

801.1(b)

**Verne, B. Michael**

**From:** [REDACTED]  
**Sent:** Thursday, April 21, 2011 3:43 PM  
**To:** Verne, B. Michael  
**Subject:** HSR Question

Dear Mr. Verne:

Thank you for agreeing to provide your thoughts regarding an HSR matter that has arisen with one of my law firm's clients. I note that you provided your advice regarding a fairly similar situation in an informal staff opinion dated February 2, 2011 (see Information Staff Opinion 1103001).

My question is whether four separate trusts (collectively, the "Trusts" and each, individually, a "Trust") are considered to be "controlled" by a certain law firm (the "Named Law Firm") (or any of the Named Law Firm's partners, members or shareholders) whose partners, members and shareholders have the power to remove and replace the "Qualified Corporate Trustee" of each Trust and, in turn, whether the Trusts are considered to hold their respective assets and voting securities. I believe the answer to the foregoing question is that none of the Trusts is "controlled" by the Named Law Firm (or any of its partners, members or shareholders), within the meaning of 16 C.F.R. § 801.1(b)(2), and, therefore, each Trust is considered to hold its assets and voting securities. However, given the unusual nature of the facts at issue, I wish to confirm my conclusion with you.

#### **The Proposed Transaction**

Each Trust holds voting securities of Company X. Company X is proposing to consummate a transaction whereby Company X would exchange certain shares of Company X for shares of its subsidiary, Company Y.

#### **The Trusts and the Trustees**

Each Trust is an irrevocable trust in which the settlor does not retain a reversionary interest in the corpus. While each of the Trusts is a separate trust, the trust agreement governing each Trust is largely the same, and each Trust currently happens to have the same trustee (although, it is not a requirement that the Trusts have the same trustee(s)), which is a corporate trustee. The trust agreement of each Trust provides that there may be multiple trustees of each Trust and that the trustees may be individual and/or corporate trustees. However, at least one trustee of each Trust must be a "Qualified Corporate Trustee" (which is a corporate trustee that maintains a minimum amount of capital under administration and meets certain other requirements). As is noted above, there is currently only one trustee of each of the Trusts, and that trustee is a corporate trustee which satisfies the definition of a Qualified Corporate Trustee. My law firm represents the Qualified Corporate Trustee of each Trust.

#### **Removal and Replacement of the Qualified Corporate Trustee**

Each trust agreement provides that, whenever there are no individual trustees of a Trust, then a Qualified Corporate Trustee may only be removed and replaced, as follows:

"Whenever no individual trustee or individual trustees are acting under this Agreement, a partner, member, or shareholder of [the Named Law Firm] or an attorney in one of the then five largest law firms in [a specified metropolitan area] . . . who has at least fifteen (15) years of experience in advising trustees regarding law pertinent to administration of trusts, as designated in writing by any two of the

partners, members or shareholders of [the Named Law Firm], shall have the power to remove or replace a Qualified Corporate Trustee then acting or designated to act and shall have a duty to appoint another Qualified Corporate Trustee to replace a sole Qualified Corporate Trustee upon such Qualified Corporate Trustee's removal or resignation."

I interpret the foregoing use of "remove or replace" to effectively mean "remove *and* replace" (particularly given that there is a duty to replace if a sole Qualified Corporate Trustee is removed).

As is noted above, each Trust has only one trustee – a Qualified Corporate Trustee – and no individual trustees. As such, per the above-quoted language from the trust agreements, any partner, member or shareholder of the Named Law Firm could remove and replace the Qualified Corporate Trustee of each Trust. Alternatively, any two of the partners, members or shareholders of the Named Law Firm could designate in writing any attorney in one of the largest five law firms in the specified metropolitan area to remove and replace the Qualified Corporate Trustee of each Trust, so long as the attorney so designated had at least fifteen (15) years of experience in advising trustees regarding law pertinent to the administration of trusts (for purposes hereof, I'll refer to any attorney satisfying the foregoing criteria as a "Designated Attorney").

I am not associated with the Named Law Firm, although I am familiar with it. According to the Named Law Firm's website, it currently has nearly 200 lawyers, well over one-half of whom appear to be partners, members or shareholders.

#### **None of the Trusts is "Controlled" by Another Person**

It seems to me that none of the Trusts is "controlled" by the Named Law Firm (or any partner, member or shareholder of the Named Law Firm), within the meaning of 16 C.F.R. § 801.1(b)(2) and, therefore, each Trust is considered to hold its assets and voting securities. I base the foregoing conclusion on the following:

- The Named Law Firm itself does not have the power to remove and replace the Qualified Corporate Trustee. Therefore, the Named Law Firm could not be said to "control" any of the Trusts.
- Any partner, member or shareholder of the Named Law Firm may remove and replace a Qualified Corporate Trustee. Alternatively, any two of the partners, members or shareholders of the Named Law Firm may designate in writing any Designated Attorney to remove and replace a Qualified Corporate Trustee. Conceivably, Partner 1 of the Named Law Firm could remove and replace the Qualified Corporate Trustee on a given day, and Member 2 could do the same on the next day, and Shareholder 3 could do so the day after that, and so on. Or, Partner 1 and Member 2 of the Named Law Firm could designate a Designated Attorney on a given day (who could remove and replace the Qualified Corporate Trustee), Shareholder 3 and Partner 4 could designate a different Designated Attorney on the next day (who could remove and replace the Qualified Corporate Trustee), and so on. To further complicate matters, the Named Law Firm appears to be continually adding and losing partners, members and shareholders (a brief review of the Named Law Firm's website reflects that it added a new lateral shareholder in just the past week), as are the five largest law firms in the specified metropolitan area (which provide the pool of potential Designated Attorney candidates). In short, the right to remove and replace a Qualified Corporate Trustee is widely shared, ever-changing and difficulty defined. I struggle to believe that each of the more than one hundred (at present) individuals who enjoy (or could be designated to enjoy) such right "controls" the Trusts, when none of them maintains that right exclusive to anyone else.
- While I do not know whether there is any contractual arrangement among the partners, members and shareholders of the Named Law Firm as to whom among them may exercise the right of removal and replacement of a Qualified Corporate Trustee, the terms of the trust agreements are clear in that any of

them may do so (and any two of them may designate a Designated Attorney to do so). I do not believe that any such contractual arrangement, if one exists, would have the effect of amending and overriding the express terms of the trust as to whom may exercise such right.

Please confirm whether or not you agree with my conclusion hereinabove stated. If you disagree, I ask that you provide guidance as to how you would recommend defining who "controls" each of the Trusts (e.g., is it partners, members and shareholders of the Named Law Firm as of a certain date (and, if so, what date), and does it also include every person as of such date who could conceivably be a Designated Attorney).

Feel free to let me know if I can provide any other information that might facilitate your review.

Thank you for your consideration. I look forward to hearing from you.

AGREE  
K. WALSH CONCURS  
BM  
4/26/11

[REDACTED]

[REDACTED]

[REDACTED]

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