

802.51

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, March 11, 2014 2:22 PM
To: Verne, B. Michael; Walsh, Kathryn
Subject: Question about 802.51 and control based on Shareholders' Agreement

Mike and Kate,

Two foreign persons (A and B) each plan to take a less than 50% equal stake in a foreign issuer (Target), and will each have the right to appoint 3 of 9 directors. Under 802.51(b) no HSR.

A and B plan to enter a shareholders agreement (SHA) that will be revocable upon mutual agreement between A and B. Under the SHA, A and B agree to meet before shareholder votes and either agree how to vote or if no agreement is reached then to each vote to retain the status quo. I do not think that this provision of the SHA confers control to either A or B under 802.51(b). Do you agree?

Under another provision of the SHA, if A in the future holds at least 5% or more of the Target shares than B, then B agrees to vote as A instructs B to vote. (A similar provision covers the scenario where B holds 5% or more of Target than A.) Assume that the holdings shift such that A holds 41% of Target and B holds 31% of Target, and so this provision comes into effect. Now, subject to the terms of the SPA, A can vote its own shares and also tell B how to vote, effectively controlling 72% of the vote. Would the acquisition of the extra 5% or more of shares by A over those held by B (triggering this SHA provision) be deemed to confer control of Target to A under 802.51, thus triggering a filing assuming that size of person and transaction are met and no other exemptions are available?

Many thanks,

[REDACTED]

Neither scenario confers control. Under 802.51, we have always taken the position that control must be conferred by holdings of voting securities, not shareholder agreements, to satisfy the control language in 802.51(b)(1).

Bm
3/11/14

KW CONCURS