

Verne, B. Michael

From: [REDACTED]
Sent: Friday, August 24, 2007 2:02 PM
To: Verne, B. Michael
Subject: Questions Relating to Section 802.4/801.10(c)(3)

Mike,

I have two questions relating to a transaction that I was hoping to obtain your guidance on. I have not to date relied on the 802.4 exemption in the following context, and want to confirm that under the facts presented, the transaction is exempt.

An entity that is controlled by Company A, Company B, will acquire 100% of the outstanding voting securities of Company C through a merger for approximately \$90M in cash subject to adjustment. Assume the parties meet the size of person test. Company B's Board equivalent has asked its outside accounting firm to determine the fair market value of Company C and its subsidiaries' non-exempt assets. The accounting firm has performed a fair market valuation, and has determined that the fair market value of Company C and its subsidiaries' non-exempt assets is below \$59.8M. It is my understanding that based on Section 802.4, the transaction would be exempt if the fair market value of the non-exempt assets of Company C and its subsidiaries is below \$59.8M. Please let me know if you agree.

I have a second related question. I understand that under Section 801.10(c)(3), "[t]he fair market value shall be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person [or equivalent body]; or by an entity **delegated** that function by such board or officials). . ." (emphasis added). My question relates to what is an appropriate delegatee for purposes of 801.10(c)(3), and whether there is any formal process by which such delegation should take place.

The PNO has stated informally that the acquiring person can delegate the fair market valuation function to the chief financial officer of Company A, or any financial officer of A who has direct responsibility for the proposed transaction. Premerger Notification Practice Manual (4th Edition 2007), Interpretation 87. I also note that the following Informal Interpretation states that "[t]he Board can delegate the role of determining the fair market value to any one they want." <http://www.ftc.gov/bc/hsr/informal/opinions/0607006.htm>. "There is no requirement that the Board take any formal action to approve the determination, but they are ultimately responsible for it." Id.

I seek your advice on two issues:

- 1) Can the Board of Company A delegate the role of determining the fair market value to Company B's Board equivalent? If Yes, I understand that Company A's Board would not need to approve the determination, but that they would be responsible for it, as any filing obligation would be that of the UPE.
- 2) If delegation to Company B's Board equivalent is permissible, would the Board of

Company A need to formally make a resolution to delegate the task? If Yes, will it suffice to have the CFO of Company A sign a resolution delegating the role of determining the fair market value to Company B's Board equivalent?

Thank you, as always, for your help.



This e-mail is from [REDACTED] and may contain information that is con

I agree that the transaction would be exempt if the fair market value of the non-exempt assets of Company C and its subsidiaries is below \$59.8M.

1. 1) Yes - the board of A can delegate the fair market value determination to the board of B.

2) The board of A does not need to make a formal resolution.