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Verne, B. Michael

From: [REDACTED]
Sent: Friday, August 29, 2008 4:29 PM
To: Verne, B. Michael
Subject: Size of Person Inquiry

Mr. Verne

When you have a moment, could you give me your thoughts on the size of person issue described below?

FACTS

Our client, A, is a holding company that has a directly wholly-owned sub, B, and an indirectly wholly-owned sub, C (i.e., A is the parent of B and B is the parent of C). A has been approached by a buyer to purchase C separately - the buyer does not want B. For tax purposes, the transaction will be structured as a sale of the voting securities of A. The steps of the spin-out and sale of A would be as follows:

1. B forms a new corporation, X.
2. B contributes all of its assets to X in exchange for all of the capital stock of X.
3. B dividends the X capital stock to A.
4. A dividends the X capital stock to its stockholders.
5. Buyer acquires all of the voting securities of A.

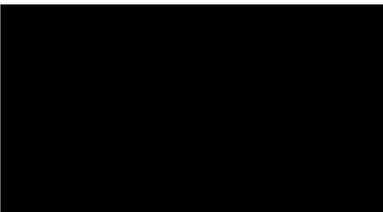
On its consolidated balance sheet, A has total assets in excess of \$12.6mm (but less than \$126.2mm) and for purposes of this inquiry we will assume that buyer has total assets in excess of \$126.2mm. Each of A, B and C are persons NOT engaged in manufacturing. The value of the voting securities of A will be less than \$239.2mm.

QUESTION

For purposes of performing the size of person test, may A exclude the value of the assets attributable to B, as these assets will be divested to X prior to the sale of the voting securities of A?

I note that I have reviewed Interpretation 130 of the Premerger Notification Practice Manual (4th ed.) and reviewed informal staff opinion 0503007. Interpretation 130 discussed the idea of specifically noting on the balance sheet that certain assets will be divested and, if so noted and the assets are actually divested, then the assets may be excluded for purposes of performing the size of person test. The issue that we are running into is that the assets of B will only be divested if we are certain that the sale of the voting securities of A is going to occur. Would a note on the balance sheet as to a conditional divestiture of the assets of B suffice for the purpose specified in Interpretation 130?

Your input on this matter is greatly appreciated. Thank you.



A CONDITIONAL
DIVESTITURE NOTE WOULD
NOT BE SUFFICIENT
BM
9/2/08

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