

801.2(f)

Verne, B. Michael

From: [REDACTED]
Sent: Friday, October 09, 2009 2:57 PM
To: Verne, B. Michael
Subject: Reportability Question - Merger of Non-Stock Corporations

Michael,

I write to describe a fact situation that I would like to discuss with you at your convenience. The facts are somewhat similar to a 2008 transaction on which I was co-counsel with [REDACTED] and which he discussed with you at that time.

The 2008 discussion concerned the treatment of a statutory merger of two nonprofit, non-stock corporations (e.g., Y into X). I believe your advice at the time was that the merger itself would be considered neither an acquisition of voting securities (i.e., because there are none) nor an acquisition of the assets of Y by X, and therefore not reportable. However, if Y had holdings of other entities, X would be deemed to acquire those holdings and, if the size-of-transaction threshold were exceeded (and assuming the size-of-person tests were met), the acquisition of Y's holdings by X would be reportable.

My instant question concerns the following variation on those facts.

- A, the acquiring person, is a nonprofit, non-stock corporation
- BP is the parent holding company, and is a nonprofit non-stock corporation.
- B1, B2, and B3 are each nonprofit, non-stock corporations of which BP is the sole member.
- B4 is a business corporation with voting securities, of which BP is the sole shareholder.

In the transaction as contemplated, the following will occur.

- Prior to the closing, the assets of B3 will be transferred to B1, and B3 will be dissolved.
- All of the outstanding stock of B4 will be transferred to a person within A.
- Each of BP, B1, and B2 will merge with and into A (or into a nonprofit, non-stock person within A) through a statutory merger.

If my initial premise above concerning the 2008 discussion is correct, it would seem that the only potentially reportable aspect of the transaction would be A's acquisition of the stock of B4 (but which, in this case, would not have fair market value in excess of the size-of-transaction threshold).

That is the question I would like to discuss and in particular to make sure (if the premise is correct) that the separate mergers of the various corporations does not change the analysis. I would note that the structure of the transaction was determined for business reasons and not based on any consideration of reporting requirements.

If you would let me know a good time for you, I will give you a call. Thank you for your assistance.

[REDACTED]

I don't recall the conversation with [REDACTED] (not surprisingly), but there must have been something unusual about the structure for us to have reached that conclusion. An acquisition of control of a non-profit, non-stock corporation is treated as an acquisition of all of the assets of that corporation (see § 801.2(f)(3)).

4. In your transaction, A would be deemed to be acquiring all of the assets of B1, B2 and any other assets of BP not held by those entities. A is also acquiring all of the voting securities of B4. The value of the transaction would be the aggregate fair market value of all of these.

BW
10/13/09