

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, February 27, 2014 4:46 PM
To: Verne, B. Michael; Walsh, Kathryn
Subject: Request for Informal Advice regarding Trusts

Mike and Kate:

I am hoping that you can help me to analyze the HSR implications of two scenarios relating to trusts.

My first issue relates to an individual who wants to exercise certain options to acquire voting shares of an issuer and dispose of the shares on the same day so that they are not considered as held by the individual. The individual has established a charitable foundation in the form of an irrevocable trust for which the individual (donor) may serve as the trustee but whether or not trustee, the donor (solely acting with donor's spouse if the spouse is surviving and competent or acting alone if the spouse is deceased or incompetent) can remove and replace the trustee. The donor has no reversionary interest in any earnings or assets (including the corpus) of the trust (as a 501(c)(3) charitable entity). The donor may not be able to employ a same day sale of the shares acquired through the exercise of options because of trading restrictions. Would a same day gift of shares to the foundation be sufficient disposition such that those shares would not be considered as held by the donor and, therefore, not implicate a potentially reportable acquisition on the part of the donor? The transfer by a settlor to an irrevocable trust is exempt, but it seems to me that the donor would still "hold" the shares donated to the irrevocable charitable trust through his control of the trust (through his right to remove and replace the trustees of the charitable trust). If a husband and wife, only acting together, can remove and replace the trustees, do they control the trust under similar logic of aggregating holdings of each of them under 801(c)(2)?

My second questions is regarding trust protectors. The informal opinion http://www.ftc.gov/sites/default/files/documents/informal_interpretations/1301002-informal-interpretation/1301002.pdf seems to support the conclusion that one type of trustee's ability to remove and replace another trustee does not confer control over the subject trust. In other words, the contractual power to remove and replace a trustee must lie outside the trust to implicate control over the trust.

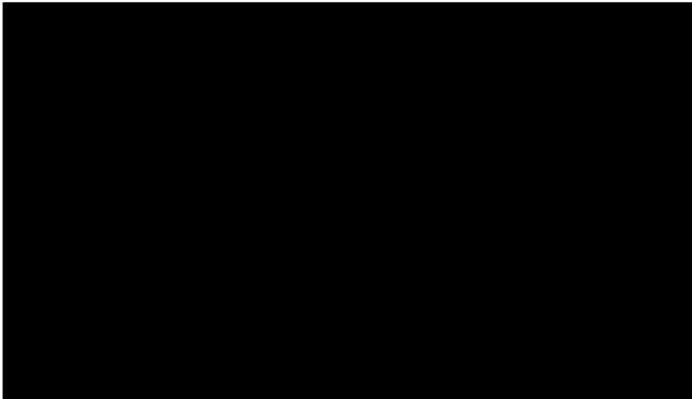
I have the following trust structure:

Trustee: The trustee is a fiduciary with control of the trust assets (including voting, buying, selling corporate securities). The trust provides the individual Trustee or Trustees may appoint one or more additional or successor Trustees, individual or corporate, effective at the time and upon the conditions set forth in the instrument of appointment.
Special Trustee: The role of the Special Trustee is to direct allocation of trust distributions to beneficiaries, add beneficiaries, and subdivide the trust as advisable. No income or principal can be directed to a Special Trustee, so there is no interest of Special Trustee in the corpus of trust. Special Trustee cannot remove or appoint trustees. Additionally, the Special Trustee can amend the trust agreement to do certain things, including to restrict or eliminate any power, authority or discretion hereunder conferred upon the Trustees, Special Trustee or any beneficiary; or reallocate to the Trustees or Special Trustee any of the powers, discretion or authority hereunder conferred on the other or others.
Trust Protector: The Trust Protector may, at any time, remove the Trustee or Trustees or Special Trustee or Special Trustees at any time in office and may appoint one or more successor Trustees or Special Trustees. There are (tax-driven) restrictions on who the Trust Protector can appoint (and they do not have interest in trust corpus). There are no provisions for removal of a Trust Protector, although there are provisions in the case of their resignation and for appointment of their successors.

No individual can hold more than one of the above positions.

In the situation described above, it seems to me, based on the logic of the informal interpretation cited, that no one controls the trust because no one outside the role of a trustee has the contractual power to designate 50% or more of the trustees of the trust.

Thanks as always for your input. There is no special urgency to this request.



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Issue 1:

- If not same day, he can use T+3 to sell the shares
- Gift to the trust would not be held by the trust if husband can on his own remove and replace the trustee (wife is deceased)
- If both husband and wife act jointly, trust is its own UPE
- Concept of husband and wife as one person only applies to holdings, not the right to remove and replace trustee

Issue 2:

- Agree – no one controls the trust

D. M.
2/28/14

KW CONCURS