801-10

Verne, B. Michael

From: [redacted]
Sent: Wednesday, February 23, 2011 6:12 PM
To: Verne, B. Michael
Subject: Analysis of a proposed transaction

Dear Mike,

I write to confirm with you my analysis of the transaction described below.

Company A is seeking to acquire Company B, an LLC with substantial outstanding third-party debt, preferred units, common units, and outstanding warrants to purchase common units.

Company A will provide cash and other consideration in excess of the $50 million (as adjusted) threshold so that:

1. Company B's third-party debts will be repaid;
2. Company B's preferred units will be acquired by Company A or redeemed;
3. Company B's outstanding warrants to purchase common units will be cancelled (Company B's warrants are entitled to compensation as if they were converted to common units, but never actually convert and do not have any rights to B's profits/assets absent conversion into common); and
4. Company B's common units will be acquired by Company A.

Steps 1 through 4 might be accomplished via a merger.

Although the cash and other consideration to be provided exceeds the $50 million (as adjusted) threshold, we believe that only the value of the existing common units is relevant for purposes of the size-of-transaction test.

1. Per several informal interpretations, payment by Company A of Company B's third-party debts is appropriately excluded from the threshold calculation. Similarly, any value paid to cancel Company B's warrants is also excludable since the unconverted warrants have no rights to profits or assets upon dissolution.

2. As to the preferred units, we believe these are likewise properly considered to be debt and therefore are excludable for purposes of the size-of-transaction test. (See also Point II.d of http://www.ftc.gov/bc/hsr/informal/opinions/0910007.htm).

A. Holders of the preferred units are entitled to receive distributions from Company B, but only in an amount equal to their preferred return plus their principal capital. The preferred return is a set annual percentage rate return of 10% per annum that increases every year by 1%, up to a maximum of 15%, and is compounded twice annually. As such, the preferred units do not directly participate in the profits of Company B.

B. Holders of the preferred units are entitled to receive a quarterly distribution -- a tax distribution -- to cover the amount of quarterly federal taxes due on any income received on those units. This quarterly tax distribution simply reduces the distribution otherwise made.

C. Upon dissolution of Company B, holders of the preferred units would be paid up to the amount of their capital and prescribed return after other creditors, but before any payment to the holders of common units. Again, this seems consistent with treatment of the preferred units as debt instruments since they have priority over the common but can take no more than their capital plus prescribed return.

D. The preferred units are subject to both a mandatory redemption in February 2017, on the 7th anniversary of the Effective Date, and are also subject to an optional redemption in full or in part prior to such date at Company B's option.

E. The preferred units do not have creditor's claims and thus cannot force Company B into bankruptcy if Company B fails to pay the return and principal capital on the preferred shares.

F. A majority of the preferred units can elect a single director to Company B's five person board of directors. We believe that is irrelevant, however, because the ability to vote for directors is not a relevant attribute of non-corporate interests under 801.1(f)(ii). (This is of course different from the definition of voting securities under 801.1(f)(i) where the ability to vote for directors is what determines whether a security in the corporate context is a "voting security". This distinction is borne out by the definition of "control" in 16 CFR 801.1(b)(1)(ii) where, for purposes of determining whether an acquisition confers control of an unincorporated entity one does not look to the percentage of voting securities held (as for corporations per 801.1(b)(1)(i)) but merely to the right to fifty percent of profits or assets upon dissolution.)

Accordingly, we believe that the only relevant acquisition for HSR purposes is the acquisition of the existing common units, i.e., the transaction would not be reportable unless the actual price to be paid for those units (or, if not determined, the fair market value of those units) exceeds the $50 million (as adjusted) threshold and no exemption applies.

I would greatly appreciate it if you could confirm this analysis in writing whenever convenient for you.

AGREE –
BW
2/24/11

Best regards,

[redacted]

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Any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties and is not intended to be used or referred to in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement.
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[redacted]**