

801.12
802.30**Verne, B. Michael**

From: [REDACTED]
Sent: Monday, March 15, 2010 3:41 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: 802.30 question

Hi, Mike - I hope all is well in DC. I have a question on the application of the Intraperson Exemption that I'm hoping you can clarify for me.

In this scenario, X and Y are separate persons and partners in a joint venture, Z. Z has 3 classes of shares: A, B and C shares, intended to vote together as a single class. X holds 100% of the A and B shares and Y holds 100% of the C shares. The total number of A and B shares equals the number of C shares. The A and B shares together are intended to represent 50% of the votes and the C shares are intended to represent the remaining 50% of the votes. The A shares are entitled to vote for 2 of the 5 directors of Z on its own, per the Series A Certificate of Designations; the B and the C shares together are entitled to elect the other 3 directors, per the Series B Certificate of Designations. Pursuant to a Stockholder's Agreement, however, X agreed to let the 3 directors elected by the B and C shares together be designated by the principal holders of the C shares. X proposes to acquire the C shares currently held by Y in a transaction that exceeds the HSR Act's thresholds.

My question is whether X can rely on 802.30. X holds 50% of the outstanding voting shares of Z, but if X is required to calculate its current holdings in accordance with 801.12, it may be less than 50% of the voting securities. In applying 802.30, can X simply look to the total number of securities held in the aggregate, without regard to 801.12?

Thanks,
[REDACTED]
[REDACTED]

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3/15/2010

You do need to calculate the percentage held under 801.12, I'm not sure how the three classes vote together as a single class if the A shares vote for 2 of 5 directors and the B/C shares vote for the other 3. Anyway, it looks like X would not control through its holding of A and B shares. The shareholders agreement is irrelevant to the calculation. Here's an example:

1. Class A represents 25 of 100 outstanding shares

Class B represents 25 of 100

Class C represents 50 of 100

So X holds $\frac{50}{100} \times \frac{2}{5} = \frac{100}{500}$ or 20%

BW
3/16/10