Verne, B. Michael

From: [redacted]
Sent: Thursday, August 25, 2011 1:21 PM
To: Verne, B. Michael
Subject: HSR Filing Questions

Hi Mike,

Thank you again for speaking with us on Tuesday. I just want to confirm the results of our discussion.

As we discussed, we represent a client ("Seller") that is the owner of a large commercial business. The Seller intends to sell the business by auction process, involving both financial and strategic buyers. Maximizing value from the sale of the business and the certainty of obtaining this value are key considerations for the Seller.

Any sale would be subject to the reporting and waiting period requirements of the HSR Act as well as of the merger control requirements of various other jurisdictions.

The purchase agreement will contain a termination provision specifying a "drop-dead date", which is the date by which all regulatory conditions to closing must be satisfied. If the conditions are not satisfied by the drop-dead date, the Seller can either unilaterally terminate the purchase agreement and retain the target business for its own account, or it can elect to sell the target business to another buyer. In either scenario, the failed buyer would not receive any interest in the target business. In particular, the failed buyer would not receive any dividends or earnings, would not have the right to vote or direct any vote of any shares in the target business, and would not have the right to influence the target business' management or otherwise influence the running of the target business.

You agreed that each of the following arrangements would not entail the failed buyer acquiring a beneficial ownership interest in the target business. In each of these arrangements, the payment by the failed buyer would not occur until after the drop-dead date. In addition, in each arrangement, the Seller, in its sole discretion, may decide to unilaterally terminate the purchase agreement (and retain the target business for its own account) or sell the target to another buyer. If the Seller elects to sell the target business, the on-sale would be subject to the HSR Act as well as the merger control regimes of various other jurisdictions.

<u>Arrangement 1</u>. The Seller elects to unilaterally terminate the purchase agreement. The failed buyer must pay the Seller a 100% reverse breakup fee (i.e., a breakup fee equal in amount to the agreed purchase price for the target business) within a certain specified time after the termination of the purchase obligations.

<u>Arrangement 2</u>. The Seller elects to sell the target business to another buyer. Upon the on-sale of the target business, the failed buyer must pay the Seller a "make-whole" reverse breakup fee equal to any difference between the purchase price which the failed buyer agreed to pay for the business (the "Original Purchase Price") and the actual purchase price the Seller receives from the on-sale. If the on-sale price is greater than the Original Purchase Price, the Seller retains the upside and the failed buyer has a zero reverse breakup fee.

<u>Arrangement 3</u>. The Seller elects to sell the target business to another buyer. The failed buyer must pay to the Seller an amount equal to the Original Purchase Price within a certain specified time after the drop-dead date. At closing of the on-sale, the Seller would refund the failed buyer the proceeds of the on-sale, capped at the Original Purchase Price, likely yielding a net payment by the failed buyer to the Seller of a make-whole reverse breakup fee.

Arrangement 4. Same as in Arrangement 3, except that, if the Seller elects to sell the target business to another buyer, the failed buyer can suggest a potential third party buyer to the Seller. The Seller has no obligation to accept the suggestion. So the Seller would have three options: (i) terminate the purchase agreement and keep the business, (ii) sell the business to the third party buyer suggested by the failed buyer, or (iii) sell the business to another third party buyer of the Seller's choice.

Arrangement 5. Same as Arrangement 3, except that, if the Seller elects to sell the target business to another buyer, the failed buyer has the right to direct the Seller to sell the business to a specific third party buyer. So, the Seller would have two options: (i) terminate the purchase agreement and keep the business, or (ii) sell the business to the failed buyer's designated third party buyer.

Arrangement 6. Same as in Arrangement 3, except that, if the Seller elects to on-sell the target business to another buyer, the failed buyer provides an interest-free loan to the Seller in an amount equal to the Original Purchase Price (instead of making an outright payment equal to the Original Purchase Price). The Seller then proceeds with the sale of the business to another buyer as described in Arrangement (3), (4) or (5) above. The Seller would repay the loan from the failed buyer from the proceeds of the on-sale but offset by a make-whole reverse breakup fee. (The reason for doing this one way or the other is likely to be tax driven.)

We did not discuss this, but I assume that it would be permissible for the Seller to recoup its costs of the on-sale process and to be held harmless by the failed buyer against liabilities arising as a consequence of the failure to close the transaction by the drop-dead date, that is, to set the make-whole reverse breakup fee to be equal to the amount required to put the Seller in the position it would have been in had the transaction closed by the drop-dead date.

I also want to confirm that the Arrangements described above would also be permissible for a partial sale of the target business, i.e., the parties close the portion of the transaction for which they receive the necessary approvals, and the remainder of the transaction would be subject to one of these Arrangements.

Please let me know if I have correctly memorialized our discussion. Many thanks again for your advice.

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