

Verne, B. Michael

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**From:** [REDACTED]  
**Sent:** Thursday, September 03, 2009 6:41 PM  
**To:** Verne, B. Michael  
**Cc:** [REDACTED]  
**Subject:** Request for Informal Interpretation - Rules 801.1(b); 801.2(f); 802.2(c); and 802.4(a)

Mike,

Thank you for taking time to speak with [REDACTED] and me this afternoon. I am writing to confirm our understanding regarding the interpretation of the Hart-Scott-Rodino Rules with respect to the facts and analysis we presented to you.

### **FACTS**

Acquiring Person will purchase interests in two limited liability companies (Company A and Company B) from subsidiaries of Acquired Person (the "Transaction"). We will assume that both Acquiring and Acquired Persons satisfy the size-of-person test. Though subject to further negotiation, we will assume a purchase price over the current size-of-transaction threshold.

#### **Acquisition of Interests in Company A**

Acquiring Person will purchase all the interests in Company A held by Acquired Person consisting of 300 of the 900 Class A membership units and 70 of the 100 Class B membership units. The to-be-acquired Class A and B membership units constitute a combined 37% ownership interest in Company A derived as follows: At the time of the occurrence of the transaction, the Class A units as a whole would be entitled to 90% of both profits and distributions on dissolution and the Class B units as a whole would be entitled to the remaining 10%. Thus, Acquiring Person would obtain a 37% interest in profits and distributions on dissolution. However, the Class B units would be entitled to the first \$500,000 of such profits and distributions in the nature of a preferred return.

Company A, in turn, owns 100% of a lower tier limited liability company that holds a 57% undivided interest in an as-yet-to-be-completed power generating plant (the "Project"). The Project is approximately 70% complete with an expected completion date in the Fall of 2010. The Project has executed power purchase agreements. In its present state, the real property held by such lower tier sub will not have generated total revenues in excess of \$5 million during the thirty-six (36) months preceding the anticipated acquisition. While we are not certain of what revenues may have been generated with respect to prior owners of a small portion of real estate encompassed by the Project, any such revenues would have derived from businesses unrelated to the Project, no longer existing on the Project site and the improvements related to which have been or are in the process of being razed.

#### **Acquisition of Interests in Company B**

Acquiring Person will purchase all the interests in Company B held by Acquired Person and constituting 100% of the interests in Company B. Company B provides services to the Project. Acquiring Person has made a good-faith determination that only a small portion of the total purchase price will be allocable to the purchase of the interests in Company B, an amount far below the present size-of-transaction threshold.

### **ANALYSIS**

We believe that the Transaction is not reportable under the Hart-Scott-Rodino Antitrust Improvements Act for the following reasons:

#### **Acquisition of Interests in Company A**

We believe that there is no acquisition of "control" of Company A. The preferred return of the first \$500,000 would

not entitle the holder to share in the future economics of the company but rather a fixed amount. (Rule 801.1(b); Reference Informal Interpretation No. 0712012). Consequently, we believe the acquisition of the 37% interest in Company A is exempt from the HSR notification rules because it is the acquisition of a minority interest in a non-corporate entity (Rules 801.1(b)(1)(ii) and 801.2(f)(1)(i)).


Further, even if the preceding paragraph were not so, we believe the assets ultimately held by Company A consist of exempt unproductive real property (Rule 802.2(c) and Rule 802.4(a); Reference Informal Interpretation No. 0808002; Informal Interpretation No. 0411008; and Informal Interpretation No. 0012010.) You indicated that the Staff would take the position that we should consider the real property as it exists now in calculating the \$5 million in revenues over the preceding thirty-six (36) months rather than attempting to trace back to revenues generated by businesses that are unrelated to the present use of the land and no longer exist on such land. You referred us to informal interpretations regarding properties destroyed during Hurricane Katrina and the Staff position that when pre-existing businesses located on a subject piece of real property had been so destroyed the Staff would not look back prior to such destruction to determine whether total revenues exceeded \$5 million during the preceding 36 months. See Informal Interpretation No. 0608003; Informal Interpretation No. 0604022; and Informal Interpretation No. 0601027.

**Acquisition of Interests in Company B**

Assuming the acquisition of interests in Company A is exempt, we believe the acquisition of the 100% interest in Company B is not reportable as not meeting the size-of-transaction test.

Thanks again for your time and assistance. Please let us know if the foregoing does not accurately reflect the facts and analysis we discussed during our telephone conversation.

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 AGREE -  
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