

801.1(b)

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, October 03, 2006 12:25 PM
To: Verne, B. Michael
Subject: HSR Question: "Control of an LLC"

Michael:

We are trying to determine the Ultimate Parent Entity of an LLC. The LLC is owned as follows:

- Company A will own 25% of the preferred equity; and 22 1/2% of common equity
- Company B will own 50% of the preferred equity; and 45% of common equity
- Company C will own 25% of the preferred equity; and 22 1/2 % of common equity
- Company D will own 1.5% of common equity
- Company E will own 10% of common equity

The preferred equity is treated like debt but is, in fact, equity. The preferred equity has a 15% dividend that accrues annually (whether or not the entity turns a profit) but is not paid until a liquidation event occurs. In addition, the preferred has a set redemption value (its original cost) so that upon a liquidation event, the payment of the preferred is in no way tied to the profits of the entity. There is no common dividend. Accordingly, there will be no distribution of dividends or profits of the company to either the preferred equity holders or the common equity holders until a liquidation event occurs.

Upon liquidation, the preferred equity holders will be paid first (the set redemption value plus accrued dividends), and then the common equity holders will receive their pro rata distributions of the residual, based on each owner's common ownership.

Based on our reading of 801.1(b)(1)(ii), we believe that the LLC is its own UPE because no other entity has "control" of the LLC as no owner is entitled to (i) 50% or more of the profits of the entity (there being no profit-based dividends), or (ii) upon liquidation, 50% or more of the assets of the entity. Please confirm.

Thank you.

[REDACTED]

Agree -
B. Michael
10/3/06

[REDACTED]