

803.3
801.2(d)

From: [REDACTED]
To: FTC.SERIOUS@ftc.gov
Date: Mon, Sep 18, 2000 6:14 PM
Subject: Technical 1(b)(1)(c) Questions on Reverse Triangular Merger

** PRIVATE **

Mike:

Welcome back. A technical HSR question on the form itself re the distinction between "being" an acquired person in a transaction for 1(b) and 1(c) purposes and "filing" as an acquired person.

A does a reverse triangular merger with B. It is accomplished by A forming 2 wholly-owned subs (1) A1, and below that (2) A2. A2 is merged into B (which is designated as the survivor between A1 and B), but at the same time all the shares of B are canceled and instead the shareholders of B now get shares of A2 pursuant to an exchange ratio. As a result of the merger, A1 ends up holding more than 50% but less than 100% of A2, which includes all of what formerly was B. Unknown and unknowable former shareholders of B (which is public before the deal) may end up with more than \$15 million of shares of A2 as a result of the deal, but all will be under 10% and A believes that all such shareholders would qualify for the investment only exemption.

The issues:

1. A is clearly the acquiring person in substance even though B is technically the "survivor." What was B company is now all part of A2 which is directly controlled by A1 and, ultimately by A. We will designate A the acquiring person and B the acquired person. Correct?

YES

2. Since shareholders of B will acquire shares of newly created A2, an entity controlled by A, isn't A technically still an acquired person and the unknown shareholder of former B technically an acquiring persons? I don't see anything in 801.2(d) to mandate a different result, but it my impression that a number of our colleagues in the HSR Bar would not treat A as an acquired person in this context. It is not clear to me how they reach that result.

← YES

3. If A is correctly thought of as both acquiring and acquired, shouldn't A check the box "both" in Item 1(b) indicating that it is both an acquiring and an acquired person, even though it is not making a reportable filing as an acquired person.

NO - INDICATE ONLY WHAT IS REPORTABLE.

4. In 1(c), should A be listed as both an acquiring and acquired person regardless of whether they have a filing obligation. We know that former B shareholders will, as a result of the acquisition, hold stock in A2 that they did not previously hold, but A2 will continue to be controlled by A. Assuming this is correct, A still should not be required to answer items 5-9 of the form separately as an acquired person, however, so long as A is not "filing" as an acquired person in a reportable acquisition.

THE LANGUAGE OF THE INSTRUCTIONS NOTWITHSTANDING, WE HAVE TAKEN THE POINT THAT ONLY INFORMATION WITH REGARD TO THE REPORTABLE PORTION OF THE TRANSACTION NEED BE PROVIDED IN THE FORM.

My concern is that if we check the box "both" in 1(b)

someone in Premerger might accidentally bounce the filing for not responding separately to Items 5-9 as an acquired person.

Do NOT indicate "both"

5. Since A does not know the identity of all former B shareholders who will end up holding stock of A2, is it appropriate to simply cross reference Item 2(a) in the 1(c) listing of all acquiring persons?

NO NEED TO

I would appreciate it if you could give me a call (leave a voice mail if you miss me) with your views on the above. As always, I appreciate your insight.

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SEE NOTES ABOVE.

B. Michael Vame

8/18/00