

FI IS

From: [REDACTED]
 To: FTC.SER(US("mverne@ftc.gov"))
 Date: Tue, Oct 31, 2000 4:31 PM
 Subject: HSR Question

Mike,

Please respond to the following question about an ambiguity under Formal Interpretation Number 15. Depending on your advice and any follow-up communications, I may later request in writing an informal interpretation pursuant to the HSR rules. Thank you in advance for your consideration of the following question.

A, a limited liability company ("LLC"), proposes to acquire B, another LLC, from C, a corporation. The transaction is valued at more than \$15 million, and C is a \$100 million person. This inquiry focuses on the size of the person that includes A.

Membership in A is held 60 percent by X and 40 percent by Y. *Does X HAVE A BALANCE SHEET?* X is an LLC that is its own UPE and which is a less than \$10 million person. (At the time of the proposed transaction, A will have no significant assets other than \$10 million in cash from Y to be used as consideration in purchasing B.) Y is a corporation that is controlled directly or indirectly by Z, a \$10 million person.

Pursuant to Formal Interpretation Number 15, an entity controls an existing LLC if it has "an interest entitling it to 50 percent of the profits or 50 percent of the assets upon dissolution." Under the A LLC Agreement, X is entitled to more than 50 percent of the profits of A and is therefore deemed to control A.

The more difficult question is whether Y also is deemed to control A. Under the A LLC Agreement, Y holds a convertible preferred membership in A. Y may convert its preferred membership to common membership at anytime for no additional consideration. Pursuant to the liquidation clause in the A LLC Agreement, upon dissolution of A, the preferred member first receives its initial capital contribution (\$10 million) plus an interest payment of 8 percent of the capital contribution. The remainder of A's assets, if any, are split according to common membership interests. Therefore, assuming Y converts its membership from preferred to common upon receipt of its preferred distribution (\$10 million plus interest), Y would also be entitled to the value of 40 percent of A's remaining assets. Mathematically, this means that if A dissolves, Y will receive 50 percent of A's assets only if A's assets on dissolution are less than approximately \$50 million. It is, of course, entirely speculative at the present what the value of A's assets might be upon dissolution or even when or whether A will be dissolved.

Under the above facts, the issue of Y's control of A turns on whether the A LLC Agreement "entitles" Y to 50 percent of the profits of A upon dissolution. The language of the Formal Interpretation does not say "presently entitle" but it would appear from the context that the word "entitle" implies an interest that is presently determinable. Otherwise the issue of "control" would have to be decided in all similar instances upon mere speculation.

Given that the A LLC Agreement does not entitle Y as a matter of contractual right to 50 percent of A's assets upon dissolution, and further given that whether Y ultimately may receive 50 percent of A's assets upon dissolution is entirely speculative, there appears to be no sound basis on which to deem Y in

control of A. Accordingly, Y has no HSR filing obligation on these facts in connection with the proposed transaction.

Thank you,



This information may contain confidential and/or privileged material and is only transmitted for the intended recipient. Any review, retransmission, conversion to hard copy, copying, reproduction, circulation, publication, dissemination or other use of, or taking of any action, or omission to take action, in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you have received this message in error, please contact the sender and delete the material from any computer, disk drive, diskette, or other storage device or media. A list of partners at each office can be provided on request.

Y DOES NOT HAVE THE RIGHT TO 50% OF THE ASSETS ON DISSOLUTION.

Michael Verne

11/1/00