

801.10

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, January 08, 2009 3:32 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Confirming email - 1/7/09 tender offer discussion

Mike:

This email is intended to memorialize the discussion among you, me and [REDACTED] in our phone call of January 7, 2009 concerning a contemplated tender offer.

1. Buyer intends to make a tender offer for 100% of the currently outstanding voting securities of Target, a Delaware corporation. The value of 100% of the currently outstanding shares (based on the tender offer price, which is higher than the market price) does not exceed \$63.1 million. Buyer then intends to merge with and into the Target, resulting in the Target's stockholders who did not tender their shares in the tender offer (other than Buyer) being entitled to receive merger consideration for each share of common stock then held equal to the amount per share offered in the tender offer.
2. For reasons wholly unrelated to the HSR Act, Buyer is only prepared to proceed with a tender offer acquisition structure in the event it is able to utilize a "short-form" merger process. Under Delaware law, in order to consummate a "short-form" merger process, the Buyer must hold at least 90% of the issued and outstanding shares of voting securities of the Target.
3. In the event that at least 90% of the currently outstanding shares are tendered and accepted for payment, Buyer would be able to consummate its acquisition of Target without an HSR filing obligation since it would be able to acquire 100% of the outstanding voting securities of Target via a "short-form" merger, valued at not more than \$63.1 million.
4. Target has additional authorized, but presently unissued, shares of common stock. In the event at least 82%, but less than 90%, of the outstanding shares are tendered, such additional unissued shares (the "Top-Up Shares") may be issued to Buyer such that, after (i) acceptance for payment of the tendered shares by Buyer and (ii) the subsequent issuance of the Top-Up Shares, Buyer would hold 90% of the issued and outstanding shares of common stock of Target and a short-form merger may be consummated. It is possible that, depending upon the number of Top-Up Shares necessary to be issued, based on the tender offer price, the aggregate value of (i) 100% of the currently outstanding voting securities and (ii) the additional Top-Up Shares could exceed \$63.1 million.
5. In the event Top-Up Shares are necessary in order for Buyer to acquire 90% of the outstanding common stock, the operative transaction documentation would require that the issuance of the Top-Up Shares occur only after the shares tendered by the current shareholders are accepted for payment. Thus, the acquisition of the voting securities of Target would take place in two distinct steps. First, the current holders would tender their shares, and the shares would be "accepted for payment." Second, at some point after the currently outstanding tendered shares are "accepted for payment," Target would issue the requisite number of Top-Up Shares to Buyer. After the foregoing two distinct steps have been taken, Buyer would complete its acquisition of Target by "short-form" merger.

As we assessed the foregoing structure, we concluded that the foregoing acquisition could be accomplished without triggering a filing obligation under the HSR Act, even where the issuance of Top-Up Shares becomes necessary. The analysis under the HSR Act would look at the two distinct steps (described in Point #5) separately.

In the first step, Buyer would acquire control of Target by virtue of its acceptance for payment of somewhere between 82% and 89.99% of the currently outstanding shares of common stock. Pursuant to 16 C.F.R. Section

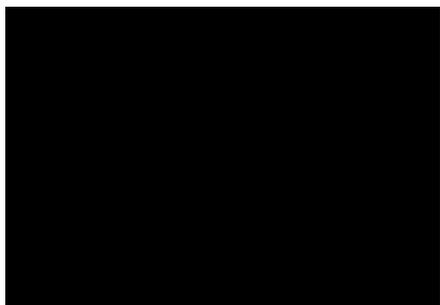
1/8/2009

801.33, "the acceptance for payment of any shares tendered in a tender offer is the consummation of acquisition of those shares within the meaning of the [HSR Act]." Thus, upon Buyer's acceptance for payment of the tendered shares, that acquisition would be deemed consummated, and Buyer would, from that point forward, control Target for purposes of the HSR Act since it would hold 50% or more of Target's voting securities. Since the value of the shares acquired in this first step does not exceed \$63.1 million, the acquisition contemplated by this first step will not trigger a filing obligation under the HSR Act since it will not satisfy the "size-of-transaction" test.

The second step, whereby Target issues to Buyer Top-Up Shares, would be viewed distinctly. That additional acquisition may be accomplished in a transaction that would be an exempt "intraperson" acquisition pursuant to 16 C.F.R. Section 802.30 since at the time of the acquisition of the Top-Up Shares, Buyer would be both (i) acquiring person and (ii) acquired person as a result of the acquisition consummated in the first step. Thus, an HSR filing obligation would not be required with respect to the issuance of the Top-Up Shares, regardless of the value of Target's voting securities held by Buyer as a result of the issuance of the Top-Up Shares.

Please let us know if you agree that the foregoing reflects our discussion and that you agree with the conclusions set forth in this confirming email.

Thanks again for your valuable guidance, and kind regards,



AGREE
[Signature]
1/8/09

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