

801.1(c)
802.21

Verne, B. Michael

From: [REDACTED]
Sent: Friday, January 13, 2012 3:02 AM
To: Verne, B. Michael
Subject: 2 Questions: 801.1(c)(4) and 802.21

Mike,

Can you help me with two questions?

1. I've seen several arguably conflicting informal opinions (e.g., compare 1106005, 0510004, 0505006, 0304003 with 0304004, 9402011) on the question whether a settlor's receipt of an annuity from a GRAT or a charitable remainder trust constitutes a reversionary interest under 801.1(c)(4) (such that the settlor holds the assets in the trust) if the annuity may be paid, or is even nearly certain to be paid, in part out of the corpus of the trust (because the annuity payment exceeds the trust's income). It appears from informal opinion 0702013 (<http://www.ftc.gov/bc/hsr/informal/opinions/0702013.htm>) that the most recent answer directly on point is "no" (such that the settlor does not hold the assets in the trust). Is that the current PNO position?

2. Hypothetical: Buyer files for an acquisition of voting securities (well under 50%) of publicly-traded X Corp at the \$100 million (as adjusted) threshold. The waiting period expires, and Buyer acquires voting securities valued in excess of the \$50 million threshold but not exceeding the \$100 million threshold. X Corp's share price then increases such that within the 1-year period following expiration of the waiting period, the value of Buyer's shares exceeds the \$100 million threshold (although Buyer did not acquire any additional shares). Does the increase in value of Buyer's holdings above the higher threshold during the 1-year period satisfy the 802.21 exemption such that Buyer can acquire more voting securities valued up to the \$500 million threshold for 5 years from the waiting period expiration without making a HSR notification?

This seems consistent with the language of 803.7, which requires the acquiring person's "holdings" to meet or exceed, within 1 year, the notification threshold with respect to which the notification was filed. The PNO addressed a somewhat similar (but not directly on point) question in Opinion #204 of the Premerger Manual (and the associated informal opinion 8302004).

Thanks,

[REDACTED]

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1. The current position is that receiving an annuity from a GRAT or CRT does not constitute a reversionary interest and therefore the settlor does not hold the assets in the trust.
2. You would not be able to acquire additional shares above the \$100 million threshold under 802.21, because meeting or exceeding the threshold has to be by means of an acquisition, not an increase in value of previously acquired shares. The key language is in 802.21(a)(3):

The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold (as adjusted) greater than **the greatest notification threshold met or exceeded in the earlier acquisition.**

In your transaction, the \$50 million threshold was the only one exceeded in the earlier acquisition.

Bar
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