

801.1(b)

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Thursday, January 11, 2007 12:49 PM  
**To:** Verne, B. Michael  
**Subject:** HSR question regarding ultimate parent entity of acquired person

Mr. Verne,

I am trying to determine the ultimate parent entity of an acquired person in an asset acquisition where the voting securities of the entity whose assets are being acquired are held in a trust. Below I have laid out the basic facts, my analysis, and two questions on which I would appreciate your thoughts. Given the length of the facts, if you feel it would be easier to discuss this over the telephone, I would be glad to give you a call.

Thank you and best regards,



#### Facts

Prior to October 2006, Shareholder A owned 53% and Shareholder B owned 47% of the outstanding voting securities of ABC Corporation. In October 2006 Shareholder A and Shareholder B entered into an agreement to transfer their voting securities of ABC Corporation to an irrevocable trust of which Shareholder A and Shareholder B became the trustees (the "Trust"). Shareholder A and Shareholder B retain reversionary interests in the voting securities of ABC Corporation that constitute the corpus of the Trust. Under the agreement, if one of the shareholders dies, the remaining shareholder is entitled to appoint a substitute trustee of the Trust in place of the deceased shareholder.

In early January 2007, Shareholder A died. Shareholder B has not yet exercised his power to appoint a substitute trustee of the Trust in place of Shareholder A.

Three days after the death of Shareholder A, ABC Corporation enters into an agreement to sell all or substantially all of its assets. The transaction is reportable under HSR.

Who is the ultimate parent entity of the person that includes ABC Corporation?

#### Analysis

1. Shareholder A and Shareholder B are the settlors of the Trust. The reversionary interest retained by Shareholder A is now the property of Shareholder A's estate.

2. Because the settlors retained reversionary interests in the voting securities that constitute the corpus of the Trust, under § 801.1(c)(4) both settlors hold the voting securities of [REDACTED] and [REDACTED] that constitute the corpus of the Trust.

3. Because Shareholder A's estate holds 53% of the voting securities of both [REDACTED] and [REDACTED], under § 801.1(b)(1)(i), Shareholder A's estate controls ABC Corporation by holding 50% or more of its outstanding voting securities.

4. Shareholder A's estate is an "entity" within the meaning of § 801.1(a)(2) and is not controlled by any other entity, as control is defined in § 801.1(b). Therefore, Shareholder A's estate is the ultimate parent entity" of a person consisting of Shareholder A's estate and ABC Corporation.

#### Questions

1. Is the above analysis correct?

2. If the answer to question 1 is yes and Shareholder A's estate is the ultimate parent entity of the acquired person, how is this to be reconciled with § 801.1(b)(2)? This rule provides that in the case of a trust described in § 801.1(c)(4), control is the contractual power presently to designate the trustees of the trust. Because Shareholder B has this contractual power as a result of the death of Shareholder A, it would seem that Shareholder B has control of the Trust and therefore of ABC Corporation. Does this mean that there are two ultimate parent entities – Shareholder A's estate and Shareholder B? Or does it mean that although Shareholder B has control of the Trust, Shareholder A's estate is still the ultimate parent entity of the acquired person?

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1. Yes
2. Because of his reversionary interest in the corpus of the trust B is deemed to hold the 47% of the voting securities. The existence of the trust is therefore immaterial to control.

B Michael W  
1/11/07