801.10

Verne, B. Michael

From: [redacted]
Sent: Monday, January 07, 2008 1:57 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: RE: Acquisition price

Thanks Mike, but HOW do they reliably value the FMV of the opportunity. When it comes down to that issue, I would think that there are only two choices:

1. regard the whole deal as two separate transactions, the second of which is impossible to predict; OR

2. value the transaction with a "handicap" value that discounts the overall value in case that the required consents never come through. I know this seems contrary to the "all or nothing" approach that you use in contingent payments.

However, the Board of Directors have fiduciary responsibilities when they value these transactions. I don;t see how they can represent to their shareholders that they are entering into a $70 million transaction ($20 MM base + $50 MM "success" fee) when it could turn out to be a $20 MM loss if the project just dies.

We would be grateful for your help on this, not just for this transaction but because it also comes up in other forms.

[redacted]

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Monday, January 07, 2008 12:54 PM
To: [redacted]
Subject: RE: Acquisition price

If there is uncertainty as to whether the contingent payment will be made, the acquisition price is undetermined and fair market value would apply.

-----Original Message-----
From: [redacted]
Sent: Monday, January 07, 2008 11:30 AM
To: Verne, B. Michael
Cc: [redacted]
Subject: Acquisition price

Mike

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We wanted some guidance on how to value a project-purchase transaction when part of the transaction price is contingent on obtaining government approvals for the project. In other words, the closing takes place with a $20 million payment, but if government approvals are obtained, then the buyer needs to pay $50 million more. Some people have referred to this second contingent payment as a "success" fee.

We look at Interpretation 94 and your own ruling on 9/14/04, but those are not quite the same issues. In this case, the contingency is not based on business success but on the rulings of third parties (government agencies). Unlike a business contingency, when presumably the parties had a chance to succeed based on marketing prowess, here, if the rulings don't come through, the project is over, period.

Under these cases, should the second "success" fee be considered part of the acquisition price?

Thanks for your time,

[redacted]

[redacted]

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I think #2 is a reasonable approach. The FMV is what you would pay up front (without any future contingency), weighing the possibility that the deal may tank if government approvals are not received. This is not an uncommon situation, especially in the pharma industry, where a licensee is getting an exclusive license to use IP to develop and commercialize a product that has not yet started clinical trials. They often pay a relatively small amount up front and then have milestone payments and royalties if FDA approvals are received and the product becomes commercially viable at some point in the future

BM
1/7/08