

801.1(b)

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, May 31, 2006 8:59 PM
To: Verne, B. Michael; Ovuka, Nancy M.
Subject: HSR question re UPE



9907007.htm (71 KB)

Dear Mr Verne and Ms. Ovuka--

I have a question about whether the control test in 801.1(b) to determine the UPE is applied at the time the purchase agreement is signed or at the time of the closing of the deal when options are exercisable which would take the present UPE below the 50% threshold. Attached below is a July, 1999 informal advice letter from the PNO which deals with this issue in a slightly different context. If possible, I'd like to get a reaction by email from at least one of you tomorrow. I initially thought the answer was simple but now am not so sure. If there is a more on point PNO informal letter, I'd also appreciate being directed to it as I have not found alot on this subject. Here are the facts on my deal.

Company A is acquiring 100% of the voting securities of B, my client. C, a natural person, owns more than 50% of the voting securities of B. C is thus currently the UPE of B. Other shareholders of B, however, have options to purchase some, but not all, the voting securities currently held by C. Such options are presently exercisable and, if exercised, would take C below the 50% and make B its own UPE. The other shareholders are not legally obligated to exercise the options prior to closing. I am told, however, that exercise of the options prior to closing is extremely likely for financial reasons and the obvious fact the options and shares of B will be gone when the deal closes.

My question is simply whether the control test in 801.1(b) to determine UPE is applied before or after the exercise of the options. If the former, then C is the UPE. If the latter, then B is the UPE. The attached July, 1999 letter indicates the latter since the options there were, as here, exercisable prior to the closing and the advice seems to be you determine the UPE at time of consummation. I have also seen a couple of other informal PNO letters which suggest that consummation is the proper time to determine the UPE. I do want to point out, however, that in my transaction, unlike the one in the attached letter, this may result in the transaction being nonreportable due to failure to meet the size of person test.

Thank you for your time and consideration.



The UPE is the person who will hold 50% or more of the voting securities at the time of consummation, so if the options are exercised prior to closing, C will no longer be the UPE and the transaction is non-reportable. Note, however, that if the options are not exercised prior to closing for some reason, the transaction would be consummated in violation of the act.

B. Michael
5/31/06