Verne, B. Michael

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From: [redacted]
Sent: Monday, July 30, 2007 12:51 PM
To: Verne, B. Michael
Subject: FW: HSR Timing

Hi Mike.

I hope you are doing well and staying cool this summer.

I have a question about the timing of an HSR filing for a transaction with an unusual structure. Company A is contemplating entering into a series of agreements under which it would acquire B through a multi-step transaction. Those steps are described below. Although there may be negotiated changes to the details of the transaction, those changes are not expected to be material to the transaction or the structure. The only significant holdings of B are IP that it hopes to develop into a new pharmaceutical product (hereafter, "B's First IP"), which is in clinical development, and IP relating to another potential pharmaceutical product (hereafter, "B's Second IP"), which is in pre-clinical development.

(1) A would make payments to, or on behalf of, substantially all of B's stockholders in the aggregate amount of approximately $45 million in exchange for options to acquire their shares in B. Under the Option Agreements, A would have the discretionary irrevocable right to acquire the shares of B held by such stockholders at any time prior to a date certain in 2010 (the "Option Period").

(2) Contemporaneously with entering into the Option Agreements described in #1 above, A and B would also enter into a Merger Agreement under which a subsidiary of A would be merged with and into B. Consideration for the shares of B in the merger would consist of $255 million in the aggregate. The closing of the merger, and the related exercise of the Option Agreements (the "Second Closing"), would occur at A's sole discretion at any time prior to the date certain in 2010 described in #1 above.

(3) During the Option Period, A would continue, direct, and fund the clinical development of B's First IP pursuant to the terms of a Collaboration Agreement between A and B. Also A (and not B) would have the right, at its discretion, to continue, direct, and fund the development of B's Second IP during the Option Period. The Collaboration Agreement will be signed at the time the Option and Merger Agreements are entered into, and would take effect at the time the $45

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million is paid and the Option becomes exercisable (the "First Closing").

Following the First Closing, it is contemplated that B would have only two officers and no employees. It is possible that some of B's employees currently involved in the development of B's First IP would be hired directly by A. A would be responsible for B's ordinary course operating costs and expenses during this time, which are anticipated to be limited to the costs incurred as result of the Collaboration Agreement.

A and B would form a joint development committee comprised of the two B officers who would remain with B and two representatives of A. Beginning at the First Closing, the committee would oversee the implementation of the development plan for B's First IP. A, however, would chair the committee and would make all final decisions regarding the implementation of the development of B's First IP, subject to the terms of the Collaboration Agreement. A would have the right to terminate further development of B's First IP under specified circumstances. If the development of B's First IP is terminated by A, A would be responsible for the wind-down costs associated with the termination. Under the Collaboration Agreement, B would be responsible for the continued prosecution of its IP subject to A's oversight and rights to acquire such responsibility if B does not meet its responsibilities.

(4) The Option, Collaboration, and Merger Agreements would be terminated if there is a material breach of such agreements by A or if the merger does not occur on or before the date certain in 2010.

Mike, I have three questions for you related to this unusual structure.

(A) Under these facts, and the reasoning expressed in Informal Staff Opinion 0511015, an e-mail to you dated November 17, 2005, and attached to this e-mail for your convenience, I believe that A would acquire beneficial ownership of B at the time of the First Closing (when the Option becomes exercisable, the $45 million is paid, and operation of the business of B under the terms of the Collaboration Agreement begins) because at that time A would effectively fund and control B's operations. Please advise if you agree.

AGREE

(B) I also assume that so long as the parties file HSR notifications and observe the waiting period before the First Closing, and so long as the First Closing occurs within one year from the expiration or termination of the waiting period, A and B would not have to file additional HSR notifications before the Second Closing, whether or not it occurs within one year of the expiration or termination of the waiting period. Do you agree?

AGREE

(C) Finally, would B's stockholders have a filing obligation as acquiring persons if the agreements terminate after A exercises

beneficial ownership over B and if threshold tests are met at that time? Or could the parties take the position that B's stockholders would then acquire beneficial ownership of B's voting securities through no act of their own and therefore the acquisitions would be exempt?

Mike, many thanks for your help on this transaction.

[redacted]

7/30/07

The message is ready to be sent with the following file or link attachments:

Shortcut to: http://www.ftc.gov/bc/hsr/informal/opinions/0511015.htm

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