

801.40  
801.11 (e)

Verne, Michael

From: [REDACTED]  
Sent: Wednesday, October 22, 2003 7:21 PM  
To: Verne, Michael  
Subject: reportability question

AGREE THIS IS NON-REPORTABLE.  
NO PERSON IS ACQUIRING MORE  
THAN \$50 MM IN NEWCO V/S  
AT ITS FORMATION. IN THE  
ACQUISITION OF TARGET, NEWCO  
HAS NO ASSETS IN DETERMINING  
ITS SIZE OF PERSON UNDER  
801.11(e). IT ONLY HAS CASH  
FOR THE ACQUISITION V/S OF

Mike:

Hope you can help out with this.

Facts:

1. A new corporation ("Newco") will be formed with three otherwise unaffiliated shareholders to acquire the stock of Target.
2. A will contribute \$18M in cash for approx. 47% of Newco's stock.
3. B will contribute \$12M in cash for approx. 32% of Newco's stock
4. C will contribute \$8M in Target stock for approx. 21% of Newco's stock .
5. None of A, B or C will have the power to appoint a majority of Newco's directors.
6. Newco will borrow \$20M from an unrelated bank.
7. The \$30M of contributed cash and the \$20M of loan proceeds will be used to acquire the rest of the Target stock in a merger of Target with a shell subsidiary of Newco.
8. The only \$100M person in the transaction is A.

*B. Michael*  
10/23/03

My take is as follows:

1. The formation of Newco is not reportable because no one will hold \$50M or more of Newco stock.
2. The acquisition of Target by Newco will only be reportable if A is Newco's UPE (if Newco is its own UPE, there is no \$100M party to the transaction). The only way to reach that result is to analyze Newco after A and B have made their contributions but before C becomes a shareholder of Newco, which would make no sense because the capital contributions by A, B and C, the bank financing, the merger and the cash-out of the Target shares will all happen simultaneously.

Does that hold up? I couldn't find any guidance on how (or when) one determines who holds the voting securities of a corporation being formed for the purpose of making an acquisition.

Please call me if you have any questions or need more info.

Thanks.