

7A(c)(3)

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, March 30, 2004 1:45 PM
To: Verne, B. Michael
Subject: Follow-up question re acquisition by 50% owner

Mike,

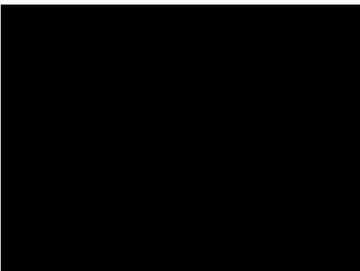
As a follow-up question to the issues we discussed yesterday by phone, in which you indicated that, in my hypothetical (A acquires a 50% ownership interest in Company X in a transaction beneath jurisdictional limits, and more than a year later, acquires the rest in a transaction that hits the \$50 million mark), the second acquisition would be exempt under Section 7A(c)(3), would the result differ depending upon the nature of Company X's entity? If X is a corporation, the result is probably clear. It is exempt.

But what if X is an LLC? I have found language in a treatise (Axinn, Fogg, Stoll & Prager, Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act) that if X is a partnership, A's increase to 100% would be treated as an acquisition of the assets of the partnership and, therefore, the transaction "may be subject to the Act." (Section 6.04[3], page 6.25). The same treatise goes on to say that

"If the joint venture is structured as an LLC, a 50% joint venturer who seeks to increase his interest to 100% would have to file a notification form since the acquisition would be treated as an acquisition of the assets of the underlying LLC and, hence, potentially reportable." (emphasis added) The treatise cites FTC Formal Interpretation 15 for the observation that if, upon formation of the LLC, the 50% venturer filed a notification form with the FTC, there would then be no requirement to again file re the second transaction, on the theory that the "combination" had already been reviewed, but the writers state that "there does not seem to be a basis in the HSR Act or Rules for this conclusion."

Hence, my continued uncertainty. Was your response yesterday confined to the assumption that Company X must be a corporate entity for the Section 7A(c)(3) exemption to apply? Is there a distinction when X is an LLC? Is the treatise either incorrect, out of date, or raising a red herring? Is the answer simply not clear...?

Thanks so much for your assistance.



ADVISED THAT 7A(c)(3) IS
ONLY APPLICABLE TO CORPORATIONS
B. Michael
3/30/04