802.30

Verne, B. Michael

From: [redacted]
Sent: Friday, May 25, 2007 4:06 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: Intraperson Exemption Question

Mike,

We have a question as to whether the following transaction is an intraperson transaction exempt under 802.30.

Seller plans to restructure before the transaction and place some of its business operations into a wholly-owned LLC subsidiary (Target LLC).
The following steps will occur simultaneously at or before closing:
1. Company A will create a newly-formed corporation, Newco, and fund it with sufficient cash to acquire 75% of Target LLC.
2. Seller will acquire 100% of the voting securities of Newco.
3. Company A will acquire nonvoting and convertible voting securities of Newco.
4. Newco will then acquire 70-75% of the noncorporate interests of Target LLC.
5. The size of the transaction with respect to NewCo's acquisition of the membership interests in Target LLC is above $239.2 million.
6. The transaction was structured for non-HSR tax reasons.

Since Seller is both the UPE of the acquired entity (Target LLC) and the UPE of the acquiring entity (Newco), would this be an exempt intraperson transaction?

If yes, would the exemption still apply if Company A and Seller both have the
contractual right to appoint 2 of 5 Newco board members, with the 5th member being an "independent director" that must be nominated by Seller and approved by Company A?

Thanks,
[redacted]

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What an odd transaction. I think the first scenario is exempt under 802.30 because Seller holds all of the voting securities of Newco and all of the non-corporate interests in Target LLC. In the second scenario, I assume that Seller will not control Newco by holding of voting securities? If so, the contractual arrangement alone is not enough to constitute control, so 802.30 would not apply

BN
5/29/07