801.10

Verne, Michael

From: [redacted]
Sent: Wednesday, June 25, 2003 9:36 AM
To: Verne, Michael
Subject: Value of the transaction

Dear Mr Vern-

I am reviewing a term sheet for a potential merger in which a public company acquires the voting securities of a private company. As part of the proposed terms, it has been suggested that two of the present owners of the private company will enter into consulting agreements and be paid in cash or other consideration.

In my review of how these types of agreements are traditionally treated, I have found that although consulting agreements with third parties are not included in the total consideration for size of the transaction test, the FTC has informally in the past held that consulting agreements with present owners of a private company being acquired in fact are included in the total acquisition price, even if such future payment is contingent on the owners remaining employed with the acquiring company. Is this informal rule still applicable, and to your knowledge, does it make a difference how little or how much of an ownership interest the consultant has in the acquired company in making this determination? For instance, a present 5% owner as opposed to a present 30% owner? Is there any rule of thumb one should use, or should all such contingent payments be included regardless of the present owner's percentage interest? I know my clients in the proposed transaction are very sensitive to this issue and it may make or break the potential deal, so I want to make sure I've covered all the bases.

Any assistance you could offer would be most appreciated.

Thank you very much in advance.

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ADVISED THAT AS LONG AS CONSULTING AGREEMENT IS BONA FIDE COMPENSATION FOR FUTURE SERVICES TO BE PROVIDED, IT IS NOT INCLUDED AS PART OF THE ACQUISITION PRICE.

6/25/03