

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Monday, December 14, 2020 3:14 PM
To: Berg, Karen E.; Carson, Timothy; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Musick, Vesselina
Subject: FW: Cash Tender Offer Inquiry

From: Walsh, Kathryn E.
Sent: Monday, December 14, 2020 3:14:09 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Cash Tender Offer Inquiry

Your transaction would not qualify for CTO status – the CVR is not a “present cash payment” (see PNPM #218) as it involves a potential future cash payment.

From: [REDACTED]
Sent: Monday, December 14, 2020 12:44:39 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: Cash Tender Offer Inquiry

Hello PNO Team,

We are hoping to get your guidance regarding the waiting period with respect to a cash tender offer. Based on previous PNO guidance we received via telephone, we believe the transaction should be considered a cash tender offer that qualifies for the 15-day waiting period, but please let us know if the PNO’s view has changed or you require additional information to provide a response.

Facts

1. Buyer and Seller are both public corporations.
2. The transaction will be structured as a tender offer whereby the Buyer acquires all of the issued and outstanding voting securities of Seller, after which Seller will be merged with an entity controlled by the Buyer.
3. The consideration for the offer will be cash. Buyer will purchase each share for a set price at closing. The agreement also grants contingent value rights (“CVR”) to certain shareholders of the Seller (“CVR Holders”) with a maximum value that is less than the share purchase price.
4. The CVRs at issue here operate as a delayed cash payment whereby, if a certain milestone event occurs before an agreed upon date, the CVR Holders are entitled to an entirely cash payment as specified by a formula provided in the agreement. The amount of the payment is dependent upon the date of occurrence of the milestone event. The sooner the event occurs, the higher the payment. However, if the milestone event does not occur before an agreed upon date, no payment will be made. Any such payment under the CVR will only be paid one time.
5. Regardless of the time of completion of the milestone event, the CVR holders are only entitled to cash consideration.

Analysis

6. The CVRs here only entitle the CVR Holders to cash payments.

7. While recent informal interpretations note that consideration in the form of a promissory note or loan note disqualify a transaction from filing as a cash tender offer, the CVRs here are different from such instruments because they are not a guarantee to be paid, they do not include additional interest payments, and are only payable one time. To the contrary, the CVRs here are like a cash bonus as the payment is contingent upon the occurrence of an event entirely in the control of the CVR Holders and is heavily discounted in comparison to the share purchase price.
8. As noted above, we received telephone guidance in 2013 that these types of CVRs qualified as cash consideration and the 15-day waiting period was applicable.

Question

9. Do the CVRs disqualify the transaction from being considered a cash tender offer such that the 15-day waiting period is applicable?

As always, we appreciate your time and consideration. Thank you.

[REDACTED]

[REDACTED]

[REDACTED]