

Verne, B. Michael

7A(c)(10)

From: [Redacted]
Sent: Wednesday, September 19, 2007 11:22 PM
To: Verne, B. Michael
Subject: Guidance on the Scope of 7(A)(c)(10) where voting percentage increases but is then immediately diluted

Mike,

I'm faced with a fact pattern that I've concluded would not trigger a filing but wanted to confirm this. I'd appreciate your views on this when you get a chance and, if needed, am happy to schedule a call to answer any questions you have.

As part of an issuer's acquisition of another company it needs (or wants) to get an infusion of cash. A minority holder, who is the focus of this email, will contribute part of those needed funds and receive additional voting securities of the issuer in return. These newly acquired shares would increase his stake such that the necessary jurisdictional thresholds are crossed and his percentage of voting securities held would also increase. However, immediately (the same day, or possibly only minutes after this cash comes in) the issuer will also be issuing substantial numbers of additional voting securities as consideration for its acquisition of the other company.

The issuance of these additional shares results in the minority holder actually ending up with a lower percentage of the total outstanding than what he held immediately before his purchase of new shares in the issuer. So, although his percentage holdings do technically increase, this increase is extremely transitory and the almost immediate result is actually a dilution of his holdings.

With the understanding that if the second step didn't occur the minority holder would not be HSR compliant, can you confirm that this temporary blip (before the inevitable dilution) isn't sufficient to trigger a filing obligation. I've been told that the two steps are inextricably linked, so that risk of a long-lived increase shouldn't be a factor.

Thank you in advance and please let me know if you have any questions. While my research didn't turn up any interpretations directly on point it seemed to me that this was somewhat analogous to the treatment of cashless exercises of options (such as that discussed at <http://www.ftc.gov/bc/hsr/informal/opinions/0210009.htm>). I'm hoping that this approach seems reasonable to you.

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BM
9/20/07

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