

801.11

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, September 18, 2012 2:08 AM
To: Verne, B. Michael; Walsh, Kathryn
Subject: Size of the Parties Test

We are writing to see if you agree with our view concerning how the Size of the Parties test is applied to our set of facts as described below. In addition we have asked a question which also appears below.

We are aware that Section 801.11(c)(2) indicates that where a person has a regularly prepared balance sheet, that person's total assets are as stated on such balance sheet. We have a client, Mr. A, a natural person, who has a Money Manager which regularly prepares a quarterly balance sheet for Mr. A. The balance sheet prepared by the Money Manager is strictly for the benefit of Mr. A and is not circulated to or relied upon by third parties. My question: Does the lack of distribution or reliance upon by a third party effect the PNO's view as to whether the balance sheet would qualify as a regularly prepared balance sheet under the HSR Rules? I have not been able to find any PNO precedent on this question.

Mr. A does not currently meet the \$13.6 million Size of the Parties test as his last regularly prepared balance sheet indicated total assets of less than \$13.6 million. He will acquire securities of Company X in October by exercising stock options and/or through the settlement of restricted stock awards and as a result of the upcoming October transaction Mr. A will hold an amount of voting securities of Company X in amount which will exceed \$68.2 million. As the Size of the Person test is a bright line test which is applied at the closing of a transaction, we believe a filing will not be necessary in connection with Mr. A's October acquisition of voting securities of Company X.

In addition, Mr. A will be entitled to acquire additional voting securities of Company X on a monthly basis pursuant to the terms of an Employee Benefit Plan, which has been in place for a number of years, in which both additional stock options will become exercisable and restricted stock awards settle each month. After Mr. A exercises options and/or receives settled restricted stock awards in October, as described above, he will hold an amount of voting securities of Company X which if added to his most recent balance sheet would satisfy the \$13.6 million Size of the Party test. Although Mr. A will acquire additional securities of Company X in November and December, his next regularly prepared balance sheet will not be prepared until the conclusion of the fourth quarter of 2012. Do you agree with our view that the Mr. A will not meet the Size of the Parties test until his next regularly prepared balance sheet is prepared?

AGREE
BM
9/18/12

