801.12

Verne, B. Michael

From: [redacted]
Sent: Monday, April 16, 2007 2:43 PM
To: Verne, B. Michael
Subject: HSR Filing Determination

Mike -

I left you a voicemail a short while ago regarding assistance in making a determination of whether a pre-merger notification filing is required. I received your return call, but I thought it might be helpful to present the facts in writing and let you review prior to us speaking.

Corporation A has in excess of $10 million in assets, and all the outstanding capital stock of Corporation A is being acquired by Corporation B for cash and stock valued at around $85 million. Corporation A is its own ultimate parent entity.

At issue is whether there is a "$100 million person" in the transaction. Corporation B has less than $100 million in assets or net sales. However, one shareholder ("Shareholder B") of Corporation B has more than $150 million in assets. If Shareholder B is the ultimate parent entity of Corporation B, we believe a filing will be required. If Corporation B is its own ultimate parent entity, we believe no filing will be required.

Corporation B has 5 classes of stock outstanding - one class of common stock and four classes of preferred stock. All the classes of preferred stock carry enhanced voting rights, but no special director appointment rights, at least based on the Articles of Incorporation and various certificates of designation.

In the aggregate, Shareholder B currently holds 40% of the voting power of the outstanding stock of Corporation B, and has warrants that, upon exercise, could entitle Shareholder B to hold a maximum of 49.9% of the voting power of the outstanding stock of Corporation B. No other shareholder of Corporation B holds 50% or more of the outstanding voting stock of Corporation B.

The Board of Directors of Corporation B consists of three directors, one of whom is appointed by Shareholder B, with the two others appointed by a handful of shareholders. Corporation B does not have cumulative voting, but either because of a contractual arrangement that has not been disclosed to us, or as a matter of past practice, Shareholder B has always been able to appoint this one director.

Based on these facts alone, because Shareholder B does not hold 50% of more of the outstanding voting securities of Corporation B and does not have the contractual right to appoint 50% or more Corporation B's directors, Shareholder B would not normally "control" Corporation B.

However, Corporation B has two classes of directors. One class is entitled to one vote per matter, and the other class is entitled to two votes per matter. As it turns out, Shareholder B appoints the director with two votes per matter. Accordingly, while Shareholder B can only appoint one of three directors, Shareholder B is able to control 50% of the Board of Directors for voting purposes because Shareholder B's director has 2 votes on all matters and the other two directors each have one vote. Again, although not shared with us to date, there is either an agreement that confers on Shareholder B the right to appoint the director with enhanced voting rights, or there is past practice of this case.

Does Shareholder B "control" Corporation B?

Sincerely,

[redacted]

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Shareholder B does not control Corporation B. Enhanced voting rights attributed to a director do not affect the calculation of percentage of voting securities held in the corporation. Only the number of votes per share that vote for the election of directors are counted. (see 52 FR @ 7071 March 6, 1987).

4/16/07