

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, January 10, 2008 10:17 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR Question re Foreign Entity ([REDACTED])

Dear Mike:

I am facing another foreign entity control issue analogous to one I presented to you last year. See Informal Staff Opinion 0703011 at <http://www.ftc.gov/bc/hsr/informal/opinions/0703011.htm>. Similar to the previous situation, the key factors I see are as follows:

1. The formation documents provide for a "board of managers" whose members are appointed by the three owners of the foreign entity, but in fact there is only one "Managing Director".
2. Unlike the previous situation, the three owners have been issued "shares". The formation documents seem refer to each share having "voting rights", but also to the board of managers being "appointed". There could be a translation issue here, so if the terminology is key to your assessment let me know and I'll clarify. In fact the Managing Director has been appointed by consensus of the three owners, rather than subjected to any formal election process -- given the small number of owners there is no requirement for a shareholders' meeting.
3. Perhaps most importantly, the Managing Director is now and will be at the closing of the proposed transaction one of the three owners. In other words, there are no "independents" involved in managing the company, nor any other level of management, beyond the Managing Director appointed by the three owners. See Interpretation 177, Premerger Notification and Practice Manual, 3d ed.; see also <http://www.ftc.gov/bc/hsr/informal/opinions/0508006.htm> (German GmbH is considered a partnership for HSR purposes, on the basis of having a non-bifurcated management structure, being managed by the general partner).

As for control, the situation is basically identical to the situation presented last year -- there are and will be at closing at least three owners, none of whom will have the right to 50% or more of the profits, or assets upon dissolution/liquidation, of the entity.

Based on the above I believe the foreign entity should be deemed non-corporate for HSR purposes, and is its own UPE. Please advise if you disagree with this conclusion.

As always, thank you for your time.

[REDACTED]

AGREE
 BM
 1/10/08