801.10

**Verne, B. Michael**

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**From:** [redacted]
**Sent:** Tuesday, February 07, 2006 10:44 AM
**To:** Verne, B. Michael
**Subject:** HSR question re valuation of an exclusive license

A grants B an exclusive license, for which B agrees to pay royalties of $15 million per year. The duration of the exclusive license is three years, but the license is renewable for an additional term of three years.

Is this a non-reportable $45 million transaction or a reportable $90 million transaction? If the former is the renewal likewise a non-reportable $45 million transaction? Would the 801.13(b)(2) throwback rule apply to the renewal?

Does it matter whether the license is "automatically" renewable in the absence of an affirmative opt-out by either party?

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I think there are a couple of ways to look at this. One would say that you are acquiring an asset (either a 3 year or 6 year exclusive right to IP), the acquisition price is undetermined because you are not sure whether the license will be renewed for the second 3 year period, so you have to do a FMV, reflecting the likelihood of the extension happening.

Another way to look at it is you are acquiring an asset (the first 3 year license) and the acquisition price is determined ($45 MM over three years), and you are acquiring an option for another asset (the second 3 year license).

If the second approach is used, 801.13(b) would be inapplicable because there is more than 180 days between acquisitions. I don't think the "automatically renewable in the absence of an affirmative opt-out" is relevant to either analysis.

I don't think either of these approaches is unreasonable, but I prefer the option analysis, primarily because I'm not sure I like doing a "probability of things happening" FMV.

B Mike
7/7/06