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Verne, B. Michael

From: [redacted]
Sent: Wednesday, March 28, 2012 3:09 PM
To: Verne, B. Michael; Walsh, Kathryn
Subject: HSR size-of-person issue

Mike and Kate:

We have a situation in which we're not certain how to apply the asset prong of the size-of-person test.

The person in question is an investment fund partnership ("P") that controls two non-public corporations ("A" and "B") but does not hold 100% of either corporation's outstanding voting securities. P regularly prepares an audited statement of financial condition showing its assets and liabilities. On the most recent such statement, three categories of assets are listed: cash, prepaid expenses, and investments. The investments are the shares held in A and B and are carried at the cost of investment in accordance with GAAP. A and B each have their own regularly-prepared balance sheets listing categories of assets they each have (e.g., property, plant, and equipment, receivables, intangibles, inventory, etc.), carried at book value in accordance with GAAP; but those asset categories are not listed on P's audited statement of financial condition, nor are the corresponding asset values taken into account there, given that P's investments are carried at cost.

Is it appropriate for P to use the total assets on its audited statement of financial condition – i.e., the sum of the cash, prepaid expenses, and investments carried at cost – in applying the size-of-person test? NO

If not, then is it appropriate for P to adjust that figure upward by (artificially) ascribing to itself 100% ownership of both A and B at the same per-share cost reflected in P's audited statement of financial condition, and use the adjusted figure as its total assets? NO

If not, then presumably P would have to look through to A and B and add up the values of their respective assets. In that case, would P add the total assets figures from A's and B's most recent balance sheets, or would P be expected to use some other valuation method? Also, regardless of the valuation method used, would this sum then be the total assets figure that P would use for purposes of the size-of-person test; or should P instead start with the total assets shown on its audited statement of financial condition and add to that only a percentage of the total value of A's assets and a percentage of the total value of B's assets – in each case, the percentage added being 100% less the percentage of the outstanding voting securities held by P (i.e., the percentage interest not reflected in the investment line of P's audited statement of financial condition?

As always, please feel free to contact me if you have any questions or need additional information in order to respond. If a phone call would be helpful, I have time to talk this afternoon.

Thanks.

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The appropriate methodology is to deduct the value of the investments in A and B from the total asset figure on P's balance sheet and then add to that figure the total assets on A and B's balance sheets. The total assets for A and B are not adjusted for the percentage held by P.

3/29/12