

Verne, B. Michael

802-4

From: [REDACTED]
Sent: Wednesday, August 08, 2007 12:14 PM
To: Verne, B. Michael
Subject: Hedge fund fact pattern

Mike -

I hope all is well. I am a junior corporate associate who handles most of the HSR analysis in my firm's practice group, and I was presented with a fact pattern that is quite confusing, both in general and from an HSR perspective. You have been extremely helpful in the past, so I thought I would reach out to you to see if you have any advice. We are admittedly a bit light on facts at this time, so a determination as to when, if at all, a notification filing is required is impossible.

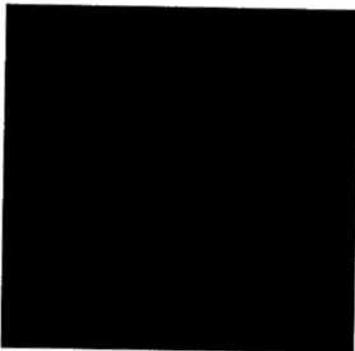
Generally speaking, we have a hedge fund that is acquiring voting securities of a publicly traded corporate issuer. The hedge fund itself is acquiring solely for investment purposes, but one of the persons affiliated with general partner of the hedge fund is a director of the corporate issuer. [It is currently unclear if the general partner "controls" the hedge fund.] Another complicating factor is that affiliates of the hedge fund independently own the issuer's securities.

I attached a Word file with a diagram of relationships involved, along with relevant facts and some possible lines of analysis. My instincts tell me the issue will ultimately be one of whether (a) the related parties' holdings are aggregated (i.e., whether the hedge fund is its own ultimate parent entity), and (b) hedge fund's multiple acquisitions of voting securities in the ordinary course will be aggregated with one another (and I think the answer to this is a big "yes"). The exemption for investment purposes is also a possibility, but I think having the director of the issuer involved creates a presumption against being able to rely on this exemption.

If you are willing to take a look at the attached I would greatly appreciate your time. I am generally available to discuss via phone or e-mail to the extent you are willing to help.

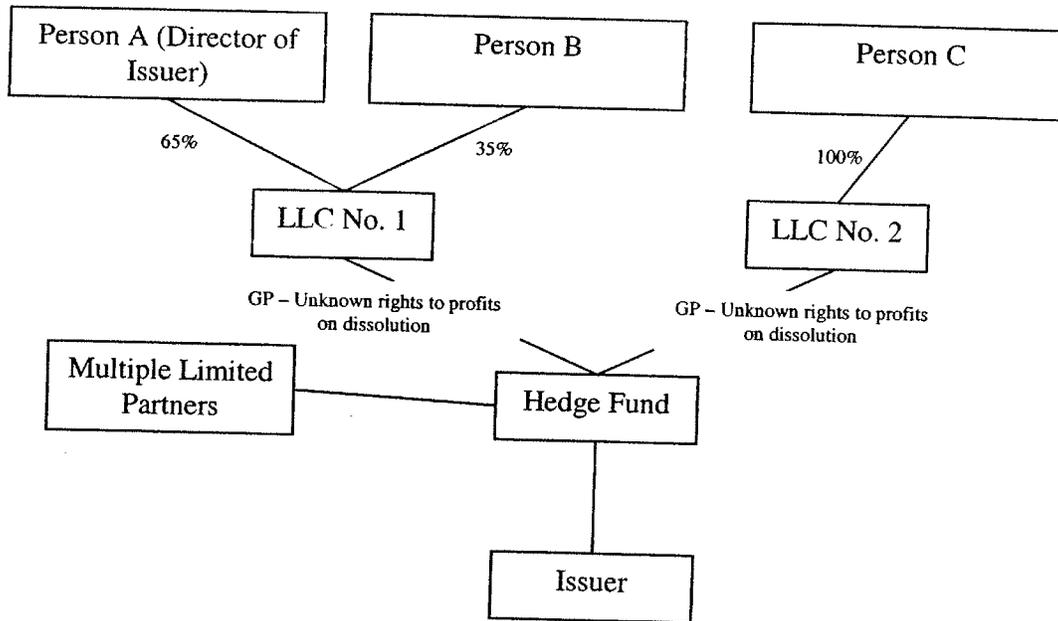
I look forward to corresponding with you.

Sincerely,



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8/22/2007



Facts:

- Issuer common stock trades at approximately \$20/share.
- Hedge Fund acquired 90,000 shares of Issuer common stock (\$1.8 million), and is looking to acquire up to 1,000,000 additional shares (\$20,000,000). Hedge Fund could, within its policies, acquire up to 9.99% (but no more) of Issuer at some point in time. At current prices, 9.99% would not exceed the reporting threshold, but a slight increase in price would cause the acquisitions, if aggregated, to exceed the reporting threshold.
- Person A, which is the controlling person of LLC No. 1, which may or may not be (facts unknown at this time) a controlling person of Hedge Fund, is a director of Issuer who holds in his individual capacity 500,000 shares of Issuer common stock (previously acquired).
- Person C, which is the controlling person of LLC No. 2, which may or may not be (facts unknown at this time) a controlling person of Hedge Fund, is not affiliated with Issuer. However, Person C holds in its individual capacity approximately 1,000,000 shares of Issuer common stock (previously acquired).
- Several of the limited partners of Hedge Fund hold Issuer common stock. One of these limited partners is the CEO of Issuer who holds approximately 2,000,000 shares of Issuer common stock (previously acquired). However, no limited partner has the rights to more than 50% of the profits on dissolution. [Although we do not know this specifically, there

are a large number of limited partners, none of which owns a large number of limited partnership interests.]

- Assuming Person A and Person C's holding are aggregated with Hedge Fund (which appears to be the safe assumption, in the aggregate, if Hedge Fund does not acquire additional Issuer securities, Hedge Fund + Person A + Person C hold approximately 1,590,000 shares (~\$31,800,000). If Hedge Fund acquires the additional 1,000,000 shares, the aggregate holdings will be 2,590,000 (~\$51,800,000).

Other Relevant Information:

- Hedge Fund is not registered as an investment company under the Investment Company Act of 1940 (i.e., it is a private fund).
- At this point in time, the acquisitions of voting securities have not exceeded the reporting threshold. However, depending on how the various parties' holdings are aggregated, holdings are close to the reporting threshold and additional acquisitions may trip the threshold.
- For various reasons independent of HSR considerations, Hedge Fund will never acquire 10% or more of Issuer (i.e., Hedge Fund holdings will be capped at 9.99%).
- At no point will control of Issuer ever change (i.e., never will Hedge Fund and all the related parties obtain control of Issuer such that Issuer will be included in Hedge Fund).

Issues:

- Hedge Fund has not intention of participating in the formulation, determination, or direction of the basic business decisions of Issuer. However, there is ambiguity as to whether the exemption set forth in Section 7A(c)(9) / 802.9 would apply as Person A is a director of Issuer. Interpretation No. 16 in the ABA's Premerger Notification Practice Manual suggests that such a fact pattern creates a presumption *against* Hedge Fund holding "solely for the purpose of investment."
- Issuer is a homebuilder and the following assets are listed on Issuer's balance sheet:

<u>Asset</u>	<u>Value > Threshold?</u>	<u>Exempt?</u>
Cash and cash equivalents	Yes	Yes
Receivables	Yes	Possibly
Real estate	Yes	Yes
Real estate not owned	Yes	Yes
Deposits on real estate under option or contract	Yes	Yes
Investments in unconsolidated entities (1)	Yes	Yes
Property and equipment, net	No	No
Deferred tax asset, net	Yes	?
Goodwill	Yes	?
Intangibles, net	No	?
Prepaid expenses and other assets	No	?

(1)

I agree that the involvement of a director of the issuer with the hedge fund probably makes the solely for purpose of investment exemption unavailable. However, I think that the acquisition could be exempted under Section 802.4. I agree with the categories of assets that you have indicated are exempt. In addition, the deferred tax asset and prepaid expenses are exempt as cash equivalents; and receivables, goodwill and intangibles that are related to the residential home building business are also exempt under the residential real property exemption. If the remaining non-exempt assets (property and equipment, other assets) do not have a fair market value exceeding \$59.8 MM, the acquisition of voting securities of the issuer would be exempt from reporting.

BW
8/23/07