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April 22, 2004

**VIA ELECTRONIC MAIL AND POSTAL SERVICE**

Mr. B. Michael Verne  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington, D.C. 20580

Re: Confirmation of Advice Regarding Acquisition of Voting Securities Combined with First Offer and Put/Call Option

Dear Mr. Verne:


In our conversation of April 21, I described for you a transaction in which Buyer will acquire 50% of the voting securities of SellCo but will also have either the right or the obligation to acquire the remaining shares after five years. I write to confirm the analysis and your informal advice.

**Description**

Seller is its own ultimate parent. Buyer will buy shares from shareholders, but will also buy some newly issued shares from SellCo. The result will be that Buyer will hold exactly 50% of the voting shares of SellCo issued and outstanding as of closing. (There is only a single class of shares.) The purchase price is approximately \$30 million, and even if the purchase price is not considered "determined" (there is an adjustment at closing), the fair market value of these shares (which are not publicly traded) is significantly less than \$50 million. Consequently, the transaction appears to be nonreportable. Since the transaction has the following additional features, however, I asked you to confirm my analysis.

The parties' agreement also provides for put and call options. In five years' time (but not earlier), Buyer will have the right to call the selling shareholders' remaining shares, and the selling shareholders will have the right to put their shares, in accordance with a pricing formula stated in the agreement. While the likely outcome is that Buyer or the selling shareholders will exercise the option, it is conceivable that neither side would do so. During the five years preceding the option date, there are restrictions on the selling shareholders' rights to transfer shares, including a right of first offer in favor of all shareholders (including Buyer) who choose not to transfer their shares, if less than 70% of the selling shareholders decide to sell their remaining shares in the five-year period. During the five years preceding the option date, the selling shareholders will retain the economic benefit of their retained shares. For example, the shares are currently dividend-paying, and if the Board continues to declare dividends, the selling





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shareholders would continue for the next five years to receive the dividends on their retained shares (but not on the shares that they are selling today).

Also during the next five years, the selling shareholders will have the right to elect four of the seven members of Seller's Board of Directors (unless Buyer comes to hold 85% of the voting shares). The selling shareholders also otherwise will continue to have the right to vote their shares, although certain major decisions will require supermajority consent (of the Board or the shareholders).

After closing, Buyer will have both the right and duty to appoint at least one senior executive into Seller's management.

This transaction structure has been chosen for business reasons independent of any HSR considerations.


#### **Analysis**

The Premerger Notification Office has consistently taken the position that the acquisition of an option to acquire voting securities is exempt from reporting, although the eventual exercise of the option is potentially reportable (assuming the relevant size test(s) is met and no other exemption applies). 16 C.F.R. §§ 801.32, 802.31. Here, the selling shareholders will clearly retain the right to vote their shares, so the exception noted at ABA, PREMERGER NOTIFICATION PRACTICE MANUAL NO. 31 (3d ed. 2003), does not apply. Similarly, the selling shareholders retain the income rights and, at least within the broad range provided in the option-exercise formula, the economic risk as to the future value of their shares.

If Buyer acquires additional shares, either through the first offer provision or through the eventual exercise of the put or call options, that acquisition(s) will not be reportable as long as, at the time of any such acquisition, Buyer continues to hold at least 50% of the voting securities of SellCo. Under 15 U.S.C. § 18a(c)(3), an acquisition of an issuer's voting securities is exempt if the buyer already holds 50% or more of the issuer's voting securities before the acquisition at issue.

#### **Conclusion**

The acquisition is not currently reportable. The Buyer's acquisition of additional SellCo voting securities will not be reportable unless, prior to any such acquisition, Buyer ceases to hold 50% of SellCo's voting securities.



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Thank you again for your assistance. I would appreciate a telephone call confirming that I have correctly stated your advice.

Very truly yours  
[REDACTED]

[REDACTED]

AGREE  
B. Michael Verne  
4/26/04