

301-1 (b)

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, August 21, 2008 7:10 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Determination of Control Question

Mike -

Hello. I don't believe we have spoken before, but I work with [REDACTED]

We would appreciate your help in analyzing a "control" question for a client, specifically, whether Company A controls an unincorporated entity, Company B. The formula governing the distribution of Company B's assets upon dissolution ("dissolution formula") is variable, as is the formula for the distribution of profits. We note that Company A has been receiving for some time and is expected to continue to receive more than 50% of the income that Company B produces. However, we understand that to determine control for HSR purposes we should look to the last regularly prepared balance sheet and apply the dissolution formula to determine if anyone would have the right to 50% or more of the assets of Company B upon dissolution.

What complicates the control analysis in this case is the existence of two regularly prepared balance sheets which value Company B's assets differently. Company A holds a substantial interest in Company B (which means that it controls Company B for accounting purposes) and consolidates Company B's financial information into its own financials. Company A's balance sheet reflects Company B's assets at close to their fair market value. Company B also keeps a balance sheet. However, it reflects a much lower book value for Company B's assets. If the last regularly prepared balance sheet Company A prepares (which includes Company B's financials) is used, Company A would have the right to 50% or more of the assets of Company B using the dissolution formula. If the balance sheet Company B prepares is used, no person would have the right to 50% or more of the assets of Company B using the dissolution formula.

After reviewing the March 2005 Statement of Basis and Purpose, informal interpretations, and other HSR Act reference resources, we have been unable to determine whose balance sheet should be used if there are multiple balance sheets for an entity. We understand that for purposes of determining HSR Act applicability, the PNO's position is that if there are two different asset valuations, the higher value should be used. Further, if no balance sheet existed for an entity, a pro forma balance sheet should be prepared that reflects the fair market value or the acquisition cost of all assets held by the entity.

We believe that it would be appropriate to use Company A's balance sheet for the determination of control. Company A's balance sheet values Company B's assets at closer to their fair market valuation and better reflects what the parties would be entitled to if Company B were actually dissolved. We would appreciate your guidance in this matter.

Thank you -
[REDACTED]

[REDACTED]

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8/25/2008

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Company B's standalone balance sheet would be the appropriate balance sheet to use. Company A's balance sheet which includes B's assets is not a regularly prepared balance sheet for B.

BW
8/28/08

K. WALSH CONCURS