From: [redacted]
Sent: Wednesday, November 12, 2008 5:34 PM
To: Ferkingstad, James H.
Subject: Proposed Transaction

Mr. Ferkingstad,

This email is to confirm my understanding of the treatment of a proposed transaction, based on a telephone conversation we had on 11/06/08. The proposed transaction is as follows:

Corporation A currently owns 42% of the membership interests in LLC X. The approximate fair market value of Corporation A's membership interests in LLC X is currently $5,000,000.00. Corporation A proposes to provide $42,000,000 in debt financing to LLC X in exchange for preferred debt securities that are convertible into common equity upon certain occurrences, and at a set price per interest. In exchange for it's commitment to lend, LLC X will also immediately issue to Corporation A $10,000,000 in warrants. Prior to conversion or exercise, neither the debt securities nor the warrants provide any current rights to profits or rights to assets upon liquidation.

Based on these facts, the convertible debt securities would not fit the definition of "non-corporate interests" in Section 801.1(f)(ii). Thus, Corporation A is not acquiring voting securities, non-corporate interests, or assets, and is not initially subject to HSR notification requirements. <u>Please confirm this conclusion</u>.

I would also like to clarify what would happen upon conversion or exercise of the warrants. I would propose the following hypothetical, based on the same facts as above:

After 2 years, Corporation A converts a portion of its debt securities into common equity interests, such that after the conversion, Corporation A has increased its membership interest (and right to profits) from 42% to 52%. The fair market value of Corporation A's previously owned 42% membership interests is then $10,000,000, and the acquisition price of the additional 10% membership interests is $10,000,000. The acquisition price for the additional 10% is disproportionate to the fair market value of the previously owned 42% because the conversion price was set at issuance and Corporation A wishes to pay a premium to convert in order to control LLC X.

My belief is this first conversion will transfer "control" of LLC X to Corporation A based on 801(b)(1)(ii), Corporation A will be deemed to acquire all of the assets of LLC X based on Section 801.2(f)(1)(i), and, based on Section 801.2(f)(1)(ii), the value of the acquisition for size of transaction purposes is determined in accordance with Section 801.10(d). Section 801.10(d) states that the value is the sum of the acquisition price of the interests to be acquired and the fair market value of any interests ... held by the acquiring person prior to the acquisition. In the proposed transaction, the acquisition price of the interests to be acquired is $10,000,000, and the fair market value of previously held interests is $10,000,000. Because the total value of $20,000,000, is less than $63,100,000, the first conversion does not meet the size of transaction test, and neither Corporation A nor LLC X is subject to HSR notification requirements. <u>Please confirm this conclusion</u>.

Another 2 years passes, and Corporation A converts the remaining portion of its debt securities and exercises all of its warrants. Corporation A has now increased its membership interest (and right to profits) from 55% to 85%. The fair market value of Corporation A's previously owned 55% membership interests is now $40,000,000, and the acquisition price of the new 30%

membership interests is $42,000,000 ($32,000,000 in debt securities plus $10,000,000 in warrants).

My belief is that after the first conversion, Corporation A is now the ultimate parent entity of LLC X based on Section 801.1(a)(3). While the value of the second conversion would equal $82,000,000, and would be greater than the $63,100,000 (as then adjusted) size of transaction threshold, the transaction would be an acquisition in which the acquiring person and acquired person are the same person by reason of Section 801.1(b)(1). Thus, the second conversion would be exempt from the requirements of the Act based on the Section 802.30 "Intraperson transaction" exemption. Please confirm this conclusion.

Finally, so long as the structure and timing of the transactions were not a sham, not driven by a desire to avoid filing under the HSR Act, and there is a good faith business purpose, the transaction will not be considered a device for avoidance and disregarded pursuant to 801.90. Please confirm that whether a multi-step transaction is a device for avoidance is a fact specific, case-by-case determination, and that no safe harbor waiting period exists in the regulations (that is, there is no set time period such as 6 months or 1 year that we could instruct our client that, if the conversions were separated by such time period, the FTC would not aggregate them as a device for avoidance).

As always, you're assistance to this point has been invaluable and much appreciated. I look forward to your response.

Best Regards,

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