June 29, 2006

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To the Editor:

Regarding the article by Bruce Prager and Hanno Kaiser titled "Good News for Hedge Funds" in your June 9, 2006 issue, your readers should understand that the Federal Trade Commission and the Antitrust Division have not changed their position regarding the reportability of put-call agreements. We also want to emphasize an important point made by the authors: Oral advice and interpretations from the FTC's Premerger Notification Office are given on a case-by-case basis and do not constitute an official position of the FTC and/or the Antitrust Division.

Since 1978, the FTC has made clear that whether a put-call agreement is reportable turns on a fact intensive analysis of beneficial ownership:

> "the existence of beneficial ownership is to be determined in the context of particular cases with reference to the person or persons that enjoy the indicia of beneficial ownership, which include the right to obtain the benefit of any increase in value or dividend, the risk of loss or value, the right to vote the stock or to determine who may vote the stock, the investment discretion (including the power to dispose of the stock) . . . Beneficial ownership may be effected directly (i.e. where the beneficial owner has legal title), or indirectly through fiduciaries, agents, controlled entities or other means." Statement of Basis and Purpose, 43 FR 33450, 33458 (July 31, 1978)

As the article pointed out, activist investors cannot usually avail themselves of the investment only exemption from Hart-Scott-Rodino (HSR) Act reporting requirements. It is equally important to remember that put-call agreements and other legal or business arrangements that allocate risk of loss and benefit of gain can raise a number of HSR issues. Whether a particular transaction requires a filing will depend on the specific facts involved in the arrangement.

The application of the beneficial ownership analysis to a particular acquisition can be complex and we encourage hedge funds to seek informal guidance from the Premerger Notification Office regarding their particular put-call transactions before taking positions in excess of the $56.7 million filing threshold without first filing and waiting as required by the Hart-Scott-Rodino Act. As always, we appreciate the efforts of Mssrs. Prager and Kaiser, as well as many other HSR practitioners, to highlight areas of interest and provide valuable insights to the FTC and the Antitrust Division in our continuing efforts to improve the Hart-Scott-Rodino Premerger Notification Program. We recognize that the reportability of transactions involving

investors in complying with the HSR Act.