

Gillis, Diana L.

From: Verne, B. Michael
Sent: Thursday, September 25, 2014 3:06 PM
To: Gillis, Diana L
Subject: FW: Debt Treatment in Minority Stock Acquisition

Diana - this is probably a good one to post. Thanks

From: Verne, B. Michael
Sent: Wednesday, September 24, 2014 3:12 PM
To: [REDACTED]
Cc: Walsh, Kathryn E.
Subject: RE: Debt Treatment in Minority Stock Acquisition

[REDACTED] - you have once again won the bizarre analysis of the week award. Oddly, this is one that we have never encountered in a §802.4 or §801.4 context. Here is the text of §802.4(a) and our take on the analysis:

- (a) An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to section 7A(c) of the Act, this part 802, or pursuant to §801.21, is exempt from the reporting requirements if the acquired issuer or unincorporated entity **and all entities it controls** do not hold non-exempt assets with an aggregate fair market value of more than \$50 million (as adjusted). 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.

§802.4 ANALYSIS

With respect to whether the acquisition of all of the partnership interests in Fund is exempt under §802.4, you would have to look to the assets of all entities it controls. This would include corporate entities that it holds 50% or more of the voting securities of **and** corporate entities in which it holds less than 50% of the voting securities but has the contractual power presently to designate 50% or more of the directors, because both constitute **control** under §801.1(b). Whether the transaction is exempt under §802.4 depends on whether the fair market value of the non-exempt assets held by all of these controlled entities exceeds \$75.9 million.

This is not at odds with the last sentence of §802.4(a) because you are not including the **value of voting or non-voting securities** of any other issuer... not included within the acquired issuer or unincorporated entity, rather you are including the value of the **assets (non-exempt)** of those issuers because they are controlled by the acquired entity.

§801.4 ANALYSIS

You would **not** have to separately look at the secondary acquisitions of any issuers in which the Fund holds less than 50% of the voting securities but controls of because of the right to designate 50% or more of the directors because Fund **controls** those issuers (see text of §801.4(a) below):

(a) Whenever as the result of an acquisition (the "primary acquisition") an acquiring person controls an entity which holds voting securities of an issuer that entity **does not control**, then the acquiring person's acquisition of the issuer's voting securities is a secondary acquisition and is separately subject to the act and these rules.

Of course you still would have to look at potentially reportable secondary acquisitions of issuers that Fund does not hold 50% or more of the voting securities of and does not have the right to designate 50% or more of the board, because fund **does not control** those issuers.

We think that you are probably thinking of the application of the intraperson exemption where only holdings of voting securities make the exemption available for a corporation, not the right to designate 50% or more of the directors. Neither §801.4 nor §802.4 have that limitation, they both only refer to control. Hope this makes sense and helps.

From: [REDACTED]
Sent: Wednesday, September 24, 2014 12:43 PM
To: Verne, B. Michael
Cc: Walsh, Kathryn E.; [REDACTED]
Subject: RE: Debt Treatment in Minority Stock Acquisition

Of course!

A is buying all of the limited partnership interests in a fund ("Fund") from B. The Fund's holdings consist of: (a) interests in corporate issuers of which Fund owns 50% or more ("Controlling Positions") and (b) minority positions (i.e., less than 50% interests in corporate issuers) ("Minority Positions"). With respect to the Minority Positions, the Fund has, in some instances, rights to appoint at least half of the board of directors. In determining whether 802.4 applies to exempt the transaction, can we exclude all Minority Positions, even those where Fund has the right to appoint at least half of the Board (and therefore controls for 801.1(b)(2))? It appears so since 802.4 speaks to issuers "included within the person" of the Fund (and without the requisite stock ownership they are not included within the Fund). I realize we will have to test secondary acquisitions. Do I have this right?

[REDACTED]