801.1(c)

Verne, B. Michael

From: [redacted]
Sent: Friday, March 20, 2009 4:13 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: Follow-Up to Telephone Call

Mike --
Thanks for speaking to me earlier this afternoon. The outline below sets forth the facts we reviewed, with additional amplification on a few points.

Any guidance on the PNO's view of the situation would be much appreciated. Obviously, we would be glad to answer any questions that you or your colleagues may have.

Best regards,
[redacted]

Key Facts

I. We represent a publicly-traded company, "Company A."
II. "Individual B", who controls a variety of investment advisory entities and manages various investment funds, has filed a Schedule 13D professing sole beneficial ownership of shares in Company A. Individual B has announced an intention to nominate directors of Company A.

A. Prior to that filing and announcement, Individual B and the related entities held a substantial number of Company A's voting securities, but were passive investors. Their holdings, even collectively, were less than 10% and their acquisitions – if otherwise reportable – were likely subject to exemption under 16 C.F.R. § 802.9.

B. Since the announcement, Individual B and his various entities have continued to acquire shares of Company A. If aggregated with their prior holdings, as we believe proper, an HSR filing (or filings) would have been required, but none was made.

C. You may assume throughout that the size-of-person test is satisfied.

III. The issue about which we seek clarification is whether Individual B "holds" the voting securities of Company A for HSR purposes pursuant to 16 C.F.R. 801.1(c). Here some of the key facts:

A. Individual B has filed a Schedule 13D on behalf of "various entities which he directly or indirectly controls or for which he acts as chief investment officer."

B. There are two entities that appear to have the greatest holdings and are of the greatest significance to this analysis: "Investment Manager B1" and "Fund Manager B2." Both entities are wholly-owned by a public company that is controlled for HSR purposes by Individual B.

IV. Investment Manager B1 is registered under the Investment Advisors Act and provides "discretionary managed account services for employee benefits plans, private investors, endowments, foundations and others."

A. Under 16 C.F.R. § 801.1(c), the determination of who "holds" voting securities is determined by beneficial ownership. The Statement of Basis & Purpose, in turn, references the following indicia of beneficial ownership: (1) the right to obtain the benefit of any increase in value or dividends; (2) the

risk of loss of value; (3) the right to vote the stock or to determine who may vote the stock; and (4) the investment discretion (including the power to dispose of the stock).

B. We are aware of informal authority indicating that "investment advisers" are not deemed to "hold" the voting securities purchased for their clients' accounts notwithstanding the fact that the adviser has voting and disposition authority. (See Premerger Notification Practice Manual # 51 (ABA 4th ed.); Informal Staff Op. 8307004; Informal Staff Op. 04040202; Informal Staff Op. 0705015; Informal Staff Op. 0511030; Informal Staff Op. 9307007; Informal Staff Op. 0802001.) With regard to the third factor (delegation of the right to vote), the prior informal guidance has suggested that the revocability of any proxy authority may bear on the analysis. (See Premerger Notification Practice Manual # 51; Informal Staff Op. 0705015.)

C. We believe, however, that the following factors may distinguish this case and lead to the conclusion that beneficial ownership for HSR purposes should be attributed to Investment Manager B1 and, by implication, Individual B:

- Individual B has indicated in his Schedule 13D that he is beneficial owner of the voting securities held by Investment Manager B1
- Investment Manager B1, in turn, has indicated that, with only a limited exception not relevant to this analysis, it has "sole voting power" and the "sole dispositive power" over shares of Company A in the accounts it manages.
- In describing its power over the shares, the Schedule 13D states that Investment Manager B1 "has the sole power to vote or direct the vote and sole power to dispose or to direct the disposition of the [voting securities] reported for it, either for its own benefit or for the benefit of its investment clients or its partners."
- While we don't know if, or under what precise circumstances, the voting rights for the securities may be revoked (if at all, as there is a general grant of voting rights by a default election), on the basis of Investment Manager B1's website, we believe that Investment Manager B1's standard operating procedures with its clients would not facilitate the revocation of those rights and, based on the Schedule 13D, Investment Manager B1 had the sole voting rights at the time that the relevant acquisitions of Company A voting securities were made.
- The grant by Investment Manager B1's clients of voting and dispositive rights to Investment Manager B1 is by default, and only if a client takes the initiative to advise Investment Manager B1 in writing would those rights be limited in any way.
- Query: Assuming that the grant of voting rights is theoretically revocable, would it affect the PNO's view if: (a) they never actually had been revoked; or (b) if clients attempting to revoke those rights had been prevented from doing so in some way or another?

V. Fund Manager B2 is also registered under the Advisers Act, and presently provides "discretionary managed account services" for approximately 25 open-end and closed-end funds, which are, in turn, registered investment companies (collectively, the "Funds"). In addition, Individual B is the Portfolio Manager for most of these Funds, including those that have the largest holdings of Company A voting securities.

A. Our understanding is that, under typical circumstances, the voting securities in the portfolios of funds such as these are deemed holdings of the Funds themselves (and any person of which the Fund is a part) for HSR purposes. We do not know the precise ownership structure of the Funds, but presume that they are not under common "control" per 16 C.F.R. 801.1(b), and are, therefore, their own UPEs.

B. Thus, as we see it, the question is: if an investment fund is its own UPE, are there conditions under which the PNO would deem another entity (e.g., the Fund manager (Individual B) or the fund investment advisor (Fund Manager B2)) to be a beneficial owner of the voting securities in the fund's portfolio for HSR purposes?

C. The facts that we believe may support the conclusion that Fund Manager B2 should be deemed for HSR purposes to be the beneficial owner of the Company A shares in the portfolios of the Funds here are as follows:

- Individual B has indicated in his Schedule 13D that he is beneficial owner of the voting securities held by the Funds and controlled by Fund Manager B2.
- Fund Manager B2, in turn, has represented in the Schedule 13D that it has "sole voting power" and the "sole dispositive power" over shares of Company A held by the Funds. In effect, because Individual B controls Fund Manager B2, he controls the votes determined by Fund Manager B2.
- In describing the voting power over the shares held by the Funds, the Schedule 13D states that Fund Manager B2 "has sole dispositive and voting power with respect to the shares of [Company A] held by the Funds so long as the aggregate voting interest of all joint filers does not exceed 25% of their total voting interest in [Company A] and, in that event, the Proxy Voting Committee of each fund shall respectively vote the Fund's shares." It further notes that "at any time, the Proxy Voting Committee of each such Fund may take and exercise in its sole discretion the entire voting power with respect to the shares held by such fund under special circumstances such as regulatory considerations."
- Individual B and/or directors, officers and employees of entities controlled by Individual B are on the Boards of these Funds, along with ostensibly independent directors. Of the five Funds with greatest holdings of Company A voting securities, Individual B is on every Board, and a relative, who an officer of other Individual B-controlled entities, is on three. Among the ostensibly independent board members, one is on all five Boards, three others are on four, and one is on three. Board members serve indefinitely.
- None of the Funds has regular annual shareholder meetings, but "may hold special meetings for consideration of proposals requiring shareholder approval, such as changing fundamental policies or upon the written request of 10% of the Funds' shares to replace its Directors." It is not known whether any of the Funds have ever held such a special meeting.
- Query: Would it matter to the PNO's analysis if Individual B selected the original members of the Board of Directors of the Funds and the shareholders of the Funds had never voted for those Directors?

VI. Two further factors that may be relevant are as follows:

A. Individual B and other entities controlled by him also directly hold shares of Company A, although the acquisitions of those holdings (if viewed apart from the holdings of Investment Manager B1 and the Funds managed by Fund Manager B2) likely would not have been sufficient to trigger a filing requirement.

B. In this case, Individual B also controls (for HSR purposes) an entity that at least arguably competes with Company A, so it is conceivable (although admittedly unlikely) that his ability – through his direct and indirect holdings and the shares voted by the Investment Manager B1 and Fund Manager B2 – to influence the management of Company A could raise potential substantive antitrust concerns.

After discussing this with some of my colleagues, our conclusion is that neither investment manager B1 or fund manager B2 hold any of the A shares. Investment manager B1 does have the right to vote the shares and dispose of them, but it does so in its fiduciary responsibilities as an investment advisor. Fund manager B2 similarly performs these duties on behalf of the mutual funds that it manages. I don't think what B is saying in the SEC 13D filings is relevant to a beneficial ownership analysis for HSR purposes. I also don't think that B initially designating the boards of the mutual fund entities constitutes ongoing control, because after the newcos are initially created, B does not have the contractual right to designate directors. The holders of the voting securities of the funds (none of which hold 50%) are the relevant test of control. So, we don't think B indirectly holds any of the shares of A held by the entities managed by B1 or the funds managed by B2.

D Mudd

3/23/09

K. WALSH & K. BERG CONWAY