

801.40

Verne, B. Michael

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From: [REDACTED]  
Sent: Wednesday, June 13, 2007 5:31 PM  
To: Verne, B. Michael  
Subject: RE: Consolidation, JV, 802.30

Another twist on the JV question, suppose corporation A has one shareholder who holds 50% or more of the voting securities, A1; corporation B does not have any 50% shareholders but it does have two entities with the present contractual right to appoint 50% of the Board, B1 and A1. So A1 controls corporation A through its ownership of voting securities and controls corporation B through its ability to appoint 50% or more the Board. A and B's shareholders are contributing all of their stock to Newco in exchange for NewCo stock and cash. Would A1 be exempt from any filing requirements based on its "control" of both A (voting securities) and B (contractual right)? If so would the only HSR be one filing by B1 in connection with its acquisition of interest in A, so it would only have to file to the extent that the value of interest in A? To determine that value would B subtract the value of B since it controls (contractual right)? Many thanks as always.

[REDACTED]

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This is very complicated. A1 is not exempt outright. The reason is that the intraperson exemption does not include control through a contractual right to designate directors. You would have to do an 802.4 analysis. A1 is contributing more than 50% of the voting securities of A to Newco, so that leaves a minority interest that would not count toward A1's 802.4 limitation. A1 would then have to look at the assets held by B to determine if they include non-exempt assets valued in excess of \$59.8 MM. If so, A1's acquisition of Newco voting securities is not exempt under 802.4. A would have to determine the fair market value of the Newco voting securities it is acquiring to determine if the size-of-transaction test is satisfied. That value would be based on all of the assets held by Newco and all of its liabilities. Presumably, since Newco holds all of the stock of A and B, the value of 100% of the voting securities of Newco would be equal to the FMV of all of the voting stock of A + all of the voting stock of B. A would then apply the percentage of Newco voting securities it will hold to that amount.

Similarly B1 would have to do the same analysis. B1 would have to look at the value of all of the non-exempt assets held by both A and B. If that amount exceeds \$59.8 MM, B1's acquisition of Newco voting securities is not exempt under 802.4. It would value its acquisition as above. Any other shareholders of A or B would analyze their acquisitions the same way as B1.

*Bu*  
6/13/07