

**Verne, B. Michael**

801.10

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**From:** [REDACTED]  
**Sent:** Friday, December 21, 2007 1:59 PM  
**To:** Verne, B. Michael  
**Cc:** [REDACTED]  
**Subject:** HSR reportability question -- acquisition price in an LLC formation

Mike:

We are analyzing a proposed transaction (a partial management buyout) that we believe is nonreportable under HSR, and we would like to confirm with you that our analysis is correct.

Company A currently holds 100% of the membership interests in an investment management entity, Company B. Company A and Company C (an LLC recently formed by three of Company B's current managers in a nonreportable transaction) plan to form a new LLC, Newco. Company A will contribute all of its interests in Company B to Newco, so that Company B will be a wholly-owned subsidiary of Newco. Company C will contribute \$1 million in cash to Newco. Although it nominally will acquire only 49% of the membership interests of Newco, Company C will nevertheless control Newco because it will have the right to more than 50% of the profits of Newco. Company C is controlled by individual D, one of the three managers who formed Company C. Individual D is Company C's ultimate parent entity.

The three managers who have formed Company C each currently have employment contracts with Company A through which they are entitled to receive salary and a share of Company B's profits, and also are entitled to take part in a deferred compensation arrangement. In connection with the formation of Newco, the managers will sever their current employment agreements with Company A, giving up their rights to a guaranteed minimum annual compensation. The managers will enter into new employment agreements with Newco through which they will be entitled to salary for their continued management of Company B and which, when added to their rights under the limited liability company agreement of Newco, will provide substantially equivalent compensation, albeit without the guaranteed minimum.

For the formation of an LLC, we look to § 801.50. Company C will be required to report its acquisition of control of Newco if the size-of-transaction test is met and no exemption applies. (It appears that the size-of-person test will be applicable and will be met.) Section 801.50(d) provides that a person acquiring control of the newly-formed entity determines the value of the acquisition in accordance with § 801.10(d). Section 801.10(d) in turn provides that "the value of the non-corporate interests held as a result of the acquisition is the sum of the acquisition price of the interests to be acquired (provided the acquisition price has been determined), and the fair market value of any of the interests in the same unincorporated entity held by the acquiring person prior to the acquisition; or, if the acquisition price has not been determined, the fair market value of interests held as a result of the acquisition."

We believe that the acquisition price in this case has been determined and that it is \$1 million, the amount of the cash contribution Company C will make to the formation of Newco.

It is our understanding that the value, if any, of the guaranteed annual minimum compensation that Company C's three co-owners would relinquish in connection with the formation of Newco should not be considered part of the consideration to be paid by Company C for the acquisition of a controlling interest in Newco. In essence, in connection with Company C's acquisition of membership interests in Company B, a compensation obligation owed to Company C's owners by Company A is being extinguished. Given the relationships among the parties involved in this transaction, it appears to us, based on our reading of Informal Staff Opinion 0406006, that this would not be considered the assumption by Company C of a liability of Company B, and thus it would not count towards the acquisition price to be paid by Company C even if this were an acquisition of assets. Further, because Company C is in fact acquiring LLC membership interests and not assets, the guaranteed annual minimum compensation that Company C's owners are relinquishing would not count towards the acquisition price even if the relinquishment of these interests were considered the assumption of a liability (see ABA Premerger

12/26/2007

Notification Practice Manual (4<sup>th</sup> ed.), Interpretations 91 and 102).

Please let us know whether you concur with this analysis. If you need any additional information, we would be happy to provide it.

Thanks, Mike, and happy holidays.



AGREE -  
BM  
1/2/08

mail server made the following annotations on 12/21/07, 12:55:52:

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