

7A(c)(10)

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, October 22, 2008 8:31 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: 7(A)(c)(10) Question
Importance: High
Attachments: 0403003 Informal Staff Opinion - 801.10, 801.90.htm

Mike,

[REDACTED] and I are analyzing a scenario which involves an investor who is purchasing additional voting securities of an issuer but who, given the simultaneous purchases of voting securities by other investors, will see his percentage of outstanding diluted. Given this dilution we view the transaction as exempt pursuant to 7A(c)(10) but wanted to make sure that additional facts (described below) didn't give rise to a reporting obligation assuming an otherwise jurisdictionally sufficient transaction.

Assume that the investor ("A") is an existing minority shareholder of the issuer ("B") and has a representative on the board of B. For legitimate business reasons unrelated to HSR considerations, B has structured the financing round such that it will use a portion of its proceeds to later repurchase/redeem some of its previously issued voting securities. That future redemption of shares will then increase the percentage of voting securities held by A and certain other existing shareholders, although A will not end up controlling B.

The question is whether A is making an "acquisition" by virtue of seeing its percentage of outstanding increase as a result of the redemption. Although we did not see any interpretation directly on point, the attached interpretation provides that the subsequent redemption of shares by a company in such circumstances should be treated as separate, and is not aggregated with the actual acquisition of voting securities by the acquiring party for HSR purposes (where the transactions have been structured for legitimate business reasons, as here, rather than for the purpose of avoidance of any HSR filing obligation).

<<0403003 Informal Staff Opinion - 801.10, 801.90.htm>>

Please confirm that A's board membership on B does not render the later redemption of shares by B an acquisition on A's part. We assume that if these facts render the later redemption to not be an acquisition it doesn't matter whether or not A was "instrumental" in structuring the deal so long as the deal was structured for legitimate business reasons.

If you conclude that the redemption would be viewed as an acquisition please confirm that the time of the "acquisition" would be when the redemption would increase A's voting percentage (meaning that A would be able to make its original, dilutive, acquisition but would need to file and observe a waiting period before the later redemption became effective).

If you need any additional facts or want to discuss this, both Rick and I are available for a call at any time that's convenient to you tomorrow (if you have any availability tomorrow whatsoever). Apologies in advance for the short notice, but the transaction has come together at lightning speed and any delay makes it likely that issuer will simply choose to close on all other investors' pieces of the deal. If it does, that would deprive my client of the pro rata exemption -- since its investment would then trail the others and not be diluted by them in a simultaneous closing. Therefore, could you please try to confirm your conclusion on Thursday, October 23rd, if at all possible.

Best,

[REDACTED]

[REDACTED]

[REDACTED]

I AGREE THAT THE REDEMPTION IS NOT AN ACQUISITION YOUR CLIENT CAN Rely ON (c)(10).

10/23/2008

L