

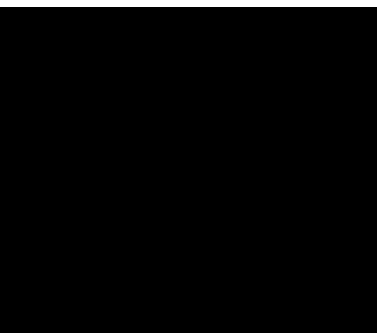
802.65

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, May 15, 2012 2:49 PM
To: Verne, B. Michael
Subject: Application of Rule 802.65

Mike –

I'm writing with respect to whether the following transaction is exempt from HSR filing requirements under Rule 802.65. A is a financial investor that is forming LLC 1 with B. A will contribute only cash and B will contribute operating assets. Initially A will have a greater than 50% interest in LLC 1 until it realizes a preferred return, after which A will have a minority interest and B will have more than 50%. This "flip point" may not occur until 10 years after A's initial capital contribution in LLC 1. A's initial acquisition of the more than 50% interest in LLC 1 may be valued at under the \$68.2 million HSR size of transaction threshold, but even if it exceeds that threshold, I understand that this initial acquisition would be exempt under Rule 802.65. See June 1, 2007 Information Interpretation 0706002. Within six months after closing of A's initial investment in LLC 1, an additional set of proposed transactions that would be subject to separate closing conditions but to the same fundamental financing (or "flip") may take place. In this second set of transactions, A would contribute an additional \$80 million in cash to LLC 1 to fund LLC 1's purchase of two LLCs, LLC 2 and LLC 3, that each are held 100% by B, and that each hold operating assets. A would like to make the same financial investment in the LLC 2 and LLC 3 projects as it did in LLC 1. Whether the second set of projects proceeds, however, is more speculative at this time than whether LLC 1 will proceed. For business reasons, A would like to unify the acquisitions in the same LLC rather than two different LLCs. Once again, A is contributing cash for the purpose of providing financing and will initially acquire a controlling interest in LLC 2 and LLC 3, but it no longer will hold these indirect controlling interests once it has realized in preferred return in LLC 1. Under these circumstances, it appears to me that the Rule 802.65 exemption should be available to exempt the second set of acquisitions. Please let me know if you agree. Thanks.



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This sounds vaguely like the other transaction you had a few weeks ago with a control issue involving 802.65. In this scenario, however, you made it clear that the overarching rationale behind the transaction is to combine all of the LLCs into one LLC that the investor will put cash into and take a temporary controlling interest in, rather than the LLC, subsequent to the investment making strategic acquisitions. We don't think that the fact that this is spread out over six months is significant to the analysis. We think that you can exempt the entire transaction under 802.65. Note, however, that going forward if the LLC makes subsequent acquisitions prior to the "flip point" being reached, the investor would be the acquiring UPE.

AGNES -
BW
5/16/12
K. WALSH CONWAS