801.12

Verne, B. Michael

From: [redacted]
Sent: Thursday, March 20, 2014 4:57 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: guidance please - pro rata exemption

Dear Mike - Company A is engaged in the issuance of Series C preferred stock in a 3rd round of financing. Two investors will participate. Investor X (the founder of the company) and Investor Y (an investment firm).

1. Investor X (the founder) filed HSR during the last round of financing and now holds in excess of 50% of the voting securities of Company A - Consequently, Investor X will not need to file

2. Investor Y (the investment firm) - As a consequence of Investor Y's acquisition in this round, it will hold voting securities of Company A valued in excess of $75.9 million. We are trying to determine whether they will be able to take advantage of the pro rata exemption. My question concerns how we calculate this based on the following facts:

- Company A has 5 board seats, only 2 of which are filled now, and those are the only 2 (out of the 5) seats that will be filled post-closing and for the foreseeable future. – (Hoping to confirm that we use 5 as the total number of directors in the following calculation)

$$\frac{\textit{\# of Votes of Class A Held}}{\textit{Total Votes of Class A}} \times \frac{\textit{Directors Elected by Class A Stock}}{\textit{Total \# of Directors}} = \%$$

- The Common Stock is split into Class A shares (100 votes/share) and Class B shares (1 vote/share).
- Series A Preferred Stock also has 100 votes per share.
- Series B Preferred Stock generally has only 1 vote per share.
- The <u>new</u> shares—the Series C Preferred Stock—will also generally have only 1 vote per share.
- Under the Charter and the Voting Agreement, the majority of the voting power of the **Common Stock** (Investor X) has the power to elect three (3) of the five board seats, one (1) of which is a currently filled seat.
- Under the Charter and the Voting Agreement, **the Series A majority holder** (Investor Y) controls one (1) Board seat, which is filled by the Series A director.
- Under the Charter, the independent director seat (unfilled) is elected by a majority of voting power of all shares outstanding (Investor X). Under the Voting Agreement, this director must be <u>designated</u> (chosen) by all the other directors then serving. (***And all key stockholders must vote their shares in favor of the person the currently serving directors agree upon for this seat.***) Again, this seat is empty and will almost certainly remain empty for the foreseeable future.
- (To summarize, that's 5 total seats: 3 common, 1 independent (appointed and elected as described above), 1 Series A. No changes to this structure are contemplated for this round.)

Would be grateful for your guidance as how we factor in the different voting powers (as described above) into the calculation.

Thank you kindly,

[redacted]

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The correct number of directors for the denominator is 5. It doesn't matter how many seats are filled.

To calculate Investor Y's holdings post acquisition of new Series C Preferred shares:

$$\frac{\text{\# of Series A Preferred held by Y x 100}}{\text{Total \# of Series A Preferred x 100}} \quad \text{X} \quad \frac{1}{5}$$

PLUS

$$\frac{\text{(\# of Series A Preferred held by Y x 100) + (\# of Series B Preferred held by Y x 1) + (\# of Series C Preferred held by Y x 1) +}}{\text{(Total Common Class A x 100) + (Total Common Class B x 1) + (Total Series A Preferred x 100) + (Total Series B Preferred x 1) + (Total Series C Preferred x 1)}} \quad \text{X} \quad \frac{1}{5}$$

To calculate Investor Y's holdings pre-issuance of new Series C Preferred shares use the same formula without the Series C Preferred in the numerator and denominator.

The terms of the voting agreement are irrelevant to the calculation of percentage held. Only the number of votes attributed to each class of shares and the total number of shares of each class are used.

3/24/14

KW & DG concur