

Verne, B. Michael

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**From:** [REDACTED]  
**Sent:** Tuesday, November 17, 2009 9:04 PM  
**To:** Verne, B. Michael  
**Cc:** [REDACTED]  
**Subject:** HSR Question

Dear Mike,

I hope all is well.

We represent a buyer that has put out a cash tender offer for a company publicly traded on a stock exchange outside the United States. Both the buyer and target have made their respective HSR notifications, and the waiting period is running. Because the trading price of the target is currently below the tender offer price, the buyer would like to enter into a contractual arrangement with one or more financial institutions that would permit (but not obligate) the buyer to acquire target stock for a fixed period of time for a fixed price ("strike price"). The arrangement could take the form of an option to buy target stock at the strike price. Alternatively, the buyer would enter into a forward contract with the financial institution(s) that would allow the buyer to purchase the target's stock in the future at the strike price.

Under either arrangement, the agreement between the buyer and the financial institution(s) would prohibit the buyer from exercising the call option/forward contract until after it obtains HSR clearance. The buyer would also be prohibited from voting or directing the financial institution(s) to vote the underlying securities until after such exercise. The parties do not expect that the target will pay any dividends before the call option/forward contract expire; however, if dividends are paid, they will be paid to the financial institution and the buyer would receive such dividends only if it exercises its call option/forward contract.

I believe that the acquisition of the call option/forward contract is not a reportable event, although the exercise of either would be reportable. See ABA Section of Antitrust Law, Premerger Notification Manual, Interpretation 29 (4th Ed. 2007) ("[t]he granting of an option to purchase voting securities at some future time is, by itself, generally not reportable, although the exercise of that option may give rise to reporting and waiting period obligations."); Informal Interpretation 0710009 (<http://www.ftc.gov/opinions/0710009.htm> <<http://www.ftc.gov/opinions/0710009.htm>> ). Please let me know if you agree, or if you are available for a call in the morning to discuss these issues.

Best regards,

AGREE -  
B  
11/17/09