

Ferkingstad, James H.

From: [REDACTED]
Sent: Monday, July 20, 2009 12:13 PM
To: Ferkingstad, James H.
Cc: [REDACTED]
Subject: 7/17 discussion of HSR question

7/20/09
801.1 802.31
Agree
JMF

Dear Mr. Ferkingstad:

Thank you for speaking with me and [REDACTED] last Friday, July 17th about a potential transaction. In our conversation, we discussed a transaction in which a buyer will acquire 80% of the voting securities of a target, but will also have the right or the obligation to acquire the remaining shares upon certain events tied to the employment of the target's CEO (who is also a shareholder). The purchase price for the 80% is approximately \$63.6 million which, taken alone, would mean the transaction does not meet the size of transaction test. We noted, however, that at the closing, the buyer and the remaining 20% shareholder are to enter into a Shareholders Agreement. The Shareholders Agreement provides for certain put and call options tied to the remaining shareholder's employment: If the remaining shareholder's employment as CEO is terminated for any reason, either the buyer, the remaining shareholder or both parties will have a put or call at fair market value with respect to the 20% held by the remaining shareholder. A few (non-exhaustive) examples: (a) if the remaining shareholder dies, his heirs will have a put and buyer will have a call at fair market value; (b) If the remaining shareholder is fired without Cause, the remaining shareholder will have a call at fair market value, but the Buyer will not have a put until the one year anniversary of the firing; and (c) If the remaining shareholder is fired with Cause, the buyer will have a call, but the remaining shareholder will not have a put. This transaction structure has been chosen for business reasons independent of any HSR considerations.

In considering whether the option to acquire additional voting securities through this put/call feature would make the deal reportable, Joel and I first pointed out to you that the Premerger Notification Office has consistently taken the position that the acquisition of an option to acquire voting securities is exempt from reporting, although the eventual exercise of the option is potentially reportable (assuming the relevant size tests are met and no other exemption applies). 16 C.F.R. §§ 801.32, 802.31. In this case, the remaining shareholder will retain the right to vote his shares and will retain the dividend rights and the economic risk as to the future value of his shares. We further pointed out that under Section 7(A)(c)(3) of the HSR Act, an acquisition of an issuer's voting securities is exempt if the buyer already holds 50% or more of the issuer's voting securities before the acquisition at issue. We said we believe this exemption applies in this case because at whatever time buyer acquires additional shares through the exercise of the put or call options, it will already hold at least 50% of the voting securities of target. We noted to you that our analysis is based on an informal staff opinion (<http://www.ftc.gov/opinions/0404017.htm>, dated April 26, 2004). We noted as well that the only notable factual difference we saw in the facts described in that opinion

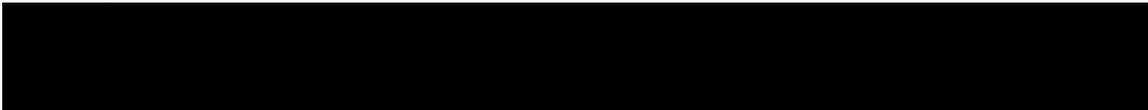
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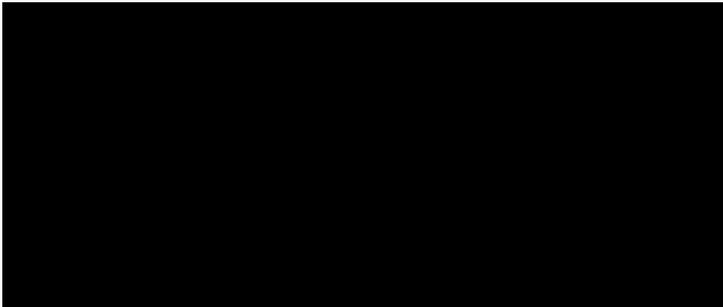
and our facts is that, in our case, the buyer's option can theoretically be exercised at any time after the closing as detailed above. In the informal opinion, the put/call option could not be exercised for five years.

After listening to the above and highlighting the applicability of the exemption in Section 7(A)(c)(3), you concurred in our conclusion that this deal is not reportable. I would appreciate a telephone call confirming that I have correctly stated your advice.

Thank you for your assistance in this matter.

With regard,





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