802.4

Verne, B. Michael

From: [redacted]

Sent: Wednesday, November 07, 2007 6:55 PM

To: Verne, B. Michael

Subject: 802.4 exemption

Mike,
I'm having a disagreement on 802.4 that I hope you can clarify. Assume the target issuer in a $150m stock acquisition has a balance sheet with total assets of $80m of which $40m is cash. Based on 802.4, if the value of the non-cash (assume remainder is all non-exempt) assets are below $59.8m, then the transaction won't be reportable. If "value" is based on the balance sheet--$40m nonexempt--then not reportable. However, if "value" is derived by the buyer's board establishing FMV, then it doesn't seem that FMV of the non-exempt assets could be much less than $110m (price minus cash), so still reportable. I think the right approach is the latter (since otherwise the $12m size of person test is meaningless), but DC counsel disagrees and maybe I'm missing something from way out here in California.

By the way, would the answer change if the acquisition price were $250m?

Thanks for your indulgence,

[redacted]

In determining the value of the non-exempt assets for purposes of 802.4, both the acquisition price and the book value on the balance sheet are irrelevant. The fair market value of the non-exempt assets is the test and if that value exceeds $59.8 MM and the size-of-transaction exceeds $59.8 MM the transaction is reportable.

BM
11/8/07