801.10

Verne, B. Michael

From: [redacted]
Sent: Tuesday, September 14, 2004 10:10 PM
To: Verne, B. Michael
Subject: Contingent Purchase Price

Michael -- I have reviewed the HSR rules and other explanatory materials and it appears that the contingent earnout portion of the purchase price is part of the "determined" price if it can be reasonably estimated (presumably by establishing the odds of the contingencies being met). If it cannot be reasonably estimated, and thus "determined," then it is based on fair market value as determined in good faith by the board of directors. Consider a transaction in which an acquiror is purchasing a business like an advertising agency that has few hard assets, and has priced the deal at $30 million up front cash, and an additional $30 million contingent purchase price that can be earned over three years if certain revenue goals are achieved. The revenue goals are based on high revenue growth that has occurred during the past two years continuing over the next three years. The odds of whether that growth will continue is hard to say, but maybe 50-50. Would it be appropriate to reduce the "value" of the $30 million earnout to reflect those odds -- which would place the earnout value at $15 million. Added to the $30 million cash, the assets to be acquired total $45 million, and the transaction would be exempt from filing. Can you comment informally on whether this is the appropriate approach to valuing the deal? I appreciate your input. [redacted]

[redacted]

ADVISED THAT THIS IS NOT AN APPROPRIATE METHOD FOR DETERMINING ACQUISITION PRICE. ACQUISITION PRICE IN THIS TRANSACTION IS NOT DETERMINED, SO FMV IS USED.

B Michael
9/15/04