801-1(b)

Verne, B. Michael

From: [redacted]
Sent: Tuesday, December 20, 2005 6:13 PM
To: Verne, B. Michael
Subject: UPE

Hi, Mike. Sorry the questions have been so frequent of late. I hope things will calm down soon, and I can quit emailing you so frequently.

I have a situation very similar to one you addressed previously, as reflected in a letter dated 3/2/05. The letter is found online at: http://www.ftc.gov/bc/hsr/informal/opinions/0503004.htm

Here, a new company has been formed to make an acquisition, indirectly, through 2 other newly-formed companies. I'll refer to them as TopCo, MidCo and BidCo. My question is whether TopCo is its own UPE.

TopCo is owned by seven partnerships, no one of which will hold more than 50% of the shares of TopCo. Each partnership has many investors, each of which is a limited partner of the partnership in which it invests. None of the partnerships is controlled by any one person or entity (according to the 50% profits/assets upon dissolution test). Thus, I believe each partnership is its own UPE. However, each partnership has the same general partner. And this general partner will have the right to appoint the directors of TopCo. I am told that this general partner will have the right to appoint more than 50% of the board of TopCo, in the aggregate.

I believe that because this general partner is acting on behalf of seven different funds, the general partner would not be deemed the UPE. The following paragraphs from the 3/2/05 letter seem to support this view, but the facts are not exactly the same.

"Messrs. (redacted) inquired as to whether the result would be different if, hypothetically, the Investment Funds were managed by a common person or entity other than the general partner of any of the Investment Funds but that is nevertheless under common control or otherwise affiliated with all of the general partners of the Investment Funds, and whether such an arrangement would vest in the manager the contractual power to designate 50 percent or more of the directors of Newco I under Rule 801.1(b)(2), and you advised that the PNO would not view such an arrangement as conferring control of Newco I.

[...]

In a follow up call on March 1, we further discussed the shareholders agreement and its terms. We explained that under the shareholders agreement to be executed at closing, all of the parties to the shareholders agreement, including the Contributing Shareholders and the Investment Funds, will agree to vote their shares in favor of board representatives selected by the Investment Funds. However, because no one

Investment Fund acting independently would have the contractual power to designate 50 percent or more of the directors, you advised that Newco I would remain its own ultimate parent. You further advised that your position would not be different even if the Investment Funds would in all likelihood be acting together."

As always, thanks in advance for your advice.

AGREE.
B
12/20/05

Best regards,

[redacted]

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For further information about [redacted] please see our website at [redacted]