801.10 (d)

Verne, B. Michael

From: [redacted]
Sent: Friday, January 27, 2006 8:49 PM
To: Verne, B. Michael
Subject: Non corporate entity valuation

Under 801.10(d), the value of the acquisition of a non corporate entity is the acquisition price plus th FMV of previously held interests.

Why doesn't it say FMV or acquisition price, whichever is greater, as in acquisitions of voting securities and assets?

If Company A and Company B merge into a newly formed LLC, and for governance purposes, each holds 50% of the interests; however, Company A also has non voting economic preferences that giv it more than 50% of the assets upon dissolution. I assume in that case Company A controls, and we do not have a transaction with two Acquiring Persons.

Additionally, in valuing the transaction as to Company A's acquisition, the value would be the value o 51% (equal to interests held by Company A) of the combined value of Company A and B, yes and not the value of Company B plus "previously held" Company A? Can this value be net of liability? If so, the value is less than $20 million. Company B has in excess of $50 million of debt (the combinec LLC will hold a lot of debt). The bankers are using EBIDA at some interest rate less liabilities. I am also assuming that if we take assets less liabilities we are also under the threshold. Are these valuations acceptable to the FTC? The informal letters aren't any help here.

Thanks, as always, a

It doesn't say greater of acquisition price or FMV, because it is valuing interests in the non-corporate entity the same as voting securities of a non-publicly traded corporation. In both, if the acquisition price is determined, there is no need to do a FMV.

In your hypothetical, I assume that A also has the right to more than 50% of the profits. If so, only A is an acquiring person. The value would be the value of 51% of the combined value. The value would reflect the fact that the newco has debt.

B Michael
1/27/06