

Verne, B. Michael

801.13

802.30

From: [REDACTED]
Sent: Monday, August 24, 2009 4:09 PM
To: Verne, B. Michael
Subject: HSR Question

801.50

802.4

Mike,

I have a somewhat unusual potential transaction and I was hoping to get your thoughts/confirmation. The facts are as follows:

Step 1: A sells \$40 million worth of assets to B.

Step 2: B and A each contribute \$40 million worth of assets to N (a newly created 50/50 JV)

Step 3: A and B also agree that N will purchase an additional \$50 million worth of assets from A within 3 years. In the meantime, N will lease the \$50 million worth of assets from A.

Questions:

1. Are steps 1 and 2 considered together as the formation of a new JV or should they be analyzed separately?
2. I think either way, A is not required to file because of the intercompany exemption and N is not required to file because of 802.41. B is not required to file because it is only acquiring half of the JV or \$40 million and therefore the size of the transaction test is not met.
3. Considering step 3, do I need to add the \$50 million into the value of N? If so, am I correct that A and N would still not need to file because of the above reasons and that B would not need to file because its half of N is still valued under \$65.2 million?
4. If each party contributes cash at the time N is created, is that cash still treated as an exempt asset?


Thanks as always for your help.

Kind regards,

[REDACTED]

1. Analyze separately
2. This not intraperson for A because § 802.30 specifically says it does not apply to formations under § 801.50
3. The future commitment to sell \$50 MM in assets to N only goes to the size-of-person of N, not the value of the interests being acquired in N by A and B
4. Yes – for purposes of § 802.4. A and B still would not have to file for the formation of N because for each of them under § 802.4, N only holds \$40 MM in non-exempt assets no matter how much cash is contributed

Note: Neither A nor B has a filing obligation in either the initial \$40 MM acquisition of assets or the formation of N. However, B will have to file within a year of the second sale of assets by A to N because the agreement for A to sell the \$50 MM in assets to N (with B as the UPE) has been entered into within 180 days of the agreement for A to sell the \$40 MM of assets to B, therefore aggregation is required under § 801.13(b)(2). B would file as the acquiring person and A would file as the acquired person for an acquisition of \$90 MM in assets.


8/27/09

K. WASH CONWAY