

801.10

Verne, B. Michael

From: [Redacted]
Sent: Friday, September 16, 2011 10:25 AM
To: Verne, B. Michael
Subject: Valuation of Noncorporate Interests

Mr. Verne:

We have a question regarding the impact of debt on the valuation of noncorporate interests. The following is a brief description of the proposed transaction and our analysis of its reportability under the HSR Act.

Facts:

Our client (the "Acquired Entity") is in the process of negotiating a merger transaction pursuant to which 100% of its noncorporate interests would be acquired by the Acquiring Person. The purchase price for the noncorporate interests, as described in the proposed Merger Agreement, is approximately \$80 million. The Acquired Entity currently has approximately \$40 million in debt to third party lenders. When the debt was originally incurred, approximately \$27 million of the debt proceeds was used to refinance the Acquired Entity's prior debt and the remaining \$13 million was used to make a distribution to the Acquired Entity's members.

The purchase price stated in the acquisition agreement is \$80M. At closing, Buyer will transfer the \$80M in cash to the paying agent, who will in turn pay-off the Seller's existing \$40 million of debt. The remaining \$40 million will be distributed to the members of the Company pro rata in accordance with their respective membership interests.

HSR Analysis:

Under 801.10(d) of the HSR regulations, we understand that the valuation of noncorporate interests is generally the same as the valuation of voting securities, such that, in an acquisition of noncorporate interests that confers control, the value of the noncorporate interests held as a result of the transaction is the acquisition price of the interests to be acquired (if the acquiring person does not already hold any interests of the acquired entity). We also understand that in the valuation of noncorporate interests, the value of the seller's liabilities is not added to the acquisition price (e.g. Informal Interpretation #0503005).

Informal interpretation #0905006 suggests that if the Acquiring Person pays off debt of the Acquired Entity at the closing of an acquisition of voting securities, the amount of that debt is excluded from the purchase price. Similarly, informal interpretation #0305012 provides that, in determining the acquisition price of voting securities for HSR purposes, the value of liabilities being assumed in the acquired entity should be excluded.

Although informal interpretations #0905006 and #0305012 described above relate to the acquisition of voting securities as opposed to noncorporate interests, our understanding is that the analysis is the same in both cases. As a result, we have concluded that the \$40 million of debt would not be included in the valuation of the noncorporate interests, and as a result, the acquisition price for HSR purposes is approximately \$40 million (notwithstanding that the purchase price stated in the acquisition agreement is \$80M). Assuming this is the case, the transaction would not be reportable under the HSR Act because it does not meet the current size of transaction threshold.

Thank you for your assistance with this analysis. I will give you a call on Monday to confirm our understanding.

Best Regards,



AGnee
BM
9/20/11

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