801.1(b)

**Verne, B. Michael**

**From:** [redacted]
**Sent:** Wednesday, May 30, 2007 9:43 PM
**To:** Verne, B. Michael
**Subject:** Acquisition of limited partnership interests

Mr. Verne:

I left a voicemail with you regarding the contents of this e-mail. I am writing in an effort to obtain informal guidance as to whether a pre-merger notification filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended from time to time (the "HSR Act"), is required for a proposed transaction.

I do apologize for the length of this e-mail, but the transaction as a whole is quite complicated from an HSR Act perspective and I would like to be thorough in my analysis.

I. Transaction

The proposed transaction involves Corporation A acquiring 100% of the voting securities of Corporation B for approximately $350 million. Corporation B, through a series of subsidiaries, owns two hotel resorts (which do not include ski facilities) valued at approximately $290 million. Corporation B also owns 2,400,000 Series A Preferred Units (the "Preferred A") in Partnership A.

II. Rules

A. Generally

An acquisition of voting securities of an issuer whose assets consist of exempt assets is exempt from the pre-merger notification requirements of the HSR Act. 16 C.F.R. Section 802.4. Accordingly, we need to examine the assets of Corporation B to determine whether a filing obligation exists.

B. Resort Properties



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The Federal Trade Commission exempts an "acquisition of a hotel or motel, its improvements such as golf, swimming, tennis, restaurant, health club or parking facilities (but excluding ski facilities), and assets incidental to the ownership and operation of the hotel or motel (e.g., prepaid taxes or insurance, management contracts and licenses to use trademarks associated with the hotel or motel being acquired)" from the pre-merger notification requirements of the HSR Act. 16 C.F.R. Section 802.2(f).

Accordingly, the approximate $290 million in resort value is exempt from the pre-merger notification obligations of the HSR Act.

C. Preferred Units

However, "[i]n an acquisition that includes a hotel or motel, the transfer of any assets that are not a hotel or motel, its improvements such as golf, swimming, tennis, restaurant, health club or parking facilities (but excluding ski facilities) and assets incidental to the ownership of the hotel or motel, shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition." 16 C.F.R. Section 802.2(f).

Accordingly, the acquisition of the Preferred A may, under certain circumstances, be separately subject to the pre-merger notification requirements of the HSR Act. Notably, an acquisition of non-corporate interests is only reportable if it confers control of the unincorporated entity on the acquiring person. See Pre-Merger Notification Practice Manual, American Bar Association, Interpretation No. 69 (4th ed.). "Control" is defined, in the case of an unincorporated entity, as having the right to 50% or more of the profits of the entity or having the right in the event of a dissolution to 50% or more of the assets of the entity. 16 C.F.R. Section 801.1(b)(1).

1. Capitalization

Partnership A has 35,000,000 common units, 2,400,000 Preferred A units, and 1,100,000 Series B Preferred Units (the "Preferred B") outstanding. Only the Preferred A units are at issue in the proposed transaction

Each unit of Preferred A is entitled to a distribution of $1.8125 per day, payable quarterly, for an annual distribution of $4,350,000. The distribution is calculated as 7.25% of the $25 per unit liquidation preference applicable to the Preferred A.

Each unit of Preferred B is entitled to a variable distribution calculated on 1.5% plus LIBOR multiplied by a liquidation preference of $25 per unit. Let us assume that LIBOR is 5.5%, so the distribution to which the Preferred B is entitled is 7% of the liquidation preference, or $1.75 per unit, for an annual distribution of $1,925,000.

The Preferred A and Preferred B are senior to the common units in all respects, but pari passu with one another.

2. Application of Rule

The rules under the HSR Act speak in terms of percentages, but how do those rules apply when the unincorporated entity's governing documents speak in terms of set dollar preferences? I think two examples will help demonstrate the issue.

Example 1:

Partnership A had, at the end of 2006, approximately $2.15 billion in assets and approximately $99 million in income from continuing operations.

If Partnership A were to liquidate, the Preferred A would get $60 million, or 2.79% of the assets, the Preferred B would get $27.5 million, or 1.23% of the assets, and the common would get $2.063 billion, or 95.9% of the assets.

Partnership A is obligated by its partnership agreement to distribute its income from continuing operations to its partners. Accordingly, from the $99 million in income, the Preferred A would get $4.35 million, or 4.4%, the Preferred B would get $1.925 million, or 1.9%, and the common would get $92.73 million, or 93.7% of the distributions.

Clearly, using the 2006 actual numbers, a sale of the Preferred A would not constitute a sale of control of Partnership A that would trigger a pre-merger notification filing.

Example 2:

Assume now that Partnership A had $50 million in assets and approximately $5 million in income from continuing operations.

If a liquidation were to occur, the Preferred A and Preferred B would split, pro rata, the assets because they are pari passu with one another and there are insufficient assets available for the common unit holders. Accordingly, the Preferred A would receive 68.57% (2,400,000/(2,400,000 + 1,100,000)) of the assets and the Preferred B would receive 31.43%. If a distribution were to occur, the Preferred A and Preferred B would split, pro rata, the distributions in the same percentages.

Based on a technical reading of "control" under the HSR Act, it would appear that using these hypothetical numbers a sale of the Preferred A would constitute a sale of "control" of Partnership A, thereby triggering a filing obligation (unless another exemption applies). However, this seems to make little sense, especially considering the size of Partnership A.

## III. Ultimate Issue

How does is the definition of "control" applied in the context of an unincorporated entity that has distribution provisions, and liquidation preferences, based on set dollar values, rather than percentages?

I look forward to discussing this issue with you and appreciate any help you can provide.

Sincerely,

[redacted]

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If both profits and assets upon distribution are variable, you should calculate assets each party would receive if the partnership was dissolved based on the last regularly prepared balance sheet. See discussion beginning with the last paragraph on page 7 of the following:

**http://www.ftc.gov/os/2005/02/050223premergerfrn.pdf**

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