

Sheinberg, Samuel I.

From: HSRHelp
Sent: Tuesday, February 22, 2022 4:10 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora
Subject: FW: 802.51 - Fair Market Value of U.S. Assets

From: Musick, Vesselina <vmusick@ftc.gov>
Sent: Tuesday, February 22, 2022 4:09:39 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: 802.51 - Fair Market Value of U.S. Assets

[REDACTED]

We can confirm that the board of the acquiring person must determine the fair market value of the assets in good faith based on the business realities of the acquisition. As we have stated before, the PNO does not have a preferred method for conducting fair market valuation, and does not give advice on what method is appropriate.

Best,

Vesselina

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From: [REDACTED]
Sent: Monday, February 21, 2022 10:13:55 AM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Cc: [REDACTED]
Subject: 802.51 - Fair Market Value of U.S. Assets

Dear All –

We are analyzing whether a transaction is exempt under 802.51(a). We have a question relating to informal interpretations 1907004 and 2105010. We would like to confirm that an acquiring person is not required to apportion goodwill based on the percentage of U.S. sales to total worldwide sales, but instead is able to utilize an appropriate valuation methodology that it in good faith determines is appropriate based on the specific transaction in question. In our transaction, Buyer is acquiring X (a software company) for a total purchase price of greater than \$101 million, but less than \$403.9 million. X is a foreign issuer that meets the \$20.2 million size of person test. X made total aggregate sales in and into the U.S. of less than \$101 million in its most recent fiscal year. The transaction will therefore be exempt under 802.51(a) if X holds assets located in the U.S. (other than investment assets) having a fair market value of less than \$101 million.

X's non-investment assets include tangible and intangible assets in the U.S. and outside the U.S., including property and equipment, customer contracts, trade receivables and patents (issued in both the U.S. and outside the U.S.).

X's total sales in 2021 were \$17.4 million. X had total sales in and into the U.S. of \$5.4 million (approximately 30% of total sales). However, on X's regularly prepared balance sheet:

- U.S. assets (including intangibles and goodwill) account for less than 5% of the total worldwide assets;
- U.S. accounts receivable account for approximately 13% of total worldwide accounts receivable;
- U.S. fixed assets account for less than 3% of total worldwide fixed assets;
- U.S. long term assets account for approximately 1% of the total worldwide fixed assets;
- U.S. "other current assets" account for less than 1% of total worldwide "other current assets".

Importantly, X does not attribute any value on its balance sheet to U.S. intangibles or goodwill, and the book value of its worldwide intangible assets is only approximately 2% of the total assets.

We believe that apportioning goodwill (the excess of the total purchase price over the fair market value of X's net identifiable assets less total liabilities) is not appropriate or required for a foreign issuer such as X that has an objectively limited nexus with the U.S. in terms of its asset base. The PNO has previously stated in its December 13, 2013 Blog on the Location and Value of Patents (<https://www.ftc.gov/news-events/blogs/competition-matters/2013/12/location-value-patents>) that:

The fair market value of U.S. patents should be determined using a method that is consistent with the method used for determining the value of the overall patent portfolio. That value should include the value of any goodwill, know-how or other intangible assets allocated to those U.S. patents. The board of the acquiring person, or someone delegated the responsibility, must determine the valuation in good faith. The PNO does not have a preferred method for conducting this valuation, and does not give advice on what method is appropriate.

While the Blog discussed the valuation of patents in particular, we believe the same approach is applicable to the determination of the proper allocation of goodwill. The allocation of goodwill based on the proportion of U.S. sales to total worldwide sales may be a valid proxy for some transactions. However, it should not be the required methodology for all transactions irrespective of the facts, particularly since buyers are much better positioned to determine in good faith what valuation methodology is appropriate. Instead, as the PNO stated in its 2013 Blog, "[t]he board of the acquiring person, or someone delegated the responsibility, must determine the valuation in good faith," even if the acquiring person chooses a different methodology than comparing U.S. sales to total worldwide sales.

Please let us know if you agree, or if we can provide additional information to assist with your review.

[REDACTED]

[REDACTED]

[REDACTED]