

801.50  
802-4**Verne, B. Michael**

**From:** [REDACTED]  
**Sent:** Thursday, June 30, 2011 12:18 PM  
**To:** Verne, B. Michael  
**Subject:** Question re Formation of LLC

Greetings Mike,

I would be grateful if you could confirm my analysis concerning the reportability of certain agreements to form an LLC.

Companies A and B propose to form an LLC under a series of agreements. The LLC will construct and operate a substantial manufacturing plant. Each of A and B have assets and sales greater than \$100 million (as adjusted). A will contribute \$30 million in cash and B will contribute to \$20 million in cash, plus nonexempt real estate which will provide the site of the plant. Assume the real estate has a fair market value of \$10 million. In exchange for their contributions, each of A and B will obtain a 50% equity interest in the LLC, with rights to 50% of profits and 50% of assets upon dissolution of the LLC. In order to construct the manufacturing plant, the agreements require the LLC to independently obtain a loan for \$100 million, without any guarantee from either A or B.

Based on my understanding of 16 C.F.R. §801.21, §801.40, §801.50, and §802.4, I believe this transaction to be exempt from any reporting obligation under the HSR Act, based on the following analysis:

- First, the transaction is principally governed under §801.50, which addresses the formation of unincorporated entities, which includes limited liability companies (LLCs).
- Second, because each will obtain a 50% stake in the LLC, under §801.50(a) A and B are each “acquiring persons” and the LLC is the “acquired person.” Under §802.30(c), for purposes of valuing the LLC interests that A and B are each acquiring, A excludes the value of its contribution to the LLC and in turn B excludes the value of its contribution.
- Third, while the LLC will acquire a loan for \$100 million, that loan (or “credit” or “obligation”) that the LLC shall obtain pursuant to A and B’s agreement, will not be considered an “asset” of the LLC, as §801.40(d)(2) only requires that valuation of the LLC interests include the “credit or . . . obligation[s]” of the LLC when extended or guaranteed by one of the acquiring persons (here, A or B). Otherwise, the loan itself is a liability of the LLC and not an “asset” affecting the fair market value of the LLC.
- Fourth, under §802.4, A will be deemed to only acquire LLC interests containing \$10 million in reportable assets (the real property), as the remaining \$20 million in cash contributed by B is considered an exempt asset pursuant to §801.21. And for the reasons explained above, the \$100 million loan secured from a third party need not be counted as an asset of the LLC. For all these reasons, B will be deemed to acquire LLC interests containing no reportable assets.

Thanks for your assistance with this. If you have any questions or clarifications that would affect my conclusions, please let me know.

AGREE  
 BM  
 6/30/11