

**Gillis, Diana L.**

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**From:** Verne, B. Michael  
**Sent:** Monday, September 15, 2014 10:55 AM  
**To:** [REDACTED]  
**Cc:** Walsh, Kathryn E.; Berg, Karen E.; Gillis, Diana L.; Whitehead, Nora; Pope, Susan H.  
**Subject:** RE: Hypothetical under 7A(c)(9), 802.9 and 801.15(b)

[REDACTED] - If Person X intends to pursue an acquisition of the entire company, the 7A(c)(9) exemption would not apply. 801.15(b) would require aggregation of the stock already held because of the clause "those sections do not apply" in 801.15(b). The sale of an equal amount of shares upon exercise of the options would make the current acquisition exempt under 7A(c)(10) because the percentage held will not increase.

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**From:** [REDACTED]  
**Sent:** Friday, September 12, 2014 5:51 PM  
**To:** Verne, B. Michael  
**Subject:** Hypothetical under 7A(c)(9), 802.9 and 801.15(b)

Mike, could I please ask your assistance with a question about the investment exemption in 7A(c)(9) and 802.9- it may also implicate 801.15(b), as explained below. Here's the hypothetical:

-Person X is the former CEO of Company Y.

-Company Y is a U.S. public company with assets or annual sales over \$151.7 million.

-Person X has investment assets (not including personal assets) and controlling interests in other companies valued at greater than \$15.2 million

-Person X separated from Company Y and now has no influence or control over Company Y.

-Person X currently holds voting securities in Company Y valued at greater than \$75.9 million but less than \$303.4 million. These voting securities amount to less than 5% of the existing shares of Company Y. Person X acquired those voting securities solely for the purpose of investment after his separation from Company Y, with no filing.

- Person X holds stock options in Company Y valued (at the current market price) at approximately \$8 million. He must exercise those options by the end of September or they will expire.

On these facts, we believe that the exercise of the \$8 million in options by Person X would not trigger a filing under 7A(c)(9) and 802.9 (and perhaps also 801.15(b)—see discussion below). Please confirm that you agree (or disagree).

There are three tweaks to this scenario for which we request your interpretation.

FIRST, assume that Person X has made a subjective, personal decision that he wishes to approach Company Y (or its shareholders directly) to attempt to acquire all of the shares of Company Y. Person X intends to send a written offer to Company Y offering to purchase the company.

Would this change in subjective intent cause Person X's exercise of the \$8 million in options to become reportable through aggregation with the securities that he earlier acquired solely for the purpose of investment?

Even if it did, would aggregation not even apply under 801.15(b) since the prior acquisition was exempt under 7A(c)(9) (it's hard to tell whether 801.15(b) requires satisfaction of section 7A(c)(9) AND one or more of 802.3, 802.4, and/or 802.64, or whether exemption of the prior acquisition under section 7A(c)(9) is good enough).

Does the analysis in any way depend on whether Person X exercises the options before or after sending the letter proposing an acquisition?

SECOND, if the answer to question 1 is that the \$8 million exercise of options would be reportable, would Person X's acquisition of the \$8 million in options still be reportable if he liquidated an equal number of existing shares in order to exercise the options? E.g., sold \$8 million worth of existing shares in order to acquire options valued at \$8 million.

THIRD, regardless of the answers to questions 1 or 2, but assuming that 7A(c)(9) and 802.9 apply to the exercise of the \$8 million in options in the initial fact pattern above, if Person X decides to form a new startup entity that will compete with Company Y, once the new entity is up and running would any later exercise by Person X of options granted by Company Y be assumed to be non-passive under 802.9? (Assuming that 801.15(b) doesn't allow us to avoid aggregation.)

If the answer is yes, would the exemption in 802.9 be available if, at the time that Person X exercises his final set of options in Company Y, the new entity is not yet up and running, but is solely a corporate entity with no assets or sales?

Thanks very much Mike, let me know if talking briefly would help.