.

Assume the size-of-person and size-of-transaction tests are met. Target's assets are located outside of the US and it generated less than $10,000 in U.S. royalties in its most recent fiscal year.

1. Buyer and Target will together form a new entity (New Public Company) by each contributing cash; Buyer and Target will then each own 50% of the outstanding common stock New Public Company.

2. Merger Sub, a Delaware corporation, will be formed as a wholly-owned subsidiary of New Public Company.

3. Each of the three owners of Buyer will contribute all of their ownership interests in Buyer, either directly or indirectly, to the New Public Company in exchange for 75% of the shares of New Public Company common stock and cash.

4. Merger Sub and Target will merge, and each share of Target common stock will be converted into a right to receive 25% of the shares of common stock of New Public Company.

5. Each of Buyer and Target will sell the shares of common stock in New Public Company referred to in step 1 to New Public Company for cash (which will be nominal).

At the conclusion of the transaction, all of the prior owners of Buyer and Target will own a portion of New Public Company, with the former owners of Buyer owning 75% and the former stockholders of Target owning 25%. New Public Company will own 100% of the beneficial interests, either directly or indirectly, of Buyer, and will own 100% of the shares of Target.

Question: Even if the transaction exceeds the HSR size-of-party and size-of-transaction thresholds, is the transaction nevertheless exempt from HSR filing requirements based on Sections 802.4 and 802.50 of the HSR regulations?

Analysis: Section 802.50(a) provides: "The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million (as adjusted) during the acquired person's most recent fiscal year."

Section 802.4(a) provides in relevant part: "An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to Section 7A(c) of the Act, this part 802, or pursuant to §801.21 of this chapter, is exempt from the reporting requirements if the acquired issuer or unincorporated entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than $50 million (as adjusted)."

Thus, if our client were acquiring the assets of Target (all of which are foreign), the transaction would be exempt under Section 802.50(a) because the assets do not generate sales in or into the US in excess of $66 million. Further, because Section 802.50(a) exempts the acquisition of the assets and because Target does not have assets in US with a value in excess of $66 million, it appears our transaction, as currently structured is also exempt even though it is essentially an acquisition of voting securities of a US corporation.

I would appreciate your guidance regarding the reportability of this transaction.

Many thanks,

[redacted]

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The transaction you have described is a consolidation for HSR purposes. See § 801.2(d) – Example 5. So, for HSR purposes, Buyer is deemed to have acquired 100% of Target and Target is deemed to have acquired 100% of Buyer. You say that the size of person test has been satisfied. The prong of the transaction where Buyer is acquiring Target is exempt under § 802.4. However, if the value of 100% of the membership interests of Buyer exceeds $66 million and Buyer has more than $66 million in non-exempt assets, the portion of the transaction where Target acquires Buyer would be reportable.

B[illegible]

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