

Verne, B. Michael

801.11(e)

From: [REDACTED]
Sent: Wednesday, December 23, 2009 11:19 AM
To: Verne, B. Michael
Subject: Question Re 801.11(e)

Mike, first, I hope you have a great holiday! Second, I have a scenario I would like to confirm whether 801.11(e) is available.

There are two possible fact situations.

The first is that a newly formed partnership (PS 1) that is its own UPE and has no regularly prepared balance sheet will create an acquisition subsidiary that will acquire another company in a transaction with a value less than \$260.7 m. The acquisition subsidiary would be approximately 60% owned by the newly formed partnership PS 1 and have two other investors that each would have a less than 50% interest. At formation of the newly formed partnership and acquisition sub, the parties will contribute only cash. At closing, the management of the target company would rollover some equity for an aggregate interest of approximately 20% in the acquisition subsidiary (no management person will hold more than \$65.2 m of stock in acquisition sub). The UPE of the acquisition subsidiary would be the newly formed partnership PS 1.

The second scenario is similar but there is another layer inserted. The newly formed partnership and 2 co investors will form a second newly formed partnership (PS 2) and contribute cash. PS 1 will have a greater than 50% interest in PS 2 and each co investor will have a less than 50% interest in PS 2. Then PS 2 will form the acquisition sub to acquire the target. At closing, the management of target would rollover some equity for an aggregate amount of approximately 20% in the acquisition sub (again with no management having more than \$62.5 million of stock). Again, the UPE of the acquisition sub will be PS 1.

Analysis: In both scenarios, the formation of the partnerships and the acquisition sub should be exempt because only cash is being contributed at formation (or with respect to the acquisition sub, it is a wholly owned sub in scenario 2).

It appears that in both scenarios the newly formed partnership (PS 1) as the UPE of the acquisition sub should be able to use 801.11(e) to deduct the acquisition funds plus related expenses from its pro forma balance sheet in determining whether it meets the size of the person test. I reviewed the following informal interpretations that involved acquisition subsidiaries owned by a UPE that was newly formed without a regularly prepared balance sheet: 9412002, 9909010, 9806011. However, in each of these, it did not appear that there were other non controlling investors involved and I wanted to confirm that this would not render 801.11(e) inapplicable. In both scenarios, PS 1 is the UPE and does not have a regularly prepared balance sheet and the size of the transaction will be less than \$260.7 m.

As one final note, PS 1 will have capital commitments (for cash) at the time of closing but they will not be drawn on except to fund the acquisition cost. Based on other informal interps, it does not appear that for purposes of 801.11(e) the commitments need be included except to the extent drawn upon at closing (I understand under 801.40 or 801.50 in analyzing a formation transaction it would be different).

Thanks so much and have a great holiday.

Regards,

AGREE -
 801.11(e) IS AVAILABLE
 IN BOTH SCENARIOS.

B
 12/23/09