

Verne, B. Michael

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**From:** [REDACTED]  
**Sent:** Thursday, December 02, 2004 2:55 PM  
**To:** Verne, B. Michael  
**Cc:** [REDACTED]  
**Subject:** HSR Analysis of Transaction Discussed in 12-1-04 Telephone Call

Hi Mike.

[REDACTED] and I appreciate your guidance on the hypothetical we discussed on the telephone yesterday. We are sending you this e-mail now to confirm our understanding of the appropriate HSR analysis of this rather complex transaction. Specifically, we discussed the following hypothetical.

Fund is a foreign trust, the units of which are held by the public and listed for trading on a foreign exchange. The unit holders of Fund have the right to elect trustees (akin to directors) of Fund. We understand that the Fund would be considered a corporation under HSR rules.

Fund is planning to acquire the voting securities of a U.S. corporation, I. Fund will acquire these shares through a merger in which I's current stockholders will exchange their current shares in I for a new class of post-merger I shares. The transaction will be structured as follows.

(1) Fund directly or indirectly will form a wholly-owned foreign subsidiary ("Foreign Sub") and a wholly owned U.S. subsidiary ("US Sub").

(2) Fund will create a new Class A Unit (described below) which it will contribute to US Sub.

(3) US Sub will merge with and into I, with I surviving. I will then hold the Class A Unit. Fund will contribute the surviving entity, I, to Foreign Sub.

(4) In the merger, each share of I capital stock outstanding immediately before the merger will be converted into a number of participating preferred shares of I and Foreign Sub will grant the holders of participating preferred shares exchange rights entitling the holders to exchange their participating preferred shares for ordinary units of the Fund or for cash. The holders of the participating preferred shares of I will have the right pursuant to I's Amended Certificate of Incorporation to elect one of I's three directors, so long as the holder of the Class A Unit is entitled to appoint at least one trustee of Fund as described below. This director will enforce the Class A Unit rights described below.

(5) The holders of certain classes of I stock are planning to convert their shares of such stock into shares of I common stock contingent upon and concurrent with the merger.

(6) The Class A Unit will have certain governance rights under the Fund's Declaration of Trust with respect to the Fund so long as X (certain current stockholders of I who are venture funds affiliated with each other but not under common control) holds a majority of the "Retained Interests" – the interests that the current I stockholders will hold in I as a result of the merger (and the Fund pursuant to an exercise of exchange rights). These governance rights will permit the holder of the Class A Unit to appoint two of the Fund's seven trustees (directors) so long as the Retained Interests

represent a certain percentage of the Fund's fully diluted equity interests. (If the Retained Interests represent a specified smaller percentage of the Fund's fully diluted equity interests, the holder of the Class A Unit will be able to appoint one of the Fund's seven trustees.) In addition, under the Fund's Declaration of Trust, the holder of the Class A Unit will vote for the Fund trustees nominated by the governance and nominating committee of Fund. Also, under I's amended certificate of incorporation, all powers and rights of I and its board with respect to the Class A Unit will be exclusively vested in the holders of a majority of the shares of Participating Preferred Stock (X). The Class A Unit does not have any economic rights with respect to the Fund, except for redemption at nominal value upon the termination of its governance rights. X, as the majority holders of I participating preferred stock, will effectively determine which two trustees to appoint to the Fund's board.

We understand that the transaction would be analyzed as a merger. We also understand that the conversion of the current I stockholders' shares into shares of I participating preferred stock would be reportable if threshold tests are satisfied and no exemption applies. If the c(10) exemption applies to one or more of I's current stockholders, however, such stockholder(s) would not have to report its or their acquisition of participating preferred shares in the merger. We understand that when applying the analysis under c(10), we do not give effect to the conversion of certain I stockholders' shares into common stock which is contingent and concurrent with the merger (as described above) in calculating the current percentage of voting securities held.

We also understand that the Class A Unit would be deemed a voting security. However, if I is deemed to beneficially hold the Class A Unit, and if the Fund is the ultimate parent entity of I as a result of the merger, then I's acquisition of the Class A Unit would be exempt from reporting requirements under the intraperson exemption. Under the facts we have described, we understand that I would be deemed to beneficially hold the Class A Unit.

Finally, we understand that any I stockholder who wants to exchange its participating preferred shares for units of the Fund could have a filing obligation if threshold tests are met and no exemption applies.

Mike, please let us know if you agree with our analysis or if we have mischaracterized in any way the proper HSR analysis of this transaction. As always, thanks for your help.

Best regards,

[Redacted]

[Redacted]

Agree -  
B. [Signature]  
12/2/08

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