801.1(b)

Verne, B. Michael

From: [redacted]
Sent: Thursday, February 01, 2007 3:21 PM
To: Verne, B. Michael
Subject: Informal interpretation

Dear Mike,

We haven't spoken in a while. I have a scenario I would like to run by you involving a newly-formed LLC and control of unincorporated entities.

Corporation "X" and over 50 individuals and other entities (the "co-investors") intend to form a limited liability company "LLC." The co-investors would contribute a total of $2 million in exchange for 90% of the votes and 90% of the rights to profits and, upon dissolution, the assets. These shares would be variously distributed among them, but no one co-investor would have 45% or more of the votes and rights to profits and assets of LLC. X would contribute $49 million and receive shares giving it the right to 10% of the vote and to 10% of the profits or, upon dissolution, the assets of LLC. X will also receive a preferred right to recover its $49 million investment before any other shareholders receive any income from the LLC. X will also serve as managing member of the LLC.

The LLC will borrow $74 million. The LLC will use the total $125 million in cash to make an acquisition of stock and assets with a determined purchase price of that amount from an acquired person satisfying the $100 million size-of-person threshold, as adjusted.

As we see it, LLC is its own ultimate parent entity, because no one will control it by having the right to 50% or more of the profits or, upon dissolution, the assets of LLC. In particular, X's right to return of its investment before other shareholders means that the rights to profits and assets both vary over time. As indicated in the Statement of Basis and Purpose accompanying the control rule for unincorporated entities, 16 C.F.R. s 801.1(b)(1)(ii), in that case control is determined by asking who, if anyone, has rights to 50% or more of "the total assets of the unincorporated entity at the time of the acquisition." 70 Fed. Reg. 11,502, 11,504 (Mar. 8, 2005). As of the transaction date, LLC would have $125 million in cash. If dissolved at that moment, X's prior right would mean that it would first receive $49 million and then 10% of the remaining $76 million, for a total of $56.6 million. The co-investors would split the rest, some $68.4 million, but no one of them would receive half or more of that, or $34.2 million. X's percentage of the total assets upon dissolution would thus be 56.6 / 125 = 45.28%, and no single co-investor would have 34.2 / 125 = 27.36% or more. Thus no one would have rights to 50% or more of the assets of LLC upon dissolution as of the time of the transaction. As a consequence, LLC would be its own ultimate parent entity.

This would mean that no HSR filing is required, because the transaction size is below the $200 million threshold (as adjusted) and LLC does not satisfy the size-of-person test. As of the acquisition, LLC will not have any regularly prepared balance sheet and no annual income statement. Under rule 801.1(e)(1), LLC's total assets for the size of person test are all the assets that it holds less all cash it will use for the acquisition. Since LLC will hold no assets other than the cash it will use for the acquisition, its total assets are valued at zero.

Are we right that this transaction is not reportable?

I'm travelling at the moment, but I'll try to reach you this afternoon to discuss, if you're around.

Thanks for your help!

[redacted]

[redacted]

I AGREE THAT THE LLC IS ITS OWN UPE AND THAT THE TRANSACTION IS NOT REPORTABLE -

B
2/1/07