802.4

Verne, B. Michael

From: [redacted]
Sent: Thursday, May 31, 2007 12:24 PM
To: Verne, B. Michael
Subject: Question

Hi, Mike -
Hope you're having a good day! I am hoping to get your thoughts on the following:

Company A is initiating a tender offer to acquire 100% of the shares of Company B. Although the amount which will be paid for the stock of Company B is well in excess of $59.8 million, it appears that the transaction may be exempt pursuant to 802.4 because the board of Company A expects that the non-exempt assets of Company B - a biopharmaceutical company - will have a fair market value of less than $59.8 million.

By way of background, Company B holds a worldwide exclusive license (other than in the U.S.) to make, sell and commercialize a pharmaceutical product (the "Product") for all indications; in the U.S. Company B holds a license to make, sell and commercialize the Product only with respect to possible indications other than its primary (and only approved) indication. Company A already holds the U.S. license to make, sell and commercialize the Product with respect to the Product's primary indication. Some time ago, Company A and Company B entered into a co-development agreement with respect to the Product. As part of the agreement, Company A, pays Company B a royalty on Company A's U.S. sales of the Product.

In order to determine whether the $59.8 million limitation with respect to non-exempt assets is exceeded, Company A has access to and will consider the balance sheet of Company B, a public company, in making its fair market valuation. The book value of Company B's assets is significantly less than $59.8 million; assets stated on the balance sheet include the following asset classes: cash and cash equivalents, short-term investments, accounts receivable, inventories, property and equipment, intangible assets (patents and licenses), goodwill, deferred costs and a catch-all for "other" assets.

We understand that the cash, cash equivalents and short-term investments (which would be either cash equivalents or securities of issuers Company B does not control) will be exempt assets for purposes of the calculation. Further, the value of the worldwide license for the Product (other than the value of the US rights for development of the Product for indications other than its primary indication) will be exempt, as will all foreign intellectual property rights (none of the foreign IP generates in excess of $59.8 million of revenues in the US). We do not believe that the Co-Development Agreement itself would be an asset which would need to be fair market valued; the actual royalty stream would be a cash/cash equivalent and thus exempt for purposes of this calculation.

On the contrary, accounts receivable, inventories, property and equipment, US intellectual property (including the right to develop the Product for other indications), goodwill, deferred costs and "other assets" would need to be fair market valued by the board of Company A or its designee. We believe, however, that a significant portion of the A/R, inventories, and goodwill are attributable to the foreign IP and could be so incidental to the exempt assets as to be exempt themselves.

According to Company A's board of directors, 100% of the purchase price for Company B is due to Company A's perceived value of the ex-U.S. license for the Product; no value was given by Company

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A's board to the U.S. right to develop the product for other indications because of Company A's belief that there is little, if any, scientific support for use of the Product in other indications. Although the board understands that its fair market valuation of the non-exempt assets (including the described US development right) would be the amount that a third-party in an arm's length transaction would pay at present without contingencies, it is some indication that Company A's board will view the value of this asset as minimal or close to 0.

I just want to make sure I'm thinking about this in the correct way.

Many thanks,
[redacted]

Agree –
BM
6/11/07

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