

Verne, B. Michael

801.1

From: [REDACTED]
Sent: Sunday, February 13, 2011 9:13 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Question on Beneficial Ownership
Importance: High

Mike:

We represent an individual ("Buyer") who seeks to make an investment in Target valued below the minimum HSR notification threshold. [REDACTED] (cc'ed here) represents Target.

Buyer is also a non-controlling shareholder in a closely held Canadian Corporation ("Existing Shareholder") that currently holds a stake in Target, and Existing Shareholder is the registered holder of the Target shares.

Buyer, as well as the other shareholders in Existing Shareholder, is party to a shareholder agreement (the "Shareholder Agreement") relating to Existing Shareholder that has an unusual provision concerning the right to vote the Target shares held by Existing Shareholder, and these provisions give rise to a "beneficial ownership" question. Importantly, if Buyer were to be deemed to have "beneficial ownership" over his pro rata portion of the Target position held by Existing Shareholder in Target, and therefore be deemed to "hold" such Target shares, the aggregate position to be held by Buyer resulting from the proposed investment would exceed the minimum HSR notification threshold. Existing Shareholder also has the right to nominate three board members of Target, and pursuant to the Shareholder Agreement, Buyer has the right to designate one of those nominees.

In essence, the terms of the shareholder agreement require that Existing Shareholder can take an action (such as voting the Target shares) only after there is unanimous consent by the Existing Shareholder shareholders to do so, and in doing so, each shareholder "shall be entitled" to direct the Existing Shareholder as to how to vote such shareholder's pro rata share.

The relevant provisions are as follows:

Section 3.4 Exercise of Authority.

Subject to [irrelevant language omitted], all decisions, approvals, determinations and consents of the Directors or the holders of Voting Shares required by this Agreement will be decided, approved, determined or consented to by all of the votes cast at a Directors' meeting or, unless otherwise required by law, by all the votes cast at a meeting of the holders of Voting Shares or by written resolution signed by all of the Directors or, unless otherwise required by law, all of the holders of Voting Shares, as the case may be.

Section 4.4 Shareholder Approvals.

(1) Subject to . . . Section 4.4(2), . . ., the [Existing Shareholder] may not make a decision, take action or implement a change without the unanimous approval of the holders of the Voting Shares, in addition to any other approval required by law.

(2) Each holder of Common Shares shall be entitled to direct the [Existing Shareholder] as to the manner in which the [Existing Shareholder] shall exercise the voting rights attached to the number of Special Voting Shares equal to the number of Common Shares held by such Shareholder at the relevant time and the [Existing Shareholder] shall exercise such voting rights as so directed.

We believe that Buyer should not be viewed as having beneficial ownership over his pro rata portion of the Target position held by Existing Shareholder since Buyer does not have the unilateral ability to vote, or even instruct the manner by which Existing Shareholder votes, Buyer's pro rata portion at his discretion, since Buyer is entitled to direct the Existing Shareholder to vote his pro rata portion only if all of the other shareholders of Existing Shareholder agree that Existing Shareholder may in fact take an action. Therefore since Buyer's ability to instruct the manner by which such Target shares are voted is contingent upon certain events that are out of Buyer's control, we do not believe beneficial ownership arises. Please let us know whether you agree with our analysis or whether you believe these provisions confer upon the Buyer "beneficial ownership" over his pro rata share of Target voting securities. As this is a time sensitive matter, and the answer to this issue is likely to be dispositive, we'd be grateful if you could let us know your thought at your earliest opportunity. We are, of course, available to discuss at your convenience.

Kind regards,

[Redacted signature]

[Redacted signature]

Agree
BW
2/14/11

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