801.10

Verne, B. Michael

From: [redacted]
Sent: Tuesday, September 01, 2009 3:31 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: Purchase Price/Fair Market Value - Target Debt

Dear Mike -

[redacted] and I are working on an acquisition of privately-held voting securities. We have questions regarding whether and how certain debt of the target should be considered in determining the purchase price/fair market value under HSR for size-of-transaction purposes.

The current factual background is set forth below. Please assume that the HSR size-of-person test is met.

Buyer intends to acquire 85% of the outstanding voting securities of Target, which is a wholly-owned subsidiary of Seller. Seller will retain the remaining 15% of the outstanding voting securities of Target. Prior to the execution of the purchase agreement, Target will declare and pay a dividend to Seller of a $25 million senior secured promissory note (the Promissory Note), which will be executed by wholly-owned subsidiaries of the Target (the Target Companies) and that will be secured by a first lien on substantially all of the assets of the Target Companies. The purchase agreement will reference the issuance of the Promissory Note to the Seller. At closing, the Buyer will guaranty the payment and performance of the Promissory Note. Although the Target will issue the Promissory Note to the Seller as a dividend because of the proposed transaction, the Promissory Note will be issued prior to the execution of the purchase agreement for tax reasons, and not for the purpose of avoiding an HSR filing requirement.

The purchase price for the Target shares, as stated in the purchase agreement, is (1) a $50M cash payment at closing, plus or minus an adjustment for net working capital, minus certain Seller transaction expenses, and minus certain debt obligations of the Target Companies, excluding the Promissory Note; plus (2) earnout payments to be made over the next four years based on EBITDA, but not in excess of $20 million in the aggregate.

Pursuant to 801.10(a)(2), the value of privately-held voting securities to be acquired is the acquisition price, if determined. If the acquisition price has not been determined, the value will be the fair market value determined in accordance with 801.10(c)(3).

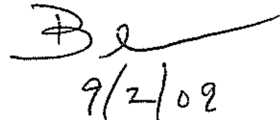
Assuming that the acquisition price is determined (the Buyer reasonably can estimate the value of the contingent portions), may the face value of the Promissory Note be ignored in calculating the acquisition price? If the acquisition price is not determined (the Buyer cannot reasonably estimate the value of the contingent portions), may the Buyer consider the Promissory Note as pre-existing debt of the Target that can be taken into account in a fair market valuation of the voting stock to be acquired?

This scenario differs from the LBO situations that [redacted] and I (and others) discussed with you last year in that the stated purchase price in the purchase agreement does not include the value of the Target debt/Promissory Note and the Target debt/Promissory Note is entered into prior to closing. Thus, the Target Companies already are encumbered by the debt of the Promissory Note at the point that Buyer acquires the voting securities of Target.

Once again, many thanks for your guidance. [redacted] and I are generally available over the next few days to discuss via phone if that would be helpful.

Best regards,

We think it is the same as the LBO scenarios we discussed last year, even if the purchase agreement does not include the promissory note as consideration. Target is taking on the $25 MM in debt for no purpose other than to partially compensate Seller for its voting securities of Target. We can't see how this is different from Buyer paying Seller $75 MM in cash and a promissory note.



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