802.30

Verne, B. Michael

From: [redacted]
Sent: Wednesday, April 11, 2012 10:47 AM
To: Verne, B. Michael
Subject: 802.30 Question

Mike-

I would be very grateful for your thoughts on the transaction described below.

Company, a Foreign Entity that is its own Ultimate Parent Entity ("UPE"), owns 100% of the voting securities of Sub1, which in turn owns approximately 40% of the voting securities of Sub2. Sub1 and Sub2 are Foreign Issuers.

Please assume for the purposes of this analysis that Sub1 and Sub2 together made in excess of $68.2 million in sales into the United States in the most recently completed fiscal year.

Three years ago, Sub2 was failing, and Sub1 was appointed by court order in its native jurisdiction as the strategic investor in Sub2, and was granted the right to acquire certain voting securities of Sub2 and also to appoint four directors to Sub2.

According to Sub2's articles of association / charter documents, Sub2's board of directors may have no fewer than 3 and no more than 12 members. Sub2's board of directors currently comprises 7 members, of which Sub1 has appointed 3 members pursuant to the court order. Sub 1, also pursuant to the court order, has the unrestricted ability at present to appoint a fourth director, thereby increasing the size of the board to eight members, of which half would be appointed by Sub1. No other entity has the ability to appoint additional directors or to expand the size of the board. Other than the unilateral authority of Sub1 to increase the size of the board by appointing an additional director, the size of the board may be increased only by a majority resolution passed by Sub2's board of directors or if put to and passed by majority shareholder vote at a General Meeting of the shareholders pursuant to the articles of association / charter documents. No shareholder of Sub2 has the present ability to vote 50% or more of the shares of Sub2.

Company wishes to undertake a reorganization merging each of Sub1 and Sub2 into Company, so that Company survives with no subsidiaries. Shareholders of Sub2 will receive voting securities of Company in exchange for their voting securities of Sub2 at a fixed exchange ratio. No shareholder of Sub2 will hold as a result of the mergers, voting securities of Company valued in excess of $68.2 million.

Based on these facts, we would conclude that Company is the UPE of both Sub1 and Sub2, and that the merger of Sub1 and Sub2 into Company is an Intraperson Transaction exempt from the reporting requirements of the HSR Act pursuant to 16 C.F.R. 802.30. Please let me know if you agree, or if you need any additional information.

Thank, as always for your assistance.

Best regards -

[redacted]

This is not exempt under 802.30. 802.30(a) reads - (a) An acquisition ... in which the acquiring and at least one of the acquired persons are, the same person **by reason of §801.1(b)(1)** of this chapter

801.1(b)(1) defines control through - holding 50 percent or more of the outstanding voting securities of an issuer – which Sub 1 does not hold in Sub 2

Company is the UPE of Sub 1 through the holding of 100% of its voting securities, but it is indirectly the UPE of Sub 2 under 801.1(b)(2) – having the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for-profit corporation - so the merger of Sub 2 into Company (the acquiring person) is not exempt under 802.30, because Sub 2 is its own UPE and the sole acquired person.

BM
4/11/12

K. WALSH CONCURS