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802.30

**Verne, B. Michael**

**From:** [REDACTED]  
**Sent:** Monday, August 24, 2009 1:12 PM  
**To:** Verne, B. Michael  
**Cc:** [REDACTED]  
**Subject:** HSR Question

Mike, hope you had a great vacation. Sorry to add to the re-entry pain, but [REDACTED] and I are working on a transaction and would appreciate your help with respect to an HSR question, the nature of which is outlined below.

We represent Company A, which owns the general partner of Company B, a master limited partnership with publicly traded common units representing limited partner interests. Company A is transferring certain assets to Company B in return for Company B's issuance of additional common units representing limited partner interests in Company B and Company B's assumption of certain debt from Company A (the "Transfer") and a question is presented as to whether an HSR filing is required.

### I. Factual Circumstances

The factual circumstances are as described below.

#### Partnership Interests Outstanding

Company B has the following outstanding partnership interests:

- 8,365,545 common units held by public – representing a 43% limited partner interest
- 4,428,067 common units held by Company A – representing a 23% limited partner interest
- 6,325,000 subordinated units all of which are held by Company A – representing a 32% limited partner interest
- 389,642 general partner units all of which are held indirectly by Company A through its ownership of the general partner – representing a 2% general partner interest
- Incentive Distribution Rights (IDR's) all of which are held indirectly by Company A through its ownership of the general partner – which entitle the holder to increasing percentages (up to 48%) of Company B's distributions if the per unit distributions exceed the minimum quarterly distribution (\$0.35 per unit)

#### Profit Distributions

The provisions of Company B's partnership agreement relating to cash distributions provide that all cash on hand is to be distributed at the end of each quarter, less reserves established by the general partner.

Distributions during the current subordination period are made according to the following formula:

- a. First, 98% to the holders of the common units and 2% to the general partner until each common unit has received a minimum quarterly distribution of \$0.35.
- b. Second, 98% to holders of common units and 2% to the general partner until any arrearages in payment to common unitholders from prior quarters are made up (subordinated units do not accrue arrearages).
- c. Third, 98% to holders of subordinated units and 2% to general partner until each subordinated unit has received a minimum quarterly distribution of \$0.35.
- d. Then according to a schedule where all common and subordinated unitholders are paid pro rata, 2% is paid to the general partner, and an increasing percentage of the distributions (up to 48%) is paid to the holder of the Incentive Distribution Rights.

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Thus, under this formula, the profit payouts are variable: if enough cash has been generated in a quarter to make the minimum quarterly distribution to all unitholders (\$0.35 per unit), then in such circumstances Company A would receive greater than 50% of the cash distributions for that quarter since Company A owns 57% of the total common, subordinated and general partner units and all of the Incentive Distribution Rights. To the extent that there is not enough cash to make the minimum quarterly distribution to all unitholders then the holders of common units are entitled to receive the full minimum quarterly distribution prior to any amounts being distributed on the subordinated units. Accordingly, in this situation, Company A could receive less than 50% of the total cash distributions for that quarter since Company A owns only 35% of the outstanding common units.

In each of the quarters since Company B's initial public offering, it has paid at least the minimum quarterly distribution and Company A has received at least 51% of cash distributions. Company B received 58% of the cash distributions paid in respect of the second quarter of 2009. The same general profit return is expected in the future but, of course, is dependent upon the actual performance of the business.

**Distribution of Assets on Dissolution After Payment of Debts**

The distribution of assets on dissolution is made in accordance with the capital accounts. After assets are sold and creditors paid off, a calculation is made of net termination gains or losses which are then attributed to the specific capital accounts. At this point investors are paid under a formula similar to that described above for profits. Certain mechanics of the calculation are designed to increase the likelihood of the common unitholders receiving back their initial unit price but in some factual circumstances this would not occur and the holders of subordinated units would receive payments even if the common unitholders did not receive back their initial unit price.

For purposes of this inquiry, it should be assumed that Company A would not receive 50% or more of the assets on dissolution. (The actual full calculation has not yet been made.)

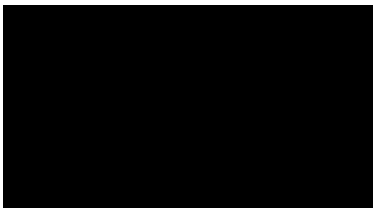
**II. Question Presented**

Under these factual circumstances and assumptions, is Company A deemed currently to control Company B such that it can rely on 16 C.F.R. 802.30 in making the transfer or would a filing be required because Company A is not deemed to control?

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Thanks very much.

A DOES NOT CONTROL B  
SO 802.30 IS NOT  
AVAILABLE.  
BJW  
8/25/09



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