

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, December 03, 2009 1:56 PM
To: Verne, B. Michael
Subject: HSR Question

Mike, we would appreciate your advice on the following transaction. Our client, A, is a major investor in LLC, B, which, in turn, is proposing to acquire assets from Company C (the "Acquisition"). The question presented is whether A is the ultimate parent of B or whether B is its own ultimate parent for purposes of an HSR filing to be made with respect to the Acquisition. The specific factual circumstances are described below.

Factual Circumstances

1. A is the major investor in B (some 90 percent of equity) and appoints 3 out of 5 of its directors.
2. B has two classes of units outstanding. The Class A units (the "Preferred Units") are held by the various investors, including A. The Class B units are held by management of B.
3. The LLC does not contemplate the payment of "profits" on a regular basis. Rather, distributions (other than quarterly tax distributions to partners to cover tax liabilities, if any) are expected to be made only on the sale of the LLC itself, a sale of the LLC's assets or another "exit" event where the value of the LLC's assets are monetized. These distributions, when they occur, will be made in accordance with a four step "waterfall" arrangement which works basically as follows:
 - a. In step one of the waterfall, holders of the Preferred Units receive back the original price they paid for the Preferred Units.
 - b. In step two of the waterfall, occurring only when full payment is made under step one above, holders of the Preferred Units receive an 8% return on their initial investment.
 - c. In step three of the waterfall, occurring only when there has been full payment under steps one and two above, the holders of the Preferred Units and Class B units share 50:50 in distributions until the Class B unit holders receive 15 percent of the 8% return received by the holders of the Preferred Units in step two described above.
 - d. In steps four of the waterfall, the holders of the Preferred Units and Class B units share 85:15 in remaining distributions.

Under the above described arrangements, the holders of Class B units are subordinate to the holders of the Class A units.

Payments on liquidation follow the same waterfall arrangement described above.

HSR Analysis

1. We would view the pay out arrangements with respect to the LLC as variable in nature, with the result that the HSR control test would turn on whether any one investor would have a right to 50 percent or more of the assets of B on liquidation after payment of "debts". 16 C.F.R. 801.1(f). Please confirm if our understanding in that regard is correct.
2. It is our understanding that the rights of the holders of the Preferred Units to repayment of the cost of their investment plus a return of 8% is considered a "debt" of the LLC for purposes of 16 C.F.R. 801.1(f)(the "Preferred Debt"). If a liquidation were to occur immediately prior to the closing of the Acquisition, based on asset values expected to be on the balance sheet of B at that time, it is anticipated that step one of the waterfall would not be completed and there would not be enough funds or assets to pay all of the Preferred Debt and other debt (such as third-party bank loans). As a result, there would be no assets to distribute to the holders of the Preferred Units or Class B units. If such is the case, it is our further understanding that no one would be considered to control B and B would be its own ultimate parent for HSR purposes. Thus any HSR filing required on the acquiring side with respect to the Acquisition would be by B and not A. Please advise if you agree that B would be the proper party to file.

AGREE
 B
 12/7/09