

802.4
801.4
801.14

Verne, B. Michael

From: [REDACTED]
Sent: Monday, June 02, 2014 4:48 PM
To: Verne, B. Michael
Subject: 801.4 / 802.4

Mike,

We have a transaction where the Acquired Person is forming a NewCo in which the Acquired Person will place certain assets (some exempt and some non-exempt, all of which are currently controlled by the Acquired Person). The Acquiring Person will then acquire 100% of the voting securities of NewCo. We are analyzing this using 802.4 to determine the FMV of the non-exempt assets held by NewCo. One of the assets to be transferred into NewCo (and thus acquired by the Acquiring Person) is 20% of the outstanding voting securities of Entity Y. Entity Y is controlled by the Acquired Person (and post transaction the Acquired Person will still control Entity Y). Since NewCo does not control Entity Y, can we treat the 20% of Entity Y's voting securities to be acquired by the Acquiring Person through its acquisition of NewCo as an exempt Secondary Acquisition (which we would have to separately analyze for potentially reportability), or does 801.4 not apply here because Entity Y is controlled by the Acquired Person?

Please let me know if you need any clarification or additional information.

As always, thank you for your guidance.

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

Acquired Person (let's call it B) holds 100% of Newco and holds at least 70% of the voting securities of Y, so both Newco and Y are issuers within the person of B. This means that for the 802.4 analysis, you would not include the value of the 20% of the voting securities of Y toward the non-exempt assets of Newco - see the last sentence of 802.4(a):

The value of voting or non-voting securities of any other issuer or interests in any unincorporated entity **not included within the acquired issuer** or unincorporated entity does not count toward the \$50 million (as adjusted) limitation for non-exempt assets.

Note that Y is not included within the acquired issuer (Newco), but is included within the acquired person (B).

The weird twist is that because B also controls Y, you would have to look at not only the non-exempt assets of Newco, but also the non-exempt assets of Y for the 802.4 analysis – see 802.4(b):

For purposes of paragraph (a) of this section, **the assets of all issuers and unincorporated entities that are being acquired from the same acquired person** are included in determining if the limitation for non-exempt assets is exceeded.

So, if the aggregate total value of the non-exempt assets of Newco and Y exceed \$75.9 million, neither is exempt under 802.4. If this is the case, you would also have to aggregate the value of 100% of the voting securities of Newco and the value of 20% of the voting securities of Y to determine the size of transaction. See 801.14:

For purposes of Section 7A(a)(2) and §801.1(h), the aggregate total amount of voting securities and assets shall be the sum of:

(a) The value of **all voting securities of the acquired person** which the acquiring person would hold as a result of the acquisition, determined in accordance with §801.13(a); and

(b) The value of all assets of the acquired person which the acquiring person would hold as a result of the acquisition, determined in accordance with §801.13(b).

Also note that if B did not control Y, the analysis would be completely different.

KW CONCURS

Bmw
6/3/14