7A(c)(10)

Verne, B. Michael

From: [redacted]
Sent: Monday, July 11, 2011 6:00 PM
To: Verne, B. Michael
Subject: Guidance on 7A(c)(10)

Mike,

I hope all's well. I'm analyzing a transaction in which the application of 7A(c)(10) comes into play, and which involves some of the same topics that we covered a few years back (included in the email chain below).

The transaction that I'm examining involves an Investor who holds two types of warrants that will be exercised in connection with an IPO.

The first group is one that will be automatically exercised under the written terms of the warrant if "in the money" immediately prior to its expiration. The occurrence of an IPO is one of the expiration triggers, and these warrants were acquired prior to any "quiet period" associated with the IPO. As a result, I understand that the exercise of this group of warrants would not be a potentially reportable "conversion" given the guidance set forth in Interpretation #156 in the Premerger Notification Practice Manual (4th Edition) (and the informal interpretations it references).

The second group of warrants is one which does not get automatically exercised by the occurrence of an IPO but which the Investor intends to exercise at that time. My read is that, in line with Informal Interpretation # 021009 (http://www.ftc.gov/bc/hsr/informal/opinions/0210009.htm), and our correspondence below, the exercise of these warrants at the same time as the IPO would fall within the coverage of 7A(c)(10) and the acquisition of the voting securities that results would be exempt. The number of IPO shares being issued will certainly dilute Investor's holdings (even after giving effect to its exercise of both groups of warrants).

As with the interpretation above, and our correspondence below, any transitory uptick in the percentage of outstanding held by Investor does not – I think – render 7A(c)(10) inapplicable given that Investor's increased stake will be diluted essentially simultaneously by virtue of the IPO ("nearly simultaneous" here being a difference of minutes or hours, if at all, and certainly occurring the same day as the IPO shares are acquired by third parties) and leave the Investor with a smaller percentage stake of Issuer's voting securities than it held immediately prior to exercising its warrants.

Please let me know your thoughts and thanks, as always, for your time. If you have any questions I'm happy to address them by email and/or live at a time that works best for you.

Thanks,

[redacted]

Agree
BM
7/12/11

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Thursday, September 20, 2007 6:29 AM

To: [redacted]
Subject: RE: Guidance on the Scope of 7(A)(c)(10) where voting percentage increases but is then immediately diluted

I agree no filing is required
-----Original Message-----
From: [redacted]
Sent: Wednesday, September 19, 2007 11:22 PM
To: Verne, B. Michael
Subject: Guidance on the Scope of 7(A)(c)(10) where voting percentage increases but is then immediately diluted

Mike,

I'm faced with a fact pattern that I've concluded would not trigger a filing but wanted to confirm this. I'd appreciate your views on this when you get a chance and, if needed, am happy to schedule a call to answer any questions you have.

As part of an issuer's acquisition of another company it needs (or wants) to get an infusion of cash. A minority holder, who is the focus of this email, will contribute part of those needed funds and receive additional voting securities of the issuer in return. These newly acquired shares would increase his stake such that the necessary jurisdictional thresholds are crossed and his percentage of voting securities held would also increase. However, immediately (the same day, or possibly only minutes after this cash comes in) the issuer will also be issuing substantial numbers of additional voting securities as consideration for its acquisition of the other company.

The issuance of these additional shares results in the minority holder actually ending up with a lower percentage of the total outstanding than what he held immediately before his purchase of new shares in the issuer. So, although his percentage holdings do technically increase, this increase is extremely transitory and the almost immediate result is actually a dilution of his holdings.

With the understanding that if the second step didn't occur the minority holder would not be HSR compliant, can you confirm that this temporary blip (before the inevitable dilution) isn't sufficient to trigger a filing obligation. I've been told that the two steps are inextricably linked, so that risk of a long-lived increase shouldn't be a factor.

Thank you in advance and please let me know if you have any questions. While my research didn't turn up any interpretations directly on point it seemed to me that this was somewhat analogous to the treatment of cashless exercises of options (such as that discussed at http://www.ftc.gov/bc/hsr/informal/opinions/0210009.htm). I'm hoping that this approach seems reasonable to you.

[redacted]