

802.60

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, September 16, 2008 11:28 AM
To: Verne, B. Michael
Subject: 802.60 / 801.10

Mike,

We have a client ("Client") acting as an underwriter for a specific placement of shares newly issued by a company ("Company"). Our client is performing the normal functions of an underwriter, although it is unclear if they operate as an underwriter in the ordinary course of business. The Client does not solely offer or perform underwriting services, and such services would be a small portion of its usual activity. In addition, Client already holds shares in Company. An HSR filing was made for the acquisition of the shares presently held.

Pursuant to the Underwriting and Placement Agreement, Client has agreed to purchase all shares of Company that are not placed with third parties. Would such a purchase be exempt under 802.60? Does it turn on whether the Client's services as an underwriter can be considered services in the ordinary course of its business?

While the underwriting agreement was entered into in good faith, there was a reasonable likelihood that some or all of the shares to be issued would not be placed, and Client would likely have to acquire any such shares not placed.

Alternatively, if the acquisition of the shares are HSR reportable, can we deduct the underwriting fee from the purchase price. Specifically, Client had agreed to underwrite the shares for a fee of X% of their face value. The contract is silent on whether this fee will be treated as a discount to the offering price, or as a separate payment. Is this fee (or a pro-rata portion of this fee) correctly considered an expense associated with their purchase, and can we exclude it from our valuation of the voting securities acquired? Recall that there was a strong likelihood that the shares would not be placed and that our Client would acquire them per the terms of the Underwriting and Placement Agreement.

(Note that the trading value of the shares is well below the placement price.)

Thanks,

[REDACTED]

I think that if Client acts as an underwriter in the ordinary course of its business, even if underwriting is only a small portion of its business, the exemption is applicable. If underwriting is not in the ordinary course of Client's business, the exemption would not be available.

I agree that the underwriting fee is an expense associated with the purchase of the new shares and should not be included in the valuation.


9/16/08