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Verne, B. Michael

From: [REDACTED]
Sent: Sunday, November 07, 2004 8:30 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR Questions

Hi Mike,

A proposed transaction has generated a couple questions.

With respect to fair market valuations, we have transaction in which an issuer has both common and preferred stock and both are voting securities under the HSR Act. Both classes will be acquired in what I will call "Acquisition 1". (Note that the parties to the transaction believe there is an exemption to the acquisition of the preferred stock, but that they will have to file in respect of the acquisition of the common stock if such acquisition meets the size-of parties and size-of-transaction thresholds.) Because the preferred stock currently have certain enhanced governance rights, their value is significantly greater than the value of the common stock. However, at some point after consummation of Acquisition 1, the holders of the preferred stock will exchange their shares of preferred stock for voting securities of another issuer, which may trigger another filing and which I will call "Acquisition 2". Upon completion of Acquisition 2, the preferred stock (and its attendant enhanced governance rights) will be effectively extinguished. As a result, the value of the common stock will increase. My question is whether our fair market valuation of the common stock in respect of Acquisition 1 needs to take account the future effect of Acquisition 2 on their value. My initial reaction is that it does not, as long as the valuation is conducted in good faith, because you are concerned with the common stock's current value, not the value after considering a future event.

On a related note, Acquisition 2 effectively operates as an option. The holders of the preferred stock may, after a waiting period, exchange their preferred stock for voting securities of another issuer. Upon completion of Acquisition 1, the parties will have signed an agreement governing the mechanics of the Acquisition 2 exchange (the "Exchange Agreement"). As mentioned in the foregoing paragraph, the holders of the preferred stock will not have filed a Form in connection with their acquisition of the preferred stock because we believe an exemption exists for such acquisition. However, the parties may wish to file notification in respect of Acquisition 2 upon the closing of Acquisition 1. Could the parties file on Acquisition 2 if they included the Exchange Agreement as evidence of their agreement and good faith intention to close (i.e., can parties file on something that so closely resembles an option?) If the parties can file in respect of Acquisition 2 upon closing of Acquisition 1, is it accurate to say that the parties would have to consummate Acquisition 2 within one year of the expiration of the waiting period? (Or re-file if it happens later?)

I realize this potential transaction is complicated and these questions are complex, so if you have any questions please don't hesitate to call me. If you reach my voicemail, you can always push "0" and ask the receptionist to page me. You can also ask my secretary to do the same.

As always, thanks and best regards.



AGREE WITH VALUATION. CAN
FILE ON ACQUISITION 2, BUT
MUST REFILE IF NOT CONSUMMATED
WITHIN A YEAR.

Blush
11/10/04