Verne, B. Michael

From:
Sent: Tuesday, February 03, 2009 3:09 PM
To: Verne, B. Michael
Subject: 801.15 Follow-Up

Mike,

I'm writing to follow up on the 801.15 question we just discussed.

Facts:
-- Acquiring person "X" is foreign.
-- Acquired person "Z" is a U.S. person, and has foreign controlled subs Z-1 and Z-2. Z-1 and Z-2 have little or no U.S. sales or assets (in any event far below US$65.2 million).
-- X currently holds a non-controlling interest in Z, valued at US$50 million.
-- X also currently holds non-controlling interests in Z-1 (valued at US$10 million) and Z-2 (valued at US$40 million).
-- X wants to exchange its shares of Z-1 for shares of Z.

As we discussed: As a result of the exchange, X would hold $60 million in Z, and would continue to hold the non-controlling $40 million in Z-2. Under 801.15(d), X's holding in Z-2 would not be aggregated with its holding in Z because X's prior acquisition of Z-2 was exempt under 802.51(b) as a foreign person acquiring a non-controlling interest in a foreign issuer. Therefore no HSR filing is required for the current exchange because the size of transaction is less than $65.2 million.

So that I'm sure I understand 801.15(d), would the result be different if Z-2 had more than US$50 million (as adjusted) in U.S. sales? The prior acquisition of Z-2 would still have been exempt under 802.51(b) as a foreign-to-foreign non-control acquisition, so the $50 million (as adjusted) limitation for U.S. sales/assets would have been irrelevant. But this is precisely where the "do not apply" language in 801.15(d) puzzles me. Does this language mean that where the prior acquisition was exempt because it was foreign-to-foreign non-control (as opposed to an acquisition of control of a foreign issuer having less than US$50 million as adjusted in U.S. sales/assets), that the shares must be aggregated? I find it hard to believe that would be the rule, but I wanted to confirm with you.

Thanks,
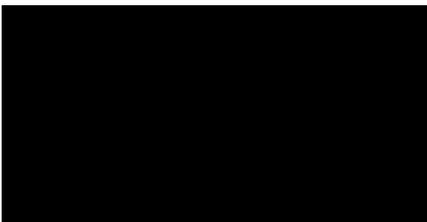
No aggregation is required.
BWV
2/3/09

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