801 . 11(e)

Verne, B. Michael

From: [redacted]
Sent: Friday, October 30, 2009 5:15 PM
To: Verne, B. Michael
Subject: 801.11(e) Question

Mike,

Can you help me with the following question re the impact of 802.51 exclusion on an 801.11(e) calculation?

Buyer will acquire 4 subsidiaries of Seller. One of the subsidiaries (USTarget) is a US entity. The other three subsidiaries (ForeignTargets) are non-US entities having in the aggregate less than US$65.2 million in sales to the U.S. and less than US$65.2 million in assets located in the U.S. So Buyer's acquisition of ForeignTargets is exempt under 802.51.

Assuming the portion of the total purchase price allocated to USTarget is between $65.2 and $260.7 million, the size of persons test applies. USTarget has more than $130.3 million in total assets and annual sales. Buyer, however, is a newly-formed entity and its own UPE, so it must make a pro forma calculation per 801.11(e). At the time of closing Buyer will of course have sufficient cash to acquire both USTarget and ForeignTargets. In the 801.11 calculation, may Buyer deduct the portion of the purchase price allocable to the non-reportable (ForeignTargets) portion of the transaction? I believe the language of the rule indicates this may be deducted because that portion of the purchase price will also "be used by the acquiring person as consideration in an acquisition of . . . voting securities issued by . . . that acquired person (or an entity within that acquired person)." Do you agree?

Agree – BM 11/2/09

Apologies if this seems a stupid question. I thought I'd find clarification in the PNO Manual about this, but I didn't.

Thanks,

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