

801.10

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, March 10, 2011 2:23 PM
To: Verne, B. Michael
Subject: Service Contract Question

Mike,

I have a question regarding long-term service contracts in the context of a voting securities acquisition.

Let's assume Company A plans to buy all of the issued and outstanding voting securities of Company B for \$20 million. Company B plans to enter into a new long-term service contract with Company A to service Company B's current customers. Company B will be paid for its performance under this contract based on certain sales targets. It is expected that the potential additional revenue to Company B could be as high as \$80 million. No premium is being paid by Company A for this long-term contract, and all of the services relating to the to-be-executed service contract will be performed in the future.

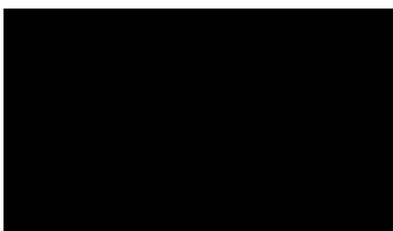
It is my understanding based on the informal guidance I have read that the size-of-transaction in this situation includes only the \$20 million payment for the voting securities of Company B, and that the service contract does not constitute an asset which needs to be valued where no premium is being paid by Company A for this new contractual arrangement. I wanted to confirm that you agree with me on this. The relevant guidance that I am drawing upon in reaching this conclusion, while not directly on point, is set out below.

I base my conclusion in part on the following informal interpretations: Premerger Notification Practice Manual, Interpretation 100 (4th ed. 2007), stating that in the context of an asset acquisition, the buyer's assumption of an obligation to pay a fixed amount in the future to the seller is not included in the acquisition price if that obligation represents payments under an executory contract with the seller . . . for which . . . services have not yet been received. I assume that the same principle will apply in a voting securities context via 802.4.

In the context of a newly formed JV, a joint-venturer's entry into a service contract with a JV requiring future performance by the JV in exchange for future revenues to the JV would not be considered an asset of the JV, unless the co-JV partner would pay a premium to assume the obligations under the contract.

<http://www.ftc.gov/bc/hsr/informal/opinions/0503015.htm>

Thank you very much for your help with this.



AGREE
BN
3/14/11