

801.10

Verne, B. Michael

From: [Redacted]
Sent: Wednesday, May 16, 2007 6:18 PM
To: Verne, B. Michael; Ferkingstad, James H.
Subject: Size of Transaction Issue

Dear Messrs. Verne & Ferkingstad:

I have a size of transaction threshold (\$59.8M) question. This is a stock deal in which several individuals are collectively acquiring 70% of stock of B. Only two (husband and wife) of the individuals meet the size of person test but collectively they alone may acquire about 50% of the stock. The stock of B is not publicly traded thus 801.10(a)(2) applies. The acquisition price has been set at roughly \$40 million and so under (a)(2) it should control and thus the size of transaction test is not met. The "wrinkle", however, is that, at or before closing, B plans to take out a loan of roughly \$50 million which will be distributed to the seller's sole shareholder as a dividend. I understand there are legitimate business and tax reasons for this loan/dividend structure, and the loan will be an obligation that the company will have on its books after the acquisition.

My initial analysis is that under (a)(2) the acquisition price controls and one need not add any or all of the loan/dividend amount to the acquisition price to determine if the size of transaction threshold is met. Thus, the transaction is not reportable. Is this correct or am I missing something? Thanks for your advice.

[Redacted]

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[Redacted]

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Agree -
BM
5/17/07