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From: [redacted]
To: "mverne@ftc.gov" <mverne@ftc.gov>
Date: 11/29/01 5:13PM
Subject: follow-up from recent conversation on "correspondence"

We recently talked about a situation where an acquiror of nominally non-voting convertible securities (or options or warrants, etc.) obtained at the same time a right to designate a certain number of directors. You explained that the Premerger Notification Office position was that, unless the acquiror obtained a right to designate a number of directors that "corresponds" to the number of directors that the acquiror would be able to elect upon conversion (or exercise), the non-voting securities would not be deemed "voting securities" for HSR purposes. (You also explained that a right to designate half or more of the directors "corresponds" with a right to obtain 50% or more of the outstanding voting securities upon conversion.)

ADVISED THAT THERE IS A DISTINCTION BETWEEN (1) & (2).

My follow-up question is this. Does the right to designate that we're talking about mean a unilateral right to designate?

(1) Suppose that an acquiror of nominally non-voting convertible securities enters into a voting agreement with another significant shareholder under which the parties agree to vote their shares in common for election of directors. We said yesterday that that wasn't a "contractual power to designate" the directors, because it required cooperation or concurrence of another person. Suppose that, as a result of the voting agreement, the two cooperating shareholders have the ability to elect half or more of the directors. And suppose that the acquiror, upon conversion, would obtain a majority of the outstanding voting securities of the issuer. Does that make the nominally non-voting securities into "voting securities" for HSR purposes? Or is the fact that the voting agreement doesn't give the acquiror the unilateral power to designate directors prior to conversion enough to distinguish this situation and render the nominally non-voting securities genuinely non-voting?

IN (1), THE TWO SHAREHOLDERS HAVE AGREED TO VOTE THEIR SHARES FOR THE ELECTION OF THE SAME MUTUALLY AGREED UPON DIRECTORS, THEREFORE, NEITHER HAS THE UNILATERAL RIGHT TO DESIGNATE.

(2) Do I have to worry about how the voting agreement "really" works? If the agreement were that the other shareholder agrees to vote its shares for everybody that the acquiror nominates as a director, does the acquiror have a unilateral power to designate those directors? Or is it, by definition, not a unilateral power because it depends upon the agreement of the shareholders to cooperate?

IN (2), ONE SHAREHOLDER CHOOSES THE NOMINEES WHICH THE OTHER HAS AGREED TO VOTE FOR.

[redacted]

IN THIS CASE, THE NOMINATOR IS DEEMED TO BE DESIGNATING THE DIRECTORS WITH HIS NOMINATION. N. OVUKA CONCURS.

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B. Michael Verne
11/30/01