

7A(c)(10)

Verne, B. Michael

From: [REDACTED]
Sent: Monday, November 14, 2011 2:36 PM
To: Verne, B. Michael
Subject: Fwd: HSR question -- application of Section 7A(c)(10)
Attachments: Picture (Device Independent Bitmap) 1.jpg

Mike -- hope that you had a relaxing Veterans Day Weekend.

I have a question regarding the application of the Section 7A(c)(10) exemption to the following scenario.

Facts: Holdco has multiple shareholders consisting of several private equity investment funds, management and individual shareholders. The shareholders hold common stock of Holdco. Holdco has a direct sub, Intermediate, in which it holds all of the Common stock representing the majority of Intermediate's outstanding voting shares. The shareholders of Holdco hold the remaining outstanding voting shares of Intermediate in the form of preferred stock. Holdco has created a new class of convertible participating preferred stock which it will offer to all of its shareholders in exchange for their shares of preferred stock of Intermediate and unpaid dividends of Intermediate. (Each share of Common stock and each share of newly issued Preferred stock will be entitled to one vote per share.)

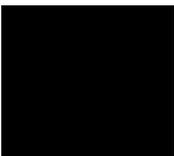
It is anticipated that most, if not all of Holdco's shareholders, will elect to participate in the exchange. However, the exchange is voluntary and it is possible that a few of the individual shareholders will not participate in the exchange (although it is not known at this time). If this occurs, the percentage of outstanding voting shares held by the other shareholders of Holdco would increase but the increase would be a rounding error, as little as a thousandth of a percentage point.

Approximately 99.2% of Holdco's outstanding voting shares are held by private firms all of which will participate in the exchange. The other 0.8% are held by 43 individuals.

My question is whether the Section 7A(c)(10) exemption would apply to the exchanges by the five or six shareholders whose holdings exceed \$66 million in value if all shareholders do not elect to participate in the exchange. Although the percentage of outstanding voting shares of Holdco held by the shareholders of Holdco would increase if all of the preferred shareholders of Intermediate do not elect to exchange their shares, the increase in the percentage of voting shares held would be insignificant because all of the major shareholders will participate in the exchange on a pro rata basis and the few shareholders who may not participate are individuals who have very small shareholdings. That said, this seems like the type of internal reorganization that Section 7A(c)(10) was meant to cover.

Please let me know if you agree.

Best regards,



We are still taking the position that 7A(c)(10) is absolute and there is no de minimis exception. I think that's the right position, because otherwise we would be interpreting the plain language of a statutory exemption to mean something other than what it unambiguously says.

Bu
11/16/11