7A(c)(3)
802.10

Verne, B. Michael

From: [redacted]
Sent: Thursday, April 08, 2004 9:28 AM
To: Verne, B. Michael
Subject: LLC Formation Under FI 15 and Proposed Rules

Mike - it was nice to see you last week at the ABA. I wanted to confirm the treatment of a proposed "going private" transaction under both the current LLC rules and proposed LLC rules (as this transaction may not close until late summer or fall). If you agree with this analysis, it would be great if you could confirm with a note back or a voice mail (I am out of the office this week -- if you think it requires further discussion, I can call you at your convenience early next week). Thanks for your help on this.

Scenario. Assume Target Corporation is public, but has 2 major shareholders, A and B (both natural persons). Assume that A holds in excess of 50% of Target's voting securities, calculated in accordance with the rule for determining "percent of voting securities held." A, B, and possibly other Target shareholders intend to form a HoldCo LLC. A will obtain a 50% + interest in HoldCo LLC, and therefore will control HoldCo LLC. HoldCo LLC will form a wholly owned acquisition subsidiary, Merger Sub. Then, A, B, and possibly other Target shareholders will each contribute their respective holdings in Target to HoldCo LLC, and Merger Sub will effect a merger with Target.

Current Rules.

Anticipated scenario. I think this transaction would not be reportable. This is an LLC formation with the contribution of shares of Target by each of A and B, who will take back interests in the LLC. Since only one business is being contributed to the LLC (Target, by virtue of A's controlling interest in Target), the LLC formation is not reportable under Formal Interpretation 15. The back end merger of Target into Merger Sub would be exempt under Section (c)(3) of the Act, as an acquisition (by A, as UPE of HoldCo LLC) of voting securities of an issuer (Target) at least 50% of the voting securities of which are already controlled by A.

Alternative scenario. A's ownership of Target is complex, because he holds some shares directly, and he probably holds some shares through revocable and irrevocable trusts, with respect to which we are verifying control. In working through the trusts, it is possible we could conclude that A does not control Target today, and Target is its own UPE. I believe under that alternative scenario, the transaction still is not reportable under Formal Interpretation 15. The formation of the HoldCo LLC still does not involve a combination of two businesses. The back end merger still would be exempt under the (c)(3) exemption, as HoldCo LLC (whether controlled by A, or perhaps as its own UPE in this scenario, depending on the resolution of the control of the trust holdings and depending on whether Target shareholders other than A and B participate in the LLC formation) would have its wholly owned subsidiary (Merger! Sub) merge with an entity (Target) in which it already holds 50% or more of the stock.

Proposed Rules.

Anticipated scenario. Under the proposed rules, I also think the proposed transaction is exempt. A will acquire a controlling interest in HoldCo LLC. Since the "two business" requirement for LLC formation would no longer apply, A would need to report for the acquisition of its HoldCo LLC interest

if that interest exceeded $50 million in value, unless some other exemption applies. However, proposed 802.30(c) states "Assets contributed to a new entity upon its formation are not subject to the requirements of the Act with respect to the person contributing the assets to the formation." Here, the only thing HoldCo LLC will hold will be shares of Target (contributed by A and B, and potentially others), but Target was controlled by A prior to the transaction anyway. I think this means that since the only things contributed to HoldCo LLC are shares of an issuer that A already c!
ontrolled, A's acquisition of an interest in HoldCo LLC is exempt under the proposed 802.30. Again, the back end merger would be exempt under (c)(3), as it is already controlled by HoldCo LLC from the initial share contributions on the LLC formation.

Alternative scenario. If we ultimately determine that A does not control Target by holding 50% or more of its voting securities, then I think we might have a reporting obligation under the proposed rule. If A obtains control over HoldCo LLC on its formation, he would have a reporting obligation if that interest was worth $50 million, unless some exemption applied. I believe A's interest will be worth $50 million, and no exemption comes to mind, since two or more people are each contributing shares of a corporation (Target) than none of them control, but in the aggregate their shares will confer control of Target to HoldCo LLC. Thus, in this scenario I believe I have a filing for A as an acquiring person for the formation of HoldCo LLC. As in the other scenarios, as long as the HoldCo LLC has 50% or more of the shares of Target, the back end merger would be exempt for the reasons described above. &! nbsp;

Thanks for your help.

Jon

[redacted]
ph: [redacted]
fax: [redacted]
email: [redacted]

AGREE WITH ALL EXCEPT ALTERNATIVE SCENARIO UNDER PROPOSED RULES. AS LONG AS THE SHAREHOLDERS TAKE BACK INTERESTS IN THE NEW LLC PRO RATA TO THEIR HOLDINGS IN TARGET, THE TRANSACTION WOULD BE EXEMPT UNDER PROPOSED 802.10(b).

[signature] 9/8/03

****
******
This message is a PRIVATE communication. This message and all attachments are a private communication sent by a law firm and may be confidential or protected by privilege. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of the information contained in or attached to this message is strictly prohibited. Please notify the sender of the delivery error by replying to this message, and then delete it from your system. Thank you.
****
******

For more information on [redacted] please visit our website at: [redacted]