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Verne, B. Michael

From: [REDACTED]
Sent: Friday, November 15, 2013 5:45 PM
To: Verne, B. Michael; Walsh, Kathryn
Cc: [REDACTED]
Subject: Request for Informal Interpretation

Dear Mike and Kate:

We represent the buyer ("Buyer") in a proposed acquisition of voting securities. Counsel for the seller ("Seller") is copied on this email. Together we request confirmation of our analysis of the proposed transaction.

Buyer is a publicly traded company. Buyer proposes to acquire from Target Parent all of the outstanding voting securities of Target. Target in turn holds 100% of the voting securities of Issuer Sub, which owns various precious metal mining assets.

Under state and federal law, a mining company has certain legal obligations to take steps to restore land to its pre-mining condition when mining operations are discontinued. To secure the performance of those "reclamation" obligations in the future, the federal Bureau of Land Management ("BLM") and the analogous state authority require the posting of financial security – known generally as a "reclamation bond." In this case, Target Parent is currently the principal of a surety bond granted by an insurance company in favor of the applicable state environmental authority in the amount of approximately USD 14.6 million; the guarantor under a corporate guarantee in the amount of approximately USD 12.6 million; and the issuer of a letter of credit in favor of the BLM in the amount of approximately USD 900,000. (collectively, the "Reclamation Bonds").

In exchange for the voting securities of Target, Buyer will pay Seller a cash amount at closing and will give Seller warrants to purchase common shares of Buyer. You may assume that the combination of the cash payment and of the value (as determined in accordance with 16 C.F.R. 801.) of the warrants will be less than USD 70.9 million.

Buyer is also obligated to take Target Parent's place as principal / guarantor on the reclamation bonds. That is not expected to happen, however, until after closing, and Target Parent wishes to ensure that it will not continue to have this obligation. Buyer therefore will create and fund an escrow account. The amount that Buyer places in the escrow account will equal the aggregate amount of the reclamation bond liability described above. Buyer will, as expeditiously as possible after closing, arrange for substitute guarantees, sureties, or bonds to be put in place of the current Reclamation Bonds. If the Buyer is unable to arrange for substitutes and the governing authorities have not released the amounts bonded pursuant to the Reclamation Bonds by the first anniversary of the closing, the escrowed amounts will be released to Target Parent, and Target Parent will continue to be liable on the Reclamation Bonds. If Target Parent is subsequently released from the liability for the Reclamation Bonds, however, Target Parent will be required to pay back to Buyer the amount released from escrow.

We have not found any informal interpretations relating specifically to reclamation bonds, but we believe that interpretations dealing with payment of debt provide an analogy. In essence, Target Parent has taken on a financial obligation that has enabled Target (and Target Sub) to operate. As in Interpretation No. 88 in the ABA's Premerger Notification Practice Manual (4th ed.), the payment to Target Parent (if the escrow is released) is related to the operation of the acquired issuer, and not to some unrelated activity. It is also analogous to Interpretation No. 91, because the escrowed funds stand as a guarantee for Target Sub's existing obligation to pay Target Parent if Target Parent is required to pay on the reclamation bonds.

Can you confirm that the parties can exclude the escrowed funds from consideration attributable to the voting securities that Buyer is acquiring?

AGREE
Bm
11/18/13
KW concurs