

801.2
802.30

TRANSACTION DESCRIPTION AND ANALYSIS

FACTS

Corporation A proposes to acquire 80% of the voting securities of Corporation B for \$64 million from the four current shareholders of Corporation B, who are management employees of Corporation B and will continue to be so following the acquisition. Business reasons for having the current shareholders of Corporation B continue to own the remaining 20% of the voting securities of Corporation B (the "Remaining Shares") are to keep them actively involved in the business and to provide an incentive for them to make the business profitable.

As part of the transaction and for no additional consideration, Corporation A will also acquire an option to acquire the Remaining Shares. In addition, as part of the transaction and for no additional consideration, each of the four shareholders of Corporation B will acquire an option to require Corporation A to purchase the Remaining Shares owned by them. There is no requirement for the holder of an option to exercise the option. Except in the event a shareholder's employment is terminated without cause or a shareholder terminates his employment for cause, none of the options is exercisable for three years, and the purchase price will depend on the earnings of Corporation B over the three year period. If the earnings increase, the option price will increase. Conversely, if the earnings decrease, the option price will decrease.

During the option period, the four current shareholders will retain all rights and indices of ownership of the Remaining Shares, including the right to vote and receive dividends, and will bear the risk of loss or gain until the option is exercised. Except for the call and put options, Corporation A will have no interest in the Remaining Shares.

It is possible that, prior to the closing, Corporation B could transfer its business to a wholly owned subsidiary, which would be a limited liability company (the "LLC"). In that event Corporation A would acquire 80% of the membership interests in the LLC, the remaining 20% of the membership interests of the LLC (the "Remaining Interests") would continue to be held by Corporation B or the four current shareholders, and the

same call and put options and the rights and risks of ownership would apply as described above. Again, except for the call and put options, Corporation A would have no interest in the Remaining Interests.

As part of the transaction and for no additional consideration, Corporation A will have the option of requiring the four shareholders to cooperate in making an election under the Internal Revenue Code whereby the transaction would be treated for federal income tax purposes as if Corporation B had sold all of its assets and distributed 80% of the proceeds to the shareholders. However, any such election would affect only the federal income tax treatment of the transaction and would not affect any part of the transaction as described above.

QUESTION

Is any filing required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), in connection with the transactions described above?

ANALYSIS

The acquisition of voting securities for \$64 million is not a reportable transaction because the purchase price does not exceed the current size-of-the-transaction threshold of \$65.2 million.

The acquisition of an option to acquire voting securities is exempt under 16 C.F.R. §§801.1(f)(3) and 801.32. See also ABA Section of Antitrust Law, Premerger Notification Practice Manual, Interpretation 29 (4th Ed. 2007). The acquisition of the put option by Corporation A does not provide Corporation A with any beneficial interest in the Remaining Shares as referenced in ABA Section of Antitrust Law, Premerger Notification Manual, Interpretation 46 (4th Ed. 2007).

The foregoing is consistent with Informal Staff Opinions 0404017, 0710009, 0905009 by B. Michael Verne and 0907015 by James H. Ferkingstad.

The same analysis would also apply to the Remaining Interests.

In view of the foregoing, I believe that the transaction is not reportable and that no filing is required under the Act. It is recognized that the exercise of an option is subject to the reporting requirements of the Act. However, with respect to Corporation A, if Corporation A remains the owner of 80% of the voting securities of Corporation B or 80% of the membership interests of the LLC, the exercise by Corporation A of the call option, and the exercise by a shareholder of the put option, would be exempt under 16 C.F.R. §802.30.

AGREE
BN
11/2/09