

802.51  
801.10(c)

From: [Redacted]  
To: Mike Verne (E-mail) <mverne@ftc.gov>  
Date: 4/30/02 11:28AM  
Subject: Follow up

Mike:

Thanks for your voice-mail this morning. One follow up question I have is who is responsible for conducting the [Redacted] of US based assets for purpose of [Redacted]. Both companies are non-US based. The acquiring company clearly meets the [Redacted] test. We are trying to determine whether my client, the acquired company, also meets the [Redacted] test. The acquiring company is purchasing all of the stock of the acquired company, whose assets mainly consist of IP. The IP is issued by the US. Who conducts the FMV of the company's assets; I would have thought that the owner does but the federal register notifying the adoption of the amendments suggests that the burden is on the acquiring party. Please advise.

[Redacted]

Advised the writer that since the burden to make any fair market valuation in connection with determining the size-of-transaction resides with the acquiring person, the PNO naturally extends this requirement to the acquiring person in determining the fair market value of assets of the issuer located in the U.S. for purposes of analyzing the availability of the 802.51 exemption. We would, however, allow the board of the acquiring person to designate the acquired person to do the valuation (like we have done for purposes of determining the size-of-transaction). Although 801.10 is titled "Value of voting securities and assets to be acquired", the section on fair market valuation does not specify that its instructions are limited only to determining the value of assets to be acquired. Any time a fair market valuation is required by the rules the instructions provided in 801.10(c) should be adhered to.

N. Ovuka concurs.

*Michael Verne*  
5/1/02