

Verne, B. Michael

801.11(e)

From: [REDACTED]
Sent: Monday, October 06, 2008 6:11 PM
To: Verne, B. Michael
Subject: Size of person/801.11(e)/open market purchases

Mike,


I have a client who is concerned that his company is the target of a hostile takeover. The buyer appears to be a newly formed shell that is its own UPE (Newco), and does not have a regularly prepared balance sheet. Assume that is true, and that Newco has less than \$10 million in assets and revenue (all references in this e-mail to "as adjusted" thresholds). I assume that Newco can go into the open market in one or a series of transactions and acquire up to \$200 million in voting securities, since that will be below the 7A(a)(2)(B) threshold for size of person, and any cash or shares of target held by Newco do not count toward size of person under 801.11(e). However, if each open market purchase is a separate acquisition under 801.11(e), Newco may have to count cash it holds toward the size of person if it is not cash held for the specific next open market acquisition being assessed. Assuming you agree with the above prior to the prior sentence, do you also agree as to how the cash held must be assessed?

If my above assumption is correct (Newco can purchase up to \$200 million without filing), does the answer change if Newco: (a) has an intent to acquire control of target; (b) has expressed that intent to target through a "bear hug" letter; or (c) has sent target an HSR notice letter and filed HSR for a transaction to acquire control valued at over \$200 million? Scenario (c) seems to raise the most questions, because it implies that Newco can take advantage of size of person and purchase up to \$200 million of target shares in the HSR waiting period even though it will not qualify for size of person based on the larger transaction in its HSR filing. However, conceptually, I do not think that the situation in (c) is that different than the situations in (a) or (b).

Thanks,

[REDACTED]

I think we would view the entire \$200 MM as being held for the purpose of the acquisition, not treat each purchase as a different transaction. So I would say that UPE can acquire up to \$200 MM (as adjusted) prior to the expiration of the waiting period. As to the other points, I don't think any of those affect the analysis, because the buyer is failing the size-of-person test, not using 802.9, so future intent is irrelevant.


10/7/08

K. WALSH CONCURS