

Verne, B. Michael

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From: [REDACTED]
Sent: Friday, May 05, 2006 10:40 AM
To: Verne, B. Michael
Subject: Automatic Warrant Exercises

Hi Mike.

Thank you for your advice this morning concerning whether the automatic exercise of a warrant on a day certain in the future could be HSR reportable. I have learned a few more facts since we talked and wonder whether they would change the analysis and conclusion.

Specifically X holds a warrant to acquire voting securities of Y. The warrant may be exercised at any time by X. If it is not exercised by the earliest of a date certain in the future or a change of control of Y, the warrant terminates and it will be deemed to have been exercised automatically immediately prior to the termination pursuant to a cashless net exercise.

At the time X acquired the warrant, Y was not publicly traded and there was no certainty Y would have an IPO. Subsequent to X's acquisition of the warrant, Y did have an IPO. Therefore, if X does not exercise the warrant before the date certain, the warrant will in fact automatically terminate and X will receive voting securities of Y in a net exercise.

Significantly, at the time that X acquired the warrant, there was no certainty that X would ever acquire voting securities of Y under the warrant. If Y had remained a private company, then under the terms of the net exercise provision of the warrant, the board of Y would have determined in good faith the fair market value of a share of Y stock for purposes of the automatic net exercise should the warrant have terminated on a date certain. If the Board had determined that the fair market value of a share of Y stock would be less than the exercise price, then under the terms of the net exercise provision of the warrant, X would not have received any shares of Y voting securities upon the automatic termination of the warrant.

Please advise if under these facts, X would not have a filing obligation should the warrant automatically terminate on a date certain in the future through no act of X and, as a result, X automatically receives certain shares of Y voting securities.

Thanks for your help Mike.

Best regards,
[REDACTED]

I don't think this changes my original conclusion. The holder of the warrants will either know that he is going to exercise them or that they will automatically be exercised at a date certain in the future.

THIS WOULD BE REPORTABLE.

B. Michael
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