

Verne, B. Michael

801.10(d)

From: [REDACTED]  
Sent: Friday, August 04, 2006 2:37 PM  
To: Verne, B. Michael  
Subject: HSR question

Mike, another question.

I am considering how to apply the 802.4 exemption to a hypothetical acquisition of 100% of the voting securities of an issuer whose only holdings are minority interests in two unincorporated entities. Upon consummating the acquisition, the buyer will obtain a controlling interest in the one of the two unincorporated entities ("second unincorporated entity"), due to the buyer's prior holding of interests in that entity. The buyer will pay a lump sum for the voting securities, and the purchase agreement will not allocate the price between the two unincorporated entities.

I understand that the acquisition of the minority interests in the first unincorporated entity is not counted toward the \$56.7 million threshold of 802.4.

How should the value of the interests in the second unincorporated entity be determined? According to 802.4(c), the value of the "assets" of the issuer whose voting securities are being acquired shall be the fair market value, determined in accordance with 801.10(c). Alternatively, 801.10(d) provides that, in an acquisition of non-corporate interests that confers control of an unincorporated entity, the value of the non-corporate interests held as a result of the acquisition is the sum of the acquisition price of the interests to be acquired (provided that the acquisition price has been determined), and the fair market value of any of the interests in the same unincorporated entity held by the acquiring person prior to the acquisition; or, if the acquisition price has not been determined, the fair market value of interests held as a result of the acquisition. Which section applies?

If 801.10(d) applies, is the acquisition price of the interests in the second unincorporated entity "determined?" At the time that the agreement to buy 100% of the voting securities is entered, the buyer is able to allocate the total purchase price between the interests in the two unincorporated entities, even though the purchase agreement will not do so. Would the buyer's allocation (as of the date the purchase agreement is entered) constitute the acquisition price being "determined?" Or would a fair market valuation be required in accordance with time frames set out in 801.10(c)?

Many thanks for your help.

[REDACTED]

*Brueckner*  
8/4/06

801.10(d) is the correct section to use. If an allocation of the purchase price can be done (even is not in the purchase agreement), the value would be the acquisition price of the newly acquired interests in the entity that will be controlled, plus the fair market value of the interests already held in that entity. If the purchase price cannot be allocated, the value is the fair market value of all of the interests that will be held in the controlled entity.