

Verne, B. Michael

802.2(e)

From: [REDACTED]
Sent: Monday, June 04, 2012 3:44 PM
To: Verne, B. Michael
Subject: HSR Question

Mike,

Following up my phone message to you from earlier today, I am hoping for your guidance on the following set of facts, which is a new situation for me:

FACTS:

My client, company A (its own UPE), owns and operates a chain of hotels. At the end of this year, Company A plans to convert to a REIT, after which it will continue to own the hotels but will no longer directly operate them. A part of the conversion process, Company A will enter into the following transaction involving with Company B, a third party with no existing relationship to Company A:

- 1) After filing HSR, but prior to closing, Company A will form a new, indirect wholly-owned LLC subsidiary, "Transfer Sub".
- 2) Company A will cause Transfer Sub to enter into management agreements with various other subsidiaries of Company A, pursuant to which Transfer Sub will have the right to manage all of Company A's hotels.
- 3) Prior to closing, Company A will also transfer to Transfer Sub certain assets associated with operating the hotels, primarily consisting of employee contracts.
- 4) At closing, Company B will acquire from Company A (a) 100% of the membership interests of Transfer Sub and (b) certain IP assets (service marks, etc) associated with operating the hotels. Company A's purchase of the membership interests of Transfer Sub will allow Company A to assume Transfer Sub's management agreements and employee contracts. The total consideration for the transaction is in excess of \$200 million.

Company B will NOT acquire any real property in this transaction.

QUESTIONS:

- 1) My understanding is that, because no real property is being acquired, this transaction is not eligible for the hotel real property exemption under 802.2(e), even though all assets held by Transfer Sub and the IP assets being acquired are all assets incidental to the operation of a hotel. Company A & Company B meet the size of person tests, and size of transaction test is met, so this transaction is reportable. Please confirm whether this is correct. ✓
- 2) Assuming the transaction is reportable, how should Company A report NAICS revenues in Item 5? Transfer Sub has no 2011 revenues because it was not in existence in 2011, and its only means of generating revenue, the management agreements, did not exist in 2011. Similarly, the IP interests being acquired by Company B are not revenue-generating assets, but are simply used in branding and operating the hotels that will be managed by Company B. Should Company A report zero 2011 revenues associated with Transfer Sub and the IP assets? ✓

Thanks for your assistance.

YES TO BOTH
(K WALSH CONCURS)

BM
6/5/12