801.50

Verne, B. Michael

From: [redacted]
Sent: Tuesday, April 13, 2010 11:07 AM
To: Verne, B. Michael
Subject: RE: Two acquisitions

Mike:

I have a few more facts and they appear to be a bit different. The facts of the transaction appear to be as follows:

N is a company with @ $700 million in sales and assets of @ $143 million. H is a company with sales of @ $100 million and assets of @ $55 million.

Both N and H will be contributing their respective businesses to Newco, a newly formed limited partnership. Just prior to the contribution, the shareholders of N will receive a $40 million note from N, and the shareholders of H will receive a $20 million note from H. H already has $7 million in debt. Investor group I will be contributing $10 million in cash. Newco will also receive bank financing (@ $65-70 million) so that it can pay the notes after closing and re-finance H's existing debt.

Consideration for the cash infusion and the acquisition of these companies will be equity in Newco, such that N will own 48%, H will own 34% and I will own 18%.

Because of the debt that Newco has assumed (either by direct assumption in connection with the contribution of N and H's assets or via the merger of N and H into Newco), the equity value of Newco is $75 million.

Analysis:

1. 801.50 governs and Newco is an acquired person, while N, H and I are acquiring persons.

2. The size of person test has been met.

3. The transaction is not reportable, though, for two reason. First, neither N nor H will control Newco, per 801.50(b)(1). Second, the FMV of Newco, given its debt is 75% and thus the size of transaction test will not be met by either H nor N. I understand that the FMV must be determined in accordance with 801.10, but would like your guidance on whether, under the facts as outlined above, such an FM would be reasonable.

Please let me know whether or not you agree with the above analysis based on the facts presented.

Best,

[redacted]

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Monday, April 12, 2010 11:56 AM
To: [redacted]
Subject: Two acquisitions

Actually, you would satisfy the size-of-person test for the first acquisition because 801.11 (e) only allows you to exclude the cash for that acquisition. The cash for the second acquisition would count toward the size-of-person test in the first acquisition. So the acquisition that satisfies the size-of-transaction test would be reportable.

I agree that this would not be reportable if none of N, H and I will have the right to 50% of the profits or assets on dissolution. This assumes that N and H are contributing their businesses to Newco, but will stay in existence and hold interests in Newco (not their shareholders/ interest holders). This kind of moots the FMV point, but since this is an acquisition of partnership interests you do take into account Newco's debt in determining the value of the partnership interests (you threw me for a moment – I assume you meant $75 MM in debt, not 75%.

BN

4/13/10