

Verne, B. Michael

801.10

From: [REDACTED]
Sent: Wednesday, March 28, 2012 3:01 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Size of Transaction Inquiry

Hi, Mike:

I'm working with [REDACTED] on a new matter. We are hoping to get your assistance on a question that has come up with regard to the size of transaction test. Please see the fact pattern below. We appreciate your assistance.

Thanks,
[REDACTED]

We represent Company A, which is proposing to acquire all of the issued and outstanding voting securities of Company B, a private issuer (the "Transaction"). Assume that the size of parties test is satisfied and that the total consideration, but for the analysis detailed below, would be in excess of the size of transaction threshold.

The consideration for the Transaction includes: (i) funds being paid to retire two outstanding loans made indirectly by certain shareholders of Company B to Company B, (ii) funds being paid to the holders of a class of non-voting stock of Company B and (iii) funds paid to the holders of voting securities of Company B. Although it seems clearly established that the amounts in (ii) are not considered in the acquisition price whereas the amounts in (iii) are, we are seeking your guidance on the repayment of the shareholder loans at issue in (i).

For purposes of determining whether the size of transaction test is satisfied in relation to the repayment of the shareholder loans, we are aware that assumption or repayment of debt by the buyer (or the repayment of such debt by the seller with closing proceeds) is not included in the size of transaction test¹, regardless of to whom such payments are owed.² In this instance, the shareholders of the creditor are also shareholders of Company B but by our calculus it should not matter whether such shareholders are controlling shareholders or minority shareholders of Company B. (We can confirm that not all shareholders of Company B are creditors and thus there will not be payments in satisfaction of Company B's debt obligations across the board.) Please confirm that you are in agreement with this approach and that the amounts described in (i) and (ii) above are not included in determining the acquisition price for purposes of the size of transaction.

1 Informal Interpretation 0803012: <http://www.ftc.gov/bc/hsr/informal/opinions/0803012.htm>

2 Informal Interpretation 0805010: <http://www.ftc.gov/bc/hsr/informal/opinions/0805010.htm>

AGREE
BM
3/29/12