

Haynes, Lanea

From: Storm, Evan
Sent: Tuesday, June 20, 2017 3:27 PM
To: [REDACTED]
Cc: [REDACTED] Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Gillis, Diana L.; Shaffer, Kristin; Whitehead, Nora
Subject: RE: Question about 802.21

[REDACTED]
The former UPE and current UPE of A are different acquiring persons. Different acquiring persons cannot both take advantage of 802.21. Thus, A may not continue to utilize 802.21 to acquire additional voting securities of T based on A's pre-consolidation HSR filing.

Regards
Evan

From: [REDACTED]
Sent: Monday, June 19, 2017 3:42 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Gillis, Diana L.; Shaffer, Kristin; Storm, Evan; Whitehead, Nora
Cc: Davis, Ryan
Subject: Question about 802.21

Hi PNO friends.

We have a question regarding what happens to existing 802.21 exemptions when a company holding those exemptions as the UPE is acquired by another. We think the answer is the exemption is the new UPE's to assert, but wanted to confirm.

The basic fact pattern is as follows.

Person A filed an HSR for the acquisition of certain voting securities of T, that it intends to make via a series of acquisitions over a period of time. A has started, but not completed, its purchase of voting securities of T and has crossed the \$50 million threshold (as adjusted), which was the threshold indicated in A's HSR filing. (You should assume that A will not meet or exceed a greater threshold in its acquisition of T's voting securities.

The UPE of A is now consolidating with B. Once the consolidation is complete, the former UPE of A will be owned by an upstream entity (which will also own B). This transaction is subject to the HSR Act and the parties have made the necessary HSR Act filings.

After closing, the upstream entity will be A's UPE.

The question is, assuming all of the other requirements of 802.21 are met, may A continue to utilize that exemption to acquire additional voting securities of T on the basis of its pre-consolidation HSR filing for the acquisition of voting securities of T?

It seems like it should. 802.21 provides that:

(a) An acquisition of voting securities shall be exempt from the requirements of the act if:

(1) The acquiring person and all other persons required by the act and these rules to file notification filed notification with respect to an earlier acquisition of voting securities of the same issuer;

(2) The waiting period with respect to the earlier acquisition has expired, or been terminated pursuant to § 803.11, and the acquisition will be consummated within 5 years of such expiration or termination; and

(3) The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold (as adjusted) greater than the greatest notification threshold met or exceeded in the earlier acquisition.

The term “person” is defined as “an ultimate parent entity and all entities which it controls directly or indirectly.” Here the acquiring person both before and after the transaction is the ultimate parent of A (albeit a different entity). Had A simply acquired B (rather than consolidated with it under a new entity), surely 802.21 would continue to be available to A. Having a different result simply because the transaction was effectuated through a consolidation would elevate form over substance. And, to the extent the agencies have concerns about the combined A/B’s post-consolidation acquisition of the voting securities of T, those concerns would have been addressed during the clearance process for the consolidation itself.

Please let us know if this interpretation is consistent with the PNO’s position. Thank you.

[Redacted]

[Redacted]