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Snell & Wilmer

CORPORATE COMMUNICATOR

Fall 2011

Dear clients and friends,

Many public and larger private companies have complex organizational structures involving multiple levels of subsidiaries, affiliates and brother-sister entities. Oftentimes these entities take different legal forms (e.g., corporations, partnerships, limited liability companies) and may involve foreign entities. Companies often wish to restructure or consolidate these entities. There can be many different reasons for doing so, including mergers and acquisitions, strategic reasons, tax planning, capital events (e.g., secured lending facilities) or because the organizational structure has grown too complex or has become unwieldy. In this issue, we provide an overview on the key steps, documents and pitfalls that should be considered when engaging in a restructuring or consolidation of a complex subsidiary structure.

This edition also includes short articles summarizing recent amendments to the Hart-Scott-Rodino Act and recent changes relating to the removal of rating requirements for the use of SEC Form S-3.

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Subsidiary Restructurings

By Melissa G. Sallee and Bianca Stoll

It is good corporate practice for a company to occasionally evaluate its organizational structure to determine if its structure is efficient and cost effective. A company may determine that a subsidiary restructuring would be beneficial to its company. A subsidiary restructuring may be accomplished through many different means such as (i) merging subsidiaries into other existing subsidiaries of the company, (ii) converting corporations into other forms of organization, such as limited liability companies, or vice versa and (iii) forming new subsidiaries of the company and/or its subsidiaries.

Benefits of Subsidiary Restructurings/Consolidation

There are several potential benefits of subsidiary restructurings and consolidations, including the following:

- Reduction of management costs;
- Reduction of costs related to organization and handling of economic

activity including the combination of complementary businesses;

- Reduction of costs related to organization and handling of a subsidiary's activity;
- Simplification of the company's organizational structure;
- Simplification of the management structure resulting in more efficient decision making; and
- Reduction in tax expenses.

Overview of Subsidiary Restructuring/Consolidation

Initial Determinations and Diligence

Initially, a company will need to assess its current organizational structure and determine whether there are opportunities to combine subsidiaries for efficiency and ease of operations. If so, the company will need to develop a detailed step plan for the actions to be taken and the resulting structure. This process should be well thought out and not rushed. Before undertaking a subsidiary restructuring, the company will want to evaluate the timing for the restructuring and its practical implications. It should involve not only senior level management but also operational management who can provide input as to how a restructuring will affect the day-to-day operations and reporting of the company and its resulting subsidiaries. In addition, the company will also want to involve its accountants and legal counsel. If a company has international operations or entities, experts from foreign jurisdictions will likely need to be involved too. A subsidiary restructuring can have significant tax implications for the ongoing business and, while the tax implications of a subsidiary restructuring are beyond the scope of this article, the company should consider in advance the tax implications of all scenarios of the subsidiary restructuring. Involving legal counsel at an early stage of the subsidiary restructuring can assist the company in addressing time consuming issues early in the process and in developing alternatives in the event of local and state law limitations or quirks.

Once the structure of the reorganization is determined, the company will need to undertake diligence and research of company organizational and other documents and state law. First, the company should review the state law governing each of the subsidiaries involved in the restructuring to determine whether the subsidiary restructuring is permitted under state law and the various filing and reporting requirements.

Next, the company should review the corporate governance documents (i.e., articles of incorporation, articles of organization, bylaws, operating agreements, partnership agreements, etc.) of each of the subsidiaries involved in the restructuring, including each subsidiary's parent company, to determine what approvals are required for the restructuring (e.g., whether board and stockholder approval is required and, if approval is required, what percentage is required to approve the specific restructuring transaction(s)).

The company should then review the various contracts and agreements of each of the entities involved in the restructuring and their parent entities to determine if there are any prohibitions or notices required in connection with the subsidiary restructuring. Depending on the plan, the company should look for provisions in contracts that require consent or notice in connection with a transfer of assets, transaction with affiliates, merger or change of control situation.

Also, any other registrations, licenses, permits, tax numbers and other items that are registered in the name of any of the entities involved in the subsidiary restructuring should be reviewed and the company should

determine if any actions need to be taken as a result of the subsidiary restructuring.

It may be helpful to have counsel prepare a step plan memo and checklist that explains in detail the subsidiary restructuring. This detailed memo can summarize the diligence review and the consents and notices that are required in connection with the subsidiary restructuring. Additionally, the memo can contain a detailed checklist of all the documents that are required to be drafted and filed. With some restructurings, it may be important to intricately map out the sequence of the transactions and steps and have the timing of the filings identified down to the minute they are occurring.

Drafting and Filing Documents

The documents that are part of a subsidiary restructuring will vary depending on the structure of the restructuring. Generally, legal counsel will be primarily responsible for drafting the restructuring documents. However, management will play a key role with populating schedules and exhibits and advising on the operations of the subsidiaries involved in the restructuring. While it would be impossible to list every conceivable document, the following is a summary of documents that are commonly involved in a subsidiary restructuring:

- *Step Plan Memo* – As noted above, a step plan memo can be a key organizational document and guide to the subsidiary restructuring. The memo will set forth each of the steps in the subsidiary restructuring, the legal documents for each step, the responsible party and specific timing and sequence for each step. The step plan memo helps to ensure that each member on the subsidiary restructuring team is aware of each step and his/her responsibilities.
- *Authorizing Resolutions* – A subsidiary restructuring can involve a number of steps and it is critical that each of the entities involved in a subsidiary restructuring have the requisite authorization to undertake the action(s). The requisite authorization will vary depending upon state law and the subsidiary's organizational documents (i.e., articles of incorporation, bylaws, articles of organization, operating agreement, partnership agreement, etc.). Depending upon the action being taken, both shareholder and board consent may be required for a corporation, member and manager consent for a limited liability company and general partner and limited partner consent for a partnership. Although subsidiaries may be wholly owned, it is important that the company obtain the requisite vote required to approve an action, which can vary based upon state law and the company's organizational documents.
- *Contribution Agreement* – Often in a subsidiary restructuring, a subsidiary may need to distribute assets down the organizational structure. Such assets may include operational assets or equity interests in other subsidiaries. The contribution agreement should specify what assets are being transferred, the party transferring and the party receiving the assets and what consideration will be given for the assets. This necessarily means determining the fair value of the asset being transferred (which may also be relevant for tax purposes). Both the party transferring and the party receiving the assets should authorize the transfer as well as the contribution agreement.
- *Distribution Agreement* – In the event assets need to be distributed up the organizational structure, this can be affected as a distribution from a subsidiary to its parent and memorialized in a distribution agreement. Assets that may be distributed include operational assets or equity interests in other subsidiaries. The distribution agreement should specify the assets being transferred and the party transferring

and the party receiving the assets. Here too, it may be necessary to specify what consideration/value will be attributed to the assets. Both the party transferring and the party receiving the assets should authorize the transfer as well as the distribution agreement.

- *Asset Purchase Agreement* - As an alternative to contributing or distributing certain assets in a subsidiary restructuring, the company can cause its subsidiaries to sell/convey specific assets (and assign specific liabilities). The effect of a transfer of assets is that only the specified assets and liabilities listed in the asset purchase agreement will be transferred. The asset purchase agreement (or similarly titled agreement) should specify the assets and liabilities being transferred and that the parties are thereby transferring the assets and liabilities, the party transferring and the party receiving the assets and liabilities and the consideration attributable to the assets. A transfer of assets through an asset purchase agreement may require the subsidiary to provide notice to third parties if the underlying contractual agreements require notice or consent upon transfer. Additional documents typically required in an asset purchase transaction include an assignment and assumption agreement, intellectual property assignment and assumption agreement or intellectual property license, bill of sale, deeds and lease assignments. There can be tax implications with respect to an asset purchase (including the basis recognizable in the acquired assets) and these should be weighed in light of the other legal alternatives to transferring assets.

- *Stock Purchase Agreement* – As an alternative to contributing or distributing certain assets in a subsidiary restructuring or a transfer of specific assets, the company can cause its subsidiaries to sell all of the outstanding stock of a subsidiary through a stock purchase agreement. Contrary to an asset purchase agreement, the effect of a stock purchase is that the acquiring subsidiary acquires all the assets and liabilities of the acquired subsidiary whether known or unknown. The stock purchase agreement should specify the stock being transferred and that the parties are thereby transferring such stock, the party transferring and the party receiving the stock and the consideration attributable to the transfer. A transfer of the outstanding stock may require notice to or consent from third parties if the underlying contractual agreements require notice or consent upon a change in control, stock transfer or the like. Additional documents required in a transfer of stock include a stock power and newly issued stock certificate in the name of the acquiring subsidiary. There can be tax implications with respect to a stock purchase and these should be weighed in light of the other legal alternatives to transferring assets. In the event that a membership interest is being transferred rather than stock, similar concepts would apply with respect to a membership interest purchase agreement.

- *Agreement and Plan of Merger* – If two or more subsidiaries will merge or consolidate in a subsidiary restructuring, this will typically be completed through an agreement and plan of merger and the filing of a certificate of merger (or similar form) with the appropriate state filing office (e.g., Arizona Corporation Commission, Delaware Secretary of State's Office, etc.). Depending upon applicable state law requirements, the agreement and plan of merger set forth the overall plan for the merger, including the effect of the merger and which subsidiary shall survive the merger, any amendments to the organizational documents of the surviving subsidiary, the effective date and time of the merger, how to terminate the merger prior to filing the certificate of merger, as well other items. The agreement and plan of merger does not necessarily have to be filed with the state filing office, in some states it may be maintained in the corporate records if it is made available to interested parties upon request. Both

the merging and surviving subsidiary will need to approve the merger, agreement and plan of merger and the certificate of merger.

- *Certificate of Merger* – The certificate of merger is a more abbreviated document than the plan of merger and is filed with the appropriate state filing office (e.g., Arizona Corporation Commission, Delaware Secretary of State's Office, etc.). Depending upon applicable state law requirements, the certificate of merger may set forth the name of the surviving subsidiary and merging subsidiary, effective date and time of the merger (if not effective upon filing), whether there will be a name change for the surviving subsidiary and a copy of the agreement and plan of merger, or that it is on file with the surviving subsidiary and that a copy can be provided upon request. State filing offices can vary in how long it will take to process a certificate of merger and the company will want to take this into consideration.

- *Plan of Conversion* – If a subsidiary will be converted to a different organizational form, such as converting a corporation to a limited liability company (or vice versa), the plan of conversion will set forth the terms of such conversion. Depending upon applicable state law requirements, the plan of conversion may set forth the name of the entity converting, including its post-conversion name, the effective date of the conversion, the conversion terms, articles of incorporation or articles of organization of the resulting subsidiary, how the equity interests of the converting subsidiary will be converted to the resulting subsidiary and the management of the resulting subsidiary. Certain states may not have provisions within their code allowing for conversions. In such instances, the subsidiary restructuring may need to contain additional steps such as having the subsidiary re-domesticate to a different jurisdiction to effect the conversion and re-domesticate back to the original jurisdiction. Alternatively, a subsidiary could use the merger process to merge into an entity with the desired organizational form. Tax implications of a conversion should be carefully considered prior to effecting the conversion. Typically, the plan of conversion is not filed with the state filing office, rather it is maintained in the corporate records and the certificate of conversion is filed and is required to be made available upon request. The converting subsidiary will need to approve the conversion, plan of conversion and the certificate of conversion.

- *Certificate of Conversion* – Similar to the process for a merger, the plan of conversion is not typically filed with the state filing office but the company will file the certificate of conversion. Depending upon applicable state law requirements, the certificate of conversion may set forth the jurisdiction and name of the converting subsidiary as well as where the converting subsidiary is organized prior to and following the conversion. State filing offices can vary in how long it will take to process a certificate of conversion and the company will want to take this into consideration.

- *Organizational Documents* – In addition to consolidating subsidiaries, the subsidiary restructuring may require the formation of new subsidiaries. Depending upon the desired form and applicable state law, organization of new subsidiaries may include articles of incorporation, bylaws, articles of organization, operating agreement, partnership agreements, etc. The company will also want to consider whether any new subsidiaries should register to do business as a foreign organization in any states and whether they will need any permits or tax identification numbers or certificates.

- *Notices and Consents* – As part of the diligence process, the contracts and agreements for the subsidiaries involved in the subsidiary restructuring should be reviewed to determine whether any contracts require consent or notice in connection with the actions. A notice will

notify a third party of the subsidiary restructuring. A consent will also notify a third party of the subsidiary restructuring and, in addition, will request the third party to countersign and agree to the action. Consideration should also be given to the impact of contracts and arrangements that would be breached or terminated if such consent cannot or will not be obtained.

- *Other Ancillary Documents* – In addition to the above, a subsidiary restructuring may require a number of other ancillary documents. Such documents may include, for example, issuance of new stock or membership interests, real property transfer documents, including deeds of trust or mortgages, assignment and assumption agreements, intellectual property assignments, bills of sale, transition services agreements, etc. Also, if the stock or membership interests of any of the entities involved have been pledged, the company will need to coordinate with the secured party that is holding the stock or membership interest certificates to exchange any cancelled certificates for the new certificates. It is common that such pledges will arise if the company is party to a credit agreement and the lender will receive a pledge of certain subsidiary stock or membership interests. The company or subsidiary may also be required to file or record, as applicable, documents reflecting a release of all or certain liens (including UCC-3 termination statements), if it has taken the necessary steps to remove such liens.
- *State and Federal Filing Issues* – A subsidiary restructuring may also trigger filing requirements under federal, state and local law. Additional filings may include, for example, foreign registrations, termination of foreign registrations, applications for new licenses and permits or transfer of existing licenses and permits, applications for new tax identification numbers, federal, city and state tax filings, notice to the Internal Revenue Service regarding the subsidiary restructuring, payment of real property transfer taxes, intellectual property assignment filings with the United States Patent and Trademark Office, etc. To the extent the subsidiary restructuring involves or affects international subsidiaries, the company will want to check with local counsel regarding additional authorization requirements, local filings and notices and local taxes, fees or assessments.

Post-Closing Clean Up

After the documents are drafted and filed to effectuate the subsidiary restructuring, there are likely some additional steps that need to be taken in connection with the subsidiary restructuring. First, if any of the subsidiaries that were merged or converted were registered to do business in a state other than the state of organization, the company will need to amend those foreign qualification filings to reflect the subsidiary restructuring. In addition, if any of the subsidiaries involved in the restructuring own real property, such real property filings (e.g., deeds) may need to be revised to reflect the restructuring (depending on the state in which the property is located).

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2011 Amendments to HSR

By Cheryl A. Ikegami

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR), requires preclearance by the Federal Trade Commission (FTC) and Department of Justice (DOJ and together with the FTC, (the Agencies)) of certain large mergers and other stock and asset acquisitions. If certain conditions are satisfied with respect to the size of the transaction and the

parties and no exemption is available, the parties must make a filing with the Agencies on a specified form (the notification form) and observe a waiting period before they can consummate the transaction. This allows the Agencies to evaluate the antitrust implications of the transaction and act to prevent the closing of a transaction they find troublesome before it is consummated.

On July 7, 2011, the FTC approved amendments to the notification form and instructions, as well as to certain related rules under HSR. The amendments were intended to revise the notification form to provide only information that the Agencies consider necessary for their review. This resulted in the removal of a number of items of the form that were no longer considered particularly relevant to the Agencies' review and the imposition of certain new requirements the Agencies believe will significantly assist in their review. The amendments became effective on August 18, 2011.

Some of the more significant changes to the notification form include the following:

- Item 4(a) of the notification form was revised to eliminate the requirement to provide paper copies of filings made with the Securities and Exchange Commission (SEC) by publicly held companies since these filings are now so easily obtainable by the Agencies from the SEC's EDGAR system. The filer must still provide a list of all entities within the person filing notification that file such reports with the SEC.
- The requirement in Item 4(b) to provide the most recent balance sheets of the person filing and of each unconsolidated U.S. issuer included within the person was also removed. Parties must continue to file the most recent annual report and annual audit report for the person filing and each unconsolidated U.S. issuer and this requirement was expanded to also require such reports for unconsolidated non-corporate U.S. entities. Natural persons will be required to provide reports only for the highest level entity(s) they control. Personal balance sheets for natural persons are not required. Since recent balance sheet information will no longer be required, the parties will have to stipulate in the notification form that they meet the size of the person test, if relevant and not otherwise demonstrated in the information provided.
- A new Item 4(d)(i) was added to require the filing of all Confidential Information Memoranda prepared by or for any officers or directors (or, in the case of unincorporated entities, individuals exercising similar functions) of the ultimate parent entity of the acquiring or acquired person or of the acquiring or acquired entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If there is no such Confidential Information Memorandum, the parties must submit any document given to any officers or directors of the buyer meant to serve the function of a Confidential Information Memorandum. Only documents produced up to one year before the date of filing need be included.
- A new Item 4(d)(ii) requires the filing of all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third-party advisors for any officers or directors (or, in the case of unincorporated entities, individuals exercising similar functions) of the ultimate parent entity of the acquiring or acquired person or of the acquiring or acquired entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires submission only of materials developed by third-party advisors during an engagement or for the purpose of seeking an

engagement. Only documents produced up to one year before the date of filing need be included. The adopting release clarifies that, except as provided below, this section will not require the submission of corporate subscriptions to market studies, information or periodicals; industry reference materials and databases; routine market research; information received by financial investors; unsolicited financial and market analyses from investment bankers and consultants; or reports prepared in the course of patent, securities, antitrust or other forms of litigation. The release notes, however, that if unsolicited materials developed by investment banking firms or other third parties for the purpose of seeking an engagement appear in the files of officers or directors, they are required to be submitted if they specifically relate to the sale of the acquired entity(s) or assets and contain competition related content as specified in the instructions.

- New Item 4(d)(iii) requires the filing of all studies, surveys, analyses and reports evaluating or analyzing synergies or efficiencies prepared by or for any officers or directors (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

- Significant amendments to Item 5 of the notification form were also made. Prior to the amendment, Item 5 required revenue information by North American Industry Classification System (NAICS) codes both for the most recent fiscal year of the person filing and for a base year (most recently, 2002). The requirement to provide base-year information was eliminated, along with related information regarding products added or deleted after the base year. Item 5 was revised to have only one reporting section requiring manufacturing revenues by 10-digit product codes and non-manufacturing revenues by six-digit industry codes for the most recent year. A requirement was added to include revenues for products manufactured outside the U.S. and sold into the U.S. The amendments also eliminated certain requirements to double count manufactured revenues. As amended, Item 5 requires that any manufacturer, whether foreign or domestic, report revenues from the sale of its manufactured products only under 10-digit NAICS manufacturing product codes. Sales of products that are not manufactured by the parties but only sold by them would continue to be reported under six-digit wholesale or retail codes.

- The amendments included changes to Items 6 and 7 of the notification form requiring that the acquiring person list certain holdings of its associates. The purpose of these changes is to provide the Agencies with information on competitively relevant minority holdings of entities that are under common investment or management control with the acquiring person but are not technically included within the acquiring person. Two common scenarios where holdings of associates can be most relevant involve families of commonly managed investment funds and master limited partnerships. The release describes, for example, a case where Fund A is acquiring 100 percent of the voting securities of a corporation. Fund A does not have holdings in any competitors of the acquired corporation, but four associates of Fund A (Funds B-E) each hold 15 percent of a competitor of the acquired corporation. As defined, an associate of an acquiring person is an entity that is not an affiliate of the acquiring person but (A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a managing entity); or (B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or (C) directly or indirectly controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly manages, is managed by, or is under common operational

or investment management with a managing entity.

- New Item 6(c)(ii) requires an acquiring person to report, based on its knowledge or belief, certain information regarding the holdings of each of its associates holding 5 percent or more but less than 50 percent of the voting securities or non-corporate interests of the acquired entity(s) or 5 percent or more but less than 50 percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year in industries within any six-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year. If NAICS codes are unavailable, information can be provided for entities having operations in the same industry as the acquired entity(s) or assets.
- Information regarding associate holdings is also now required by Item 7 of the notification form. Item 7 requires certain geographic information if to the knowledge and belief of the person filing notification, the acquiring person or any associate of the acquiring person derived dollar revenues in the most recent fiscal year in any six-digit code in which any acquired entity that is a party to the acquisition also derived revenue in the most recent year.

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Removal of Rating Requirement for Use of Form S-3

By Cheryl A. Ikegami

On July 27, 2011, the Securities and Exchange Commission (SEC) adopted certain amendments required by Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act to remove references to credit ratings in rules and forms promulgated under the Securities Act of 1933, as amended (the Securities Act) and the Securities Exchange Act of 1934, as amended (the Exchange Act). One of the more important of the amendments relates to the use of Form S-3. The amendments became effective on September 2, 2011.

Form S-3 is a "short form" registration statement that allows eligible issuers to rely on reports filed under the Exchange Act to satisfy many of the disclosure requirements under the Securities Act. In addition, use of Form S-3 allows issuers to conduct primary offerings "off the shelf" under Securities Act Rule 415. Use of the shelf registration procedures enables an issuer to register an offering prior to planning any specific offering and, once the registration statement is effective, offer securities in one or more tranches "off the shelf" without waiting for further SEC action. To be eligible to use Form S-3, an issuer must meet the form's eligibility requirements as to registrants and at least one of the form's transaction requirements. Prior to the amendment, one such transaction requirement in General Instruction I.B.2. allowed registration of primary offerings of non-convertible debt securities that were rated at least investment grade by at least one nationally recognized statistical rating organization at the time of sale. This was the transaction requirement generally utilized by issuers who had public debt but no public equity securities—such as wholly-owned subsidiaries of other publicly reporting companies.

The adopted amendments removed all references to ratings as a precondition to the use of Form S-3. In drafting these provisions, the SEC was sensitive to comments of the utility and other industries where wholly-owned subsidiaries of a parent company often are reporting companies separate from the parent. Since these subsidiary companies have no public equity float, they were generally able to use Form S-3 only for primary offerings of non-convertible investment grade debt securities. In drafting the

replacement requirements, the SEC attempted to preserve the ability to use Form S-3 for issuers that are widely followed in the marketplace. They therefore revised General Instruction I.B.2. of Form S-3 to provide for a number of alternative tests.

Under the amended Form, such an offering of non-convertible securities, other than common equity, is now eligible to be registered on Form S-3 if:

(i) the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) the issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) the issuer is a wholly-owned subsidiary of a well-known seasoned issuer (WKSI), as defined in Rule 405 under the Securities Act; or

(iv) the issuer is a majority-owned operating partnership of a real estate investment trust that qualifies as a WKSI; or

(v) the issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S-3 in existence prior to the new rules, discloses the basis for such belief and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments.

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