

802.30
802.31**Verne, B. Michael**

From: [REDACTED]
Sent: Monday, March 15, 2010 4:08 PM
To: Verne, B. Michael
Subject: 801.1(f)(1)(i) and put/call rights

Dear Mike,

I wanted to call you to review a set of facts and preliminary conclusions and thought it would be helpful to you to have them set out for you in writing first. I would appreciate it if you could review the below and call me at [REDACTED]

Seller is creating a wholly owned LLC. By itself, such a formation of a wholly owned unincorporated entity is exempt under s. 802.30(b). Soon after the LLC is formed, Buyer will acquire 49% of the membership units of the LLC from Seller. Seller will retain 51% of the membership units of the LLC. In acquiring 49% of the LLC's membership units, Buyer will not acquire the right to 50% or more of the LLC's profits or 50% or more of the LLC's assets upon its dissolution. Without more, Buyer's acquisition of 49% of the LLC's membership units is exempt under s. 801.50.

Buyer will also acquire options to purchase additional units in the same LLC from Seller (the "Buyer Call Options"). We understand that generally, the acquisition of options to purchase voting securities is not an acquisition of voting securities. (s. 802.31). But we have seen some Informal Interpretations finding that certain put and call rights led to a different position and want to review the facts in this instance.

In this case, Buyer can exercise the Buyer Call Options upon one or more of the Buyer Call Events that are set forth in the LLC's operating agreement. Likewise, Seller will have Seller Put Rights according to which it can require Buyer to purchase Seller's units in the LLC upon one or more of the Seller Put Events set forth in the LLC operating agreement. Buyer Call Events and Seller Put Events include the death or disability of one of the founders, the second and fourth anniversaries of the LLC operating agreement, the attempt to transfer by Seller of the LLC's shares to an unaffiliated third party, the filing of a bankruptcy application, material breach of the LLC operating agreement, termination of the founders as employees or replacement of them as shareholders, and so forth. None of the Buyer Call Events or the Seller Put Events will happen at or on the closing when Buyer acquires 49% of the LLC's units; they take some additional action or inaction, in the future, to occur. Seller is restricted from transferring its units in the LLC to an unaffiliated third party for the first four years after the LLC operating agreement is signed. As well, the optioned units will be held in escrow.

Notwithstanding the transfer restriction on Seller and the units being placed in escrow, we believe Seller will retain beneficial ownership of the optioned units unless and until the options are exercised. Buyer will not bear the risk of loss or benefit of gain with respect to the underlying units before the options are exercised. When Buyer acquires 49% of the membership units of the LLC, it will also have the right to designate 3 of the LLC's 5 members of the LLC's Board of Managers. But, because this right applies to an unincorporated entity, Buyer will not be gaining an interest sufficient to control the LLC. Under s. 801.1(b), the test for control of an unincorporated entity is having the right to 50% or more of the unincorporated entity's profits or 50% or more of the entity's assets upon its dissolution. Unlike a corporation or trust, a person does not control an unincorporated entity when it has the contractual power presently to designate 50% or more of the LLC's managers or others exercising functions similar to those of directors or trustees.

The transaction in which Buyer acquires 49% of the LLC's units and options is exempt. The conversion of the option or put rights into membership units is potentially reportable. The LLC operating agreement recognizes this and makes the closing of the purchase of units in the LLC pursuant to the exercise of the call option or put rights subject to expiration or termination of the HSR waiting period if notification under the Act is required.

Thank you for your time, [REDACTED]

AGREE
[Signature]
3/16/10

3/15/2010