Verne, B. Michael 801.2(b)

From: [redacted]
Sent: Friday, March 16, 2007 10:09 AM
To: Verne, B. Michael
Subject: HSR Issue Concerning Foreign Entity [redacted]

Dear Mike:

I am writing concerning a foreign entity "control" issue. In some respects the entity's structure is similar to that we discussed in the emails below (my, how quickly 3 years flew by!), but because that was before the new rules took effect I hope you don't mind me coming back to you on this.

The entity that will be making an acquisition was previously formed as a foreign LLC ("LLC"). At formation it had one "shareholder" intended to act as a manager of the LLC's investments (the "managing shareholder") and one shareholder with a nominal holding of one "share", in accordance with local law (requiring that a LLC have at least two shareholders). As the LLC is a private equity investment vehicle, investment in the LLC by investors (the "investor shareholders") will be required before closing of any acquisition by the LLC. Therefore, prior to closing, in addition to the forming shareholders, it will necessarily have certain investor shareholders who will, in the aggregate, be entitled to 100% of the LLC's profits. At the time of closing it is expected that there will be at least three such investor shareholders. Although the investor shareholders will receive "shares" in LLC, the managing shareholder will continue to hold the majority of LLC "shares" post-closing.

I believe the keys to the HSR analysis are as follows:

1. The LLC will have a "board"-like entity whose members are appointed or designated by the managing shareholder.

2. There are no "share certificates" per se; the interests are instead reflected solely in a commercial register, confirming the percentages of "shares" held by each stakeholder. (For the sake of completeness, I note that the investor shareholders' interests may not be recorded in the commerical register until after closing, but they nevertheless will be legally entitled to 100% of the profits of the LLC upon making their investment, even prior to that registration.) Likewise, the LLC's formation articles express the rights as to members of the board-like entity in appointment/designation terms, rather than using the concepts of voting or election.

3. Although factor 2 already differentiates the LLC interests from most "voting securities" in corporate entities, more importantly, all the members of the board-like entity are, and will be at closing, officers, directors or employees of the managing shareholder. This will remain true once the other investor shareholders join.

On these bases I believe that the LLC will be deemed a non-corporate entity, for HSR purposes.

As for control of the LLC, the managing shareholder, even while holding a majority of shares, does not have a right to a majority of the profits -- 100% of those profits are to be distributed to the investor shareholders, at least until their initial investment is repaid. Should the LLC be dissolved or liquidated, the investor shareholders would have a similar preferential right to those assets, pending repayment of their investment. Because there will be at least three investor shareholders at closing, no one investor shareholder will have the right to 50% of the profits, or assets upon dissolution/liquidation, of the LLC. On this basis I believe that the LLC will be treated as its own

ultimate parent entity, for HSR purposes.

Please advise whether you disagree with any of the foregoing, or feel free to call me with any questions. As always, thank you for your attention to this matter.

Thanks,

[redacted]

AGREE THIS IS A NEW-CORPORATE ENTITY & ITS OWN UPE

3/16/07

-----Original Message-----
From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Thursday, March 18, 2004 11:21 AM
To: [redacted]
Subject: RE: HSR Issue Concerning Formation of New Foreign Entity

Looks fine

-----Original Message-----
From: [redacted]
Sent: Wednesday, March 17, 2004 12:41 PM
To: Verne, B. Michael
Subject: HSR Issue Concerning Formation of New Foreign Entity

> Dear Mike:
>
> I am writing to confirm our recent discussions regarding the formation
> of a new foreign entity. This is a different transaction from the one
> we discussed last week (which involved acquisition of an existing
> entity), but I believe the key issue is the same (a foreign entity
> being treated as a partnership for HSR purposes).
>
> As we have discussed, two existing foreign persons (the "Parents")
> will be forming a new joint venture. I mentioned the Parents having
> labelled the new entity a "corporation" -- more precisely, at present
> a "Memorandum of Understanding" (MOU) actually refers to formation of
> a joint venture "vehicle", a country of "incorporation" and
> "shareholders". However, the MOU also provides that "[t]he precise
> form of the Transaction will be determined on completion of due
> diligence," and that "[c]ompletion of the Transaction is subject to
> definitive binding documentation". My understanding is that the
> parties are also considering forming the "vehicle" as a partnership.
>

> Most importantly, I believe our discussions concluded that even if
> technically denominated a "corporation" under foreign law, for HSR
> purposes the entity would be treated as a partnership for either or
> both of two reasons: (i) its ownership interests will not carry an
> inherent right to elect directors, this instead being reflected in a
> contractual right of appointment agreed among the Parents, and (ii)
> the Parents' current intention is for the JV to be "member managed" --
> the Parents will be appointing solely "insiders" (persons who are
> current officers, directors, or employees of the Parents) to the board
> (or board equivalent) of the new entity.
>
> Because this would thus qualify as a "partnership formation" for HSR
> purposes, the Parents' contributions to the partnership as part of
> that formation would not constitute reportable acquisitions, even if
> such contributions involve assets or issuers that might otherwise meet
> the HSR "size of transaction" test, and fall outside the exemptions in
> 16 C.F.R. §§802.50 and 802.51. Moreover (and although we have not
> discussed this recently), I believe from past discussions that the
> transaction would remain nonreportable even if the partnership were
> created a short time prior to the Parents completing their
> contributions, so long as the partnership formation and contributions
> were contemplated by the Parents to be part of a single overall
> transaction.
>
I should add my recognition that the transaction might be reportable once the proposed changes on non-corporate interests are implemented. However, again consistent with our other discussions last week, I understand that if the transaction is consummated even one day prior to implementation of the Proposed Changes, it will be judged under the current rules, and not subject to any second guessing under the Proposed Changes.

> Please advise if you disagree with any of the foregoing, and thanks
> again for your help. Sincerely, [redacted]
> [redacted]
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[redacted]

[redacted]