

Verne, B. Michael

801.10

From: [REDACTED]
Sent: Monday, December 26, 2005 5:57 PM
To: Verne, B. Michael
Subject: Reorganization Question

Mike--

Another question in the reorganization area.

XYZ is a debtor in bankruptcy. Under the reorganization plan, the secured noteholders of XYZ will form New XYZ.

Upon consummation of the plan, the secured noteholders will--

1. Surrender their old notes.
2. Purchase in the aggregate \$50 million in voting preferred stock.

New XYZ will--

1. Borrow \$10 million from a bank.
2. Issue common stock and \$100 million in new notes to the XYZ secured noteholders in exchange for the old notes (which have a substantially greater principal amount).
3. Acquire all of the assets (but none of the liabilities) of old XYZ, in exchange for the cash that it receives from the preferred stock issuance and the bank borrowing and the extinguishment of the old notes.

XYZ will--

1. Use the cash from New XYZ to pay off unsecured creditors.
2. Arrange for certain other of its liabilities to be assumed by its former control persons (unrelated to the secured noteholders).

All of these transactions will occur simultaneously, as is typical upon consummation of a plan of reorganization.

No single holder will receive voting securities of New XYZ valued in excess of \$53.1 million, and no person will control XYZ for HSR purposes upon consummation of the plan. However, the assets acquired by New XYZ will have a fair market value in excess of \$212.4.

Q1. Is the acquisition of assets by New XYZ from XYZ reportable? Ordinarily, one might say yes, because the size of the person test is inapplicable. Here, however, what is really happening is a bankruptcy reorganization of XYZ, as all the transactions are occurring pursuant to the plan, with the secured noteholders becoming the equity holders of the reorganized company.

Q2. Assuming your answer to Q1 would otherwise be yes, does the following change the analysis?

Approximately 20% of the old notes were acquired by the secured noteholders prior to the commencement of the XYZ bankruptcy. If one backs out the cash (received upon issuance of the preferred stock and from the bank borrowings) from the asset valuation, the remaining value is necessarily being given to New XYZ on account of the old XYZ notes. If one then deducts from the total asset value 20% of the remaining value (viewed as eligible for treatment under 802.63), the asset value is below \$212.4 million. Under this analysis, the size of the transaction is below the \$212.4 million, so that the size of the person test again becomes relevant. But since New XYZ is a newly formed entity with no balance sheet and no assets other than those required to consummate the reorganization plan, the size of the person test is not satisfied.

It would therefore seem that on either theory, a filing should not be required here.

I would appreciate your views.

[Redacted]

*Agree no FILING
IS REQUIRED
B. [Signature]
12/27/05*

[Redacted]

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