

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Wednesday, April 11, 2007 9:24 AM  
**To:** Verne, B. Michael  
**Subject:** HSR Analysis of Joint Venture Formation

Dear Mike,

We have been asked to assess the reportability of a joint venture formation and would like to run the structure by you to confirm that our analysis under the HSR rules is correct. For the purposes of this hypothetical, we can assume that the size of transaction and size of person tests are met and that the transactions are not otherwise exempt.

**Facts**

The proposed structure would fall under a multistage formation scenario: A, a non-US corporation, forms a wholly-owned subsidiary JV Sub Corp (a non-US corporation) and contributes only cash of approximately \$20,000 to JV Sub Corp (1). Virtually simultaneously with the formation, B, a US corporation, acquires 60% of the voting securities of JV Sub Corp from A in exchange for less than \$59.8 million in cash. At this time, B has the right to appoint the sole director of JV Sub Corp (2). At a later date (which could be between 3 months to one year later), several events will occur virtually simultaneously upon closing of the joint venture (3). A third party, C, a US corporation, will acquire newly issued shares of JV Sub Corp (11% of all outstanding shares) for an amount in excess of \$59.8 million. A will contribute to JV Sub Corp assets valued in excess of \$59.8 million and B will contribute to JV Sub Corp assets valued in excess of \$59.8 million. In exchange for their contributions, A will receive cash and 40% of the voting securities of JV Sub Corp, and B will receive cash and will now hold 49% of the voting securities of JV Sub Corp. None of A, B, or C will have the right to appoint 50% or more of the directors of JV Sub Corp.

From its creation, JV Sub Corp will be a shell corporation that is being formed solely for the purpose of holding the assets that will later be contributed by A and B. JV Sub Corp will not hold any assets or undertake any business prior to the asset contributions of A and B, other than to be a party to the transaction agreements.

**Analysis**

We have received prior advice from you to the effect that if JV Sub Corp is being formed solely for the purpose of holding the assets contributed by A and B, and if the contributions of the assets by both parties and the acquisition of interests in JV Sub Corp occur contemporaneously, the acquisition would be analyzed as a formation of a joint venture under 801.40.

If this transaction is analyzed under 801.40, B will be required to file for its acquisition of 49% of the voting securities of JV Sub Corp for in excess of \$59.8 million. C would also be required to file for its acquisition of 11% of the voting securities of JV Sub Corp for in excess of \$59.8 million. However, A would not be required to file, because its acquisition of 40% the voting securities of JV Sub Corp would be exempt under 802.51(b)(1) because A is not acquiring control of JV Sub Corp. JV Sub Corp would be exempt from filing under 802.41.

Our analysis assumes that the continuum theory would apply to the transaction such that all parts of the transaction would be considered together as part of the same transaction, and that the final transaction that would be analyzed would be the formation of a joint venture corporation and thus analyzed under 801.40. Although these steps will not happen contemporaneously, the JV Sub Corp is being formed solely for the purpose of holding the assets to be contributed by the parties A and B, there is no competitive significance to the first two steps in the transaction, the subsequent steps are a virtual certainty given that the JV Sub Corp will be a party to the transaction documents, and the only purpose of JV Sub Corp is to receive the contributed assets.

Because we believe that the continuum theory should apply to this transaction as described, we would propose to analyze the transaction as laid out above, with B and C submitting HSR filings in connection with the proposed transaction.

If the continuum theory should not apply (which we do not believe to be the case), the transaction would be analyzed in separate steps. Step (1) would be a formation of a wholly-owned entity by A and non-reportable under 802.30(b). Step (2) would be a non-reportable acquisition of voting securities by B valued at less than \$59.8 million. Alternately, should steps (1) and (2) be analyzed as one transaction because of their proximity in time, the transaction would still be non-reportable because the transaction value would be below \$59.8 million. With regard to Step (3), B would be the UPE of JV Sub Corp with its 60% holding. B would file as an acquiring person for the acquisition of the assets contributed by A (valued in excess of \$59.8 million), and A would file as an acquired person. B's contribution to JV Sub Corp would be exempt under the intraperson exemption 802.30(a). C's acquisition of voting securities of JV Sub Corp valued in excess of \$59.8 million would also be reportable, where C would file as an acquiring person and JV Sub Corp would file as an acquired person.

Thank you, as always, for your help.

Best regards,

[REDACTED]

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