

802-63

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Friday, September 11, 2009 2:22 PM  
**To:** Verne, B. Michael  
**Cc:** [REDACTED]  
**Subject:** FW: 802.63 Question

Hi, Mike:

Hope you are well. I am hoping to get your thoughts on the reportability of a new deal. Here is the background:

Company A's sole assets consist of a portfolio of securities comprised primarily of corporate debt securities, mortgage-backed securities and other asset-backed securities. As a result of deteriorated market prices for the types of assets in Company A's portfolio, and following a financial covenant default causing an acceleration of secured notes issued by Company A, Company A's noteholders are exploring their options to protect the value of their investments through an exchange offer (the "Exchange Offer") and one or more public foreclosure sales (collectively, the "Foreclosure Sale"). For reasons detailed below, we believe that the entirety of the described transactions are exempt under 16 C.F.R. 802.63. We would appreciate your confirmation of the same.

As the first step in the debt work-out, and solely as a means to allow the noteholders to credit bid their notes at the Foreclosure Sale, noteholders of Company A will have the option to exchange their notes of Company A for notes (the "New Notes") issued by a newly-formed issuer ("Newco"). Newco will then use such New Notes to credit bid at the Foreclosure Sale for a proportional share of Company A's assets.

#### *Formation of Newco*

At this time, it is not known if Newco will be non-corporate or corporate in nature. It is possible that, if Newco is non-corporate, it will be controlled by a person; it is certain that, if Newco is corporate, most or all persons contributing to its formation will meet the size of person test and will hold interests in Newco valued at or above the size of transaction threshold. However, it is our belief that the reportability of the formation of the Newco does not need to be vetted since it is being formed solely in connection with a bona fide debt work-out and the contributors are contributing only their notes of Company A, cash and cash equivalents; no contributor is agreeing to extend credit or guarantee obligations of Newco at any point in the future.

If you believe that the formation of Newco under these circumstances needs to be separately analyzed for reportability, we would like to discuss with you whether the formation will be otherwise exempt under 16 C.F.R. 802.4 due to the nature of the assets contributed (we are confident that the vast majority of assets will clearly be exempt assets such as mortgage-backed securities and our only question in this regard is the need to analyze the collateral securing all notes which will be contributed to determine if such notes are exempt.

#### *Public Foreclosure Sale*

It should be noted that there has never been a public announcement by Company A or its representatives that Company A intends to file for bankruptcy, though bankruptcy has been and remains one of several restructuring options. In the absence of such announcement, it seems that the "vulture fund" exception to the exemption contained in 16 C.F.R. 802.63 does not come into play, regardless of the subjective intent of the investors, assuming that all of the creditors of Company A extended credit (e.g., bought notes of Company A) in the ordinary course of their respective businesses, with a genuine expectation of repayment, and that none is a competitor of Company A.

Although a sizeable portion of noteholders are expected to participate in the Exchange Offer for purposes of the credit bid at the Foreclosure Sale, some creditors may ultimately (i) obtain cash in extinguishment of the debt obligation, (ii) credit bid their notes directly for a proportional share of Company A's assets and

then hold such assets directly or (iii) credit bid their notes and, if their bid is successful, contribute their proportional share of Company A's assets to the Newco in exchange for an interest in Newco. We believe that the exemption contained in 16 C.F.R. 802.63 will exempt the acquisition of Company A's assets regardless of whether a creditor cashes out, credit bids directly or acquires assets through Newco in the Foreclosure Sale so long as such creditor (1) originally extended credit in the ordinary course of its business, (2) acquires/acquired its notes before Company A publicly announces an intention to file for bankruptcy and (3) is not a competitor of Company A.

Please confirm that you are in agreement with our conclusions and don't hesitate to let me know if you have any questions.

Best regards,

[Redacted]

AGREE -  
BL  
9/15/09

[Redacted]

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