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Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, March 16, 2010 2:27 PM
To: Verne, B. Michael
Subject: HSR Question re: warrant + rights to elect directors

Mike,

Thanks for your call. I thought it might be easier to put my questions in an email for you to consider. I'd like to get your read on HSR consequences of the following transaction:

A, an ESOP, will acquire 80 percent of Corporation B's voting securities in a potentially reportable transaction that meets the requirements for exemption under 16 CFR 802.35. At the same time, B will redeem the remaining 20 percent of its voting securities from the shareholders.

Five days later, 20 entities (former shareholders) will receive 1) subordinated notes with rights to elect directors attached to them; and 2) warrants. These 20 entities will pay \$130 million for the notes and warrants collectively. The notes will entitle these 20 shareholders to elect 3 out of 8 directors of the corporation. The warrants, when converted, would entitle the group to 24% of the voting securities of the corporation. Each shareholder would have a pro rata portion of notes, warrants, and voting rights, according to the shareholder's former share ownership. Three shareholders would hold 58% of the total group's notes and warrants: 22%, 19%, and 17%, respectively. There is no formal relationship between the three, however, and each will be its own Person under the Act and Rules.

I have the following questions:

1. Will the acquisition by the 20 entities be considered an acquisition of voting securities by virtue of the simultaneous acquisition of contractual rights to elect directors and warrants with a similar conversion correlation? If so, would your conclusion change if the shareholders were entitled collectively to elect 5 directors instead of 3?
2. Assuming the acquisition would be of voting securities, is there any circumstance under which the rights of the 20 acquiring persons would be aggregated to meet the size of transaction test? If the group as a whole (or the three who would control 58% of the rights as described above) were to contractually assign all of the director election rights by proxy to one person, would that result in a potentially reportable transaction? Would it matter if the proxy were revocable?

Thanks, Mike. Please let me know if you need additional information in order to flesh this out.

Best Regards,

[REDACTED]

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1. Because the warrants carry the right to “elect” directors, they are voting securities. It doesn’t matter what the percentage correlations before and after conversion are.

2. No aggregation would be required. Contractually assigning the right to vote by proxy does not constitute an acquisition, regardless of whether revocable or irrevocable. I am assuming that the persons assigning the right to vote for the election of directors are retaining the other indicia of beneficial ownership (risk of loss and benefit of gain in value and investment discretion/right to sell the shares).

BN
3/17/10