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Verne, B. Michael

From: [redacted]
Sent: Tuesday, July 05, 2011 10:54 AM
To: Verne, B. Michael
Subject: HSR question

Mike,

I have a question about when the "acquisition price" of non-publicly traded voting securities has been "determined."

Assume the following facts:

Acquired person ("Target") has issued shares of Class A Voting common stock and shares of Class B Non-Voting common stock to various stockholders. Acquiring person ("Buyer") intends to pay almost $600 million for all issued and outstanding shares of Target. Here are the number of outstanding shares and the dollar value assigned to them in the Stock Purchase Agreement:

Class	Number of Shares	Dollar Value Assigned in Stock Purchase Agreement
Class A Voting Common Stock	3,400	$12.0 million
Class B Non-Voting Common Stock	170,200	$560.0 million

The same natural persons own Class A Voting Common and Class B Non-Voting Common in identical percentages within each class.

For convenience's sake and at the selling stockholders' request, the parties have simply assigned the same dollar value to each share of the Class B Non-Voting Common as they have assigned to the Class A Voting Common. Because there are far fewer shares of Class A Voting Common issued and outstanding, this makes it appear that the Class A Voting Common, taken as a collective whole, is worth far less than the Class B Non-Voting Common. However, it does not reflect the reality that to the Buyer, the Class A Voting Common is clearly worth far more than the Class B Non-Voting Common. There is a control premium that Buyer would be prepared to pay for the Class A Voting Common. That control premium has not been precisely calculated by the parties.

In my view, this is a situation where the acquisition price of non-publicly traded voting securities has not been "determined," even though the purchase agreement purports to assign a value to the voting securities that looks, on the surface, lower than the basic size-of-transaction threshold. Therefore, it seems to me that Buyer has an obligation to determine the fair market value of the Class A Voting Common in good faith. Given that Buyer is prepared to pay almost $600 million for what is in effect control of Target, it seems to me this should be a reportable transaction. The reality is that Buyer would not be entering into the transaction at all if it were only going to be acquiring Class B Non-Voting Common.

Any analysis that this transaction is not reportable seems to me to boil down to a recipe for HSR avoidance. It is very common for closely held family businesses to issue a much smaller number of voting shares than non-voting shares. If we let parties assign the same value to voting and non-voting shares with no analysis of the

control premium associated with the voting shares, very large transactions involving these closely held businesses would often require no filing. I cannot believe that is the intention behind the valuation rules.

Am I thinking about this correctly?

Thanks.

Agree

7/5/11

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