

7A(c)(3)

Verne, B. Michael

From: [REDACTED]  
 Sent: Monday, July 19, 2010 11:32 AM  
 To: Verne, B. Michael  
 Subject: 7A(c)(3)/FMV/Contingent Acquisitions Questions

Hi Mike,

I hope that all is well and you are enjoying your summer. I want to run a few related scenarios by you regarding a proposed transaction. I haven't been able to find anything directly on point.

Questions:

1. In the event a buyer purchases 50% of the voting securities of a target but does not meet the size of transaction threshold, we all agree that no HSR filing is required at that time that the buyer purchases such 50%. In the event that the buyer later acquires additional voting securities of the target and crosses the size of transaction threshold (after aggregating what buyer already holds), is the transaction exempt from filing under Section 7A(c)(3) because the buyer already owns 50% of the voting securities of the target? *YES*

2. Now say that buyer is entering into an agreement to purchase voting securities of the target in multiple stages. Buyer already owns 30% of target. Now buyer is entering into an agreement to purchase an additional 10% of the voting securities of target this year and an additional 10% next year. It is a certainty that these two acquisitions will happen. When should buyer do a fair market valuation of the voting securities of target that buyer already owns - when the parties enter into the purchase agreement, or when buyer is actually getting ready to make the acquisitions at the end of this year and at the end of next year? *AT THE TIME OF THE 1ST ACQUISITION. AGGREGATE & FILE FOR 50% BEFORE 1ST CLOSING*

3. Now say that Buyer is entering into an agreement to purchase stock as noted above so that Buyer, which already owns 30% of the voting securities of target, is agreeing to purchase an additional 20% of the voting securities of target over the next two years. As noted above, it is a certainty that these acquisitions will happen. Buyer is also agreeing in the same agreement to purchase the remaining 50% of the voting securities target in three stages which are contingent upon certain milestones being met. These three contingent acquisitions are dependent on certain milestones outside the control of buyer. We do not believe that the size of transaction threshold will be met with buyer's acquisition of the initial 50% but that depends somewhat on the answer to the question above on when to do fair market value determinations. However, the size of transaction threshold would be met if buyer makes the first of the three contingent acquisitions.

We do not believe that buyer should file now for acquiring 100% of the voting securities target as it is not certain that buyer will actually acquire 100% of the voting securities of target. Assuming that the milestones for the first contingent acquisition are met and that the transaction thresholds will be met after aggregating the fair market value of the voting securities of target already held by buyer, should buyer make a filing at the time the first milestone is met but prior to consummating the transaction? Would the transaction actually be exempt under Section 7A(c)(3) as buyer will own 50% of

*YES*

the voting securities of the target (but buyer will not have made an HSR filing for the transaction as the size of transaction threshold will not previously have been met) before any of the milestone acquisitions would occur?

7A(C)(3) IS ABSOLUTE -  
WHETHER A FILING WAS  
DONE OR NOT.

I would appreciate your insights on these questions.

Please call me with any questions.

Kind regards,

[REDACTED]

BN  
7/19/10

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[REDACTED]