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Verne, B. Michael

From: [REDACTED]
Sent: Thursday, October 18, 2007 1:01 PM
To: Verne, B. Michael
Subject: LLC Option Question

Dear Mike,

I hope all is well. I have a question relating to a put-call option for non-corporate interests. I assume that the treatment of such an option is similar to that of a put-call option for voting securities, but wanted to confirm that you agree with my analysis, which is set out below:

Company A plans to acquire all of the common non-corporate interests of LLC for approximately \$20M through a Purchase Agreement, which represent about 10% of the interests in the LLC. As a result of this acquisition, under the terms of an LLC Agreement, Company A will not have the right to 50% or more of the profits, or to 50% or more of the assets upon dissolution of LLC. Company A and LLC meet the size-of-person test.

At the same time that the Purchase Agreement is executed, Company A will also receive through the LLC Agreement a "put-call option" to acquire all of the preferred interests of LLC for up to an additional \$70M. No additional consideration will be paid by Company A to acquire this option. This "put-call option" is exercisable for a 2-year period. However, Company A has the option to pre-purchase preferred interests under the terms of the option. Under the terms of the LLC Agreement, until Company A holds \$90M worth of the non-corporate interests of LLC, Company A will not acquire control of the LLC by having the right to 50% or more of the profits, or assets upon dissolution.

I have concluded that until Company A has either: (1) exercised the put-call option, or (2) has pre-purchased preferred interests pursuant to the option such that the total value of its non-corporate interests is valued at \$90M (thus conferring "control" of LLC as defined by 801.1(b)(1)(ii)), Company A has not made a reportable acquisition of non-corporate interests.

I base this conclusion upon the fact that, as with voting securities, acquisition of an option to acquire non-corporate interests is not reportable, but exercise of that option may be reportable. See ABA Section of Antitrust Law, Premerger Notification Manual, Interpretation 29 (4th Ed. 2007) ("[t]he granting of an option to purchase voting securities at some future time is, by itself, generally not reportable, although the exercise of that option may give rise to reporting and waiting period obligations."). This is so provided that there is no agreement or present intention for Company A to exercise the option, and that its exercise is subject to legitimate contingencies.

<http://www.ftc.gov/bc/hsr/informal/opinions/0402013.htm>.

I further base this conclusion on the fact that the "put-call option" does not transfer beneficial ownership to Company A. PNO Manual, Interpretation 46, ("[t]he PNO recognizes that there are some situations involving the use of put-call agreements that may not require reporting under HSR, there are other situations involving the use of put-call arrangements that may transfer sufficient indicia of beneficial ownership to require an HSR filing."). This is because the LLC will continue to hold title to the LLC interests as well as bear the risk of loss or gain until the option is exercised in whole or in part. Therefore, Company A will not gain beneficial ownership of the LLC interests that would confer control

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until the option to acquire all of the preferred non-corporate interests of LLC is exercised, or until sufficient non-corporate interests are acquired by Company A to confer control under the LLC Agreement.

Please let me know if you you agree with my analysis, or if you have any follow-up questions.

I appreciate your guidance on this issue. Thank you very much for your help.

[Redacted]

[Redacted]

AGREE
BM
10/18/07

This e-mail is from [Redacted] a law firm, and may contain information that is con