801.1(b)

Verne, B. Michael

From: [redacted]
Sent: Thursday, March 15, 2012 7:25 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: HSR Question

Mike:

Your name was given to me as the person that would best be able to assist on a question of whether or not a trustee controls a trust. The filing of a HSR application depends on the answer. At this point, we believe that the research supports no filing, but we want to be very cautious because the rule is not explicit on our question.

To give you some very broad background, we are working on a transaction where several different companies are being sold that have a similar business. Half of these companies are owned by two individuals (or that individual and spouse) on a 50/50 basis. The other set of companies being sold are owned, in part, by these same individuals and one or more trusts created by these individuals. It the companies that are owned, in part, by the trusts, are not included in aggregating the individuals (the UPEs) stock/assets sold, then we no longer meet the dollar threshold with only the companies owned solely by the individuals (i.e. excluding the ones owned in party by the trusts), and likewise, the ones owned, in part, by trust do not individually (or in the aggregate) meet the dollar threshold.

To simplify, we can take one entity. In that entity, the individual ("H") owns 40% of the stock of the issuer. H created an irrevocable trust several years ago, and as a result of a contribution made at that time, the trust owns 10% of the stock. (H still owns 40%.) H did not retain a reversionary interest in the trust, and he has no power to appoint the trustee after his initial appointment was made in the trust instrument.

H's wife ("W") is the sole trustee of the trust. W, as the trustee, has the power to resign and appoint her successor. The key language in the trust document to this effect is as follows:

"Upon assuming office, [H} authorizes and directs [W], and any other successor Trustee appointed in the manner herein provided, to nominate and appoint by an instrument in writing duly executed, acknowledged and filed in the manner hereinafter provided (with the right to change such nomination and appointment at any time until such person ceases to serve as Trustee hereunder), a successor Trustee to act in such person's place and stead in the event such person shall fail or cease to act for any reason.
Notwithstanding the foregoing provisions of this Paragraph A(1), if any Trustee is removed from office as Trustee hereunder, his or her nomination and appointment of a successor Trustee shall be automatically revoked."

As you can see from the above language, W's power as trustee to appoint her successor trustee exists, but it is not absolute. The trust identifies a "Protector". The Protector is not a member of the family of H and W. This Protector is in charge of appointing the successor trustee in the event that the existing trustee fails to do so (and if the Protector doesn't do it, we go to the Clerk of Court). More importantly, the Protector is granted the authority to remove any trustee and designate his/her successor. Here is the key language:

" The Protector, as hereinafter designated, shall, from time to time, review the performance of the Trustee and shall have the power to remove any Trustee with or without cause and to appoint a successor Trustee. Said removals and appointments under this Paragraph B of this Article VI shall be made by delivering an instrument, signed and acknowledged by the Protector, to the Trustee so removed (or to the conservator or guardian of any Trustee who is removed by reason of such Trustee's incapacity), to any other Trustee then serving hereunder, and to the successor Trustee, if applicable, who shall signify his or her acceptance of the appointment in writing. Such removal powers shall continue after termination of the Trust until the Trustee have made actual distribution of all property held in the Trust."

Finally, the Protector's power is not absolute. The Protector can also be removed from office "for cause" and replaced with the consent of (i) the trustee(s), (ii) the beneficiaries of the trust and (iii) our law firm.
All have the authority to stop this removal and replacement. Thus, neither the trustee nor any beneficiary has the authority to remove the Protector.
Here is the key language:

"With respect to each trust created hereunder, the Trustee and the income beneficiary or beneficiaries (or the parent or guardian of the estate of each minor income beneficiary) of such trust, with the consent of the [redacted] shall have the power, exercisable by unanimous vote, to remove the Protector of such trust for cause and to appoint a successor. For purposes of this Paragraph C(3), removal of a Protector shall be deemed to be made "for cause" if such removal is on account of the Protector's incapacity (as defined in Paragraph D of this Article VI), negligence, or wrongful or willful acts or misconduct."

(Note: a beneficiary is not allowed to serve as a trustee or the Protector under the terms of the trust document.)

As a result of the foregoing, we had two questions/ confirmations:

1. It appears that under the definition of "control" in 801(b), W, as the trustee, may not be deemed to have "control" even though, in some respects, she does have the authority to resign (i.e. remove herself) and appoint her successor(s) (i.e. appoint 50% or more of the trustees). Her power is not absolute. It can be easily taken away ("with or without cause") by the Protector. The Protector may not be removed solely under the authority of the Trustee. If W, as trustee, does not have control of the trust and its 10% of stock, then H and W together don't collectively have control of 50% of the stock, and this entity is removed from our consideration.

[Note: if you agree that W does not control the trust and, thus, its 10% holdings of the issuer, you don't need to address the second question.]

2. If W is deemed to have control of the trust, then I still have a question as to whether that 10% is aggregated with H's 40%. In 801(c)(2), the "holdings of spouses and their minor children shall be holdings of each of them." 801(c)(8) states that: "A person holds all assets and voting security held by the entities included within it;... an entity holds all assets and voting securities held by the entities which it controls directly or indirectly." So, by controlling the trust (and thus its corpus), W would be deemed to hold the 10% which would be aggregated with H's 40%, and they would have control of the issuer.

However, I have a hard time reconciling that reading with the Example given in the rules under 801(c)(3), which seem to indicate that a trustee's "control" of a trust does not equal a trustee's "holding" of the voting securities that make up the corpus of that trust. It specifically says that the trustee need not aggregate the holdings of the trust for determining whether the requirements of the act apply.

So, how should I read this?

W DOES NOT CONTROL TRUST
K. WALSH CONCURS
BN
3/16/12

I apologize for the length of this email.

Feel free to call me if that would help.

[redacted]