

801-2

Verne, B. Michael

From: [Redacted]
Sent: Monday, January 27, 2014 8:47 AM
To: Verne, B. Michael
Subject: Performance Stock Units

Hi Mike.

Happy Monday!

I have a question about the possible HSR reportability of "performance stock units" ("PSUs") awarded to a company executive (Mr. X).

Under the PSU award, Mr. X would acquire the underlying shares only if and when two conditions are satisfied: (i) certain stated performance goals are met and the Company's compensation committee certifies satisfaction of such goals and (ii) Mr. X continues to serve as an officer of the Company on a date certain in the future (the Vesting Date).

Assume that at the time the PSUs were awarded to Mr. X, satisfaction of the stated performance goals was not certain to occur. Also assume that there is a lag of months between certification that the performance goals were satisfied and the Vesting Date. Mr. X cannot vote the underlying shares, sell the underlying shares, or even receive dividends on the underlying shares until the Vesting Date. However, should the Company have a 2:1 stock split before the Vesting Date in the form of a stock dividend, the number of shares he would receive on the Vesting Date would double. I believe, and can confirm if it is relevant, that the exact number of shares Mr. X would receive on the Vesting Date is a function of the Company's actual performance and could vary significantly depending on by how much the Company exceeds the stated performance goals.

- (1) Because at the time the PSUs were awarded to Mr. X it was not a certainty that the performance goals would be satisfied, is it the case that Mr. X does not have an HSR filing obligation when and if he ultimately acquires the shares even if HSR threshold tests were satisfied as a result? Does it matter that he will know months before the Vesting Date whether the performance goals were satisfied, although the Vesting Date still would not occur if he were not a Company officer on that date?
- (2) If Mr. X could have an HSR filing obligation even though it was not a certainty that the performance goals would be satisfied, when would Mr. X be deemed to acquire beneficial ownership of the shares underlying the PSUs? I assume that he would not have a filing obligation when the compensation committee certifies satisfaction of the performance goals because Mr. X cannot vote the shares, sell the shares, or receive dividends on the shares at that time. Moreover, he will not receive the underlying shares at all if he is not an officer of the Company on the Vesting Date. Would the Vesting Date be the date he acquires beneficial ownership of the shares (and has an advance HSR reporting obligation) for HSR purposes?

Thanks for your help.

Best regards,
[Redacted]

1. Mr. X will know months in advance of the vesting date whether the performance goals have been met. Further, presumably he knows whether he intends to remain an officer of the company through the vesting date. We think he needs to file before the PSUs vest.
2. We don't think that beneficial ownership of the underlying shares passes to Mr. X until the vesting date.

BW

1/28/14

KW CONCURS