

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, March 17, 2004 12:41 PM
To: Verne, B. Michael
Subject: HSR Issue Concerning Formation of New Foreign Entity

> Dear Mike:

>
> I am writing to confirm our recent discussions regarding the formation of
> a new foreign entity. This is a different transaction from the one we
> discussed last week (which involved acquisition of an existing entity),
> but I believe the key issue is the same (a foreign entity being treated as
> a partnership for HSR purposes).

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> As we have discussed, two existing foreign persons (the "Parents") will be
> forming a new joint venture. I mentioned the Parents having labelled the
> new entity a "corporation" -- more precisely, at present a "Memorandum of
> Understanding" (MOU) actually refers to formation of a joint venture
> "vehicle", a country of "incorporation" and "shareholders". However, the
> MOU also provides that "[t]he precise form of the Transaction will be
> determined on completion of due diligence," and that "[c]ompletion of the
> Transaction is subject to definitive binding documentation". My
> understanding is that the parties are also considering forming the
> "vehicle" as a partnership.

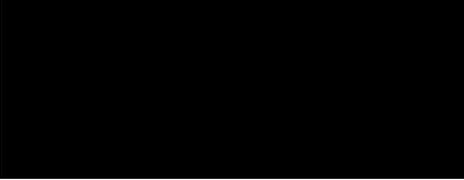
>
> Most importantly, I believe our discussions concluded that even if
> technically denominated a "corporation" under foreign law, for HSR
> purposes the entity would be treated as a partnership for either or both
> of two reasons: (i) its ownership interests will not carry an inherent
> right to elect directors, this instead being reflected in a contractual
> right of appointment agreed among the Parents, and (ii) the Parents'
> current intention is for the JV to be "member managed" -- the Parents will
> be appointing solely "insiders" (persons who are current officers,
> directors, or employees of the Parents) to the board (or board equivalent)
> of the new entity.

>
> Because this would thus qualify as a "partnership formation" for HSR
> purposes, the Parents' contributions to the partnership as part of that
> formation would not constitute reportable acquisitions, even if such
> contributions involve assets or issuers that might otherwise meet the HSR
> "size of transaction" test, and fall outside the exemptions in 16 C.F.R.
> §§802.50 and 802.51. Moreover (and although we have not discussed this
> recently), I believe from past discussions that the transaction would
> remain nonreportable even if the partnership were created a short time
> prior to the Parents completing their contributions, so long as the
> partnership formation and contributions were contemplated by the Parents
> to be part of a single overall transaction.

>
I should add my recognition that the transaction might be reportable once
the proposed changes on non-corporate interests are implemented. However,

again consistent with our other discussions last week, I understand that if the transaction is consummated even one day prior to implementation of the Proposed Changes, it will be judged under the current rules, and not subject to any second guessing under the Proposed Changes.

- > Please advise if you disagree with any of the foregoing, and thanks again
- > for your help.
- > Sincerely,



AGREE -
B. [Signature]
3/18/07

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- >

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