

801.1(b)
802.65

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, June 25, 2009 6:53 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Inquiry re: Section 802.65

Hello Mike:

We would like to request your guidance on interpreting Section 802.65 of the HSR rules. We have reviewed the guidance available online and did not find anything addressing this situation:

We represent an entity that will become the general partner of a newly-formed limited partnership ("NFLP"). Three parties, A, B and C, will take economic interests in NFLP of less than \$20 million each; none will have the right to 50% or more of the NFLP's profits (or assets upon dissolution). However, limited partner C will also make a loan (secured by a first mortgage lien) to NFLP of \$290 million in cash for the purposes of financing the purchase of certain assets from an unrelated party. After all of these contributions, C will control NFLP under the definition in Section 801.1(b). However, as the loan is repaid, C's economic interest in NFLP will decrease (eventually to a level less than 50%) such that C no longer controls NFLP. C is its own ultimate parent entity.

Immediately after NFLP's formation, while C controls NFLP, NFLP will acquire certain assets valued at more than \$300 million.

We have two questions:

(1) Under the facts above, we assume Section 802.65 would exempt C's acquisition of control of NFLP from the requirements of the Act, but could you please confirm?

(2) Since Section 802.65 exempts C from the requirements of the Act for the formation of NFLP, we assume the PNO would disregard C's loan to NFLP and any indices of control that explicitly accompanied it for purposes of determining whether C is the ultimate parent entity of NFLP in the event NFLP's purchase of assets from an unrelated party is an HSR-reportable transaction. The UPE analysis would therefore focus on whether A, B and C's respective purchases of economic interests in NFLP conferred on any of them the right to 50% or more of NFLP's profits or the right to 50% or more of NFLP's assets in the event of dissolution. Could you please confirm this analysis is correct?

If possible, please copy both [REDACTED] and me on your response. Thank you very much.

Best regards,

[REDACTED]

I think § 802.65 would exempt C's acquisition of control, but I don't think C ever really has control. Non-corporate interests are defined in § 801.1(f)(1)(ii) as "an interest in any unincorporated entity which gives the holder the right to any profits of the entity or in the event of dissolution of that entity the right to any of its assets **after payment of its debts.**" (emphasis added). Because C's loan to NFLP is a debt, you would only look to the economic interests conferred to A, B and C from the initial capitalization of NFLP, at which point none of them control.

BW
6/26/09