

801.1

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, April 03, 2014 10:03 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Interpretation of 801.1 concerning shares held in trust

Mike,

We wanted to get your view of the following scenario.

Corporate Officer is set to receive Company A voting securities later this year due to the vesting of certain performance stock units and restricted stock units. Corporate Officer is also a beneficiary of certain trusts that contain substantial amounts of Company A voting securities as well. To be clear, Corporate Officer is not the Grantor of either of the trusts. The value of the vesting shares alone is not likely to trigger an HSR filing for Corporate Officer. However, if Corporate Officer were deemed under 801.1(c) to "hold" the voting securities in the trusts, then the vesting of the performance stock and restricted stock units may trigger an HSR filing. We do not think that the shares in the trust are "held" by Corporate Officer under the 801.1(c) and the applicable interpretations, but given the complexity of the trust agreements, we wanted to confirm our analysis with you.

FACTS

TRUST 1

Corporate Officer is the beneficiary of a trust containing voting securities of Company A as part of the trust corpus. Corporate Officer also serves as "Investment Director" of the trust. The Investment Director (i.e., a fiduciary) makes all decisions concerning investments by the trust. Corporate Officer's decision-making authority includes but is not limited to the vote of Company A voting securities held by the trust and the purchase or sale of company A voting securities by the trust. The Trustee retains all other trustee powers provided in the trust agreement.

TRUST 2

Corporate Officer is one of the beneficiaries of a second trust containing voting securities of Company A as part of the trust corpus. Corporate Officer also serves as "Investment Director" of the trust. Generally, the Investment Director (i.e., a fiduciary) makes all decisions concerning investments by the trust. However, unlike Trust 1, a Business Advisory Committee makes all decisions concerning the vote of Company A shares held by the trust. The Business Advisory Committee consists of two members (i.e., fiduciaries); (1) Corporate Officer and (2) the Corporate Officer's adult sibling, who is a beneficiary of a separate, similarly structured trust, with the Trustee participating as a "tie-breaker" in the event of disagreement between the two members. Therefore, the Corporate Officer does not have sole decision-making authority concerning the vote of Company A shares in Trust 2. The Trustee retains limited authority to sell Company A shares in certain circumstances without the direction of the Investment Director. The Trustee retains all other trustee powers provided in the trust agreement.

Even with the voting rights in Trusts 1 and 2, Corporate Officer is not close to holding voting rights for 50% or more of the voting securities of Company A, and so will not "control" Company A under 801.1(b).

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We don't think Corporate Officer holds the shares of Company A in either trust. We are assuming, although it is not specifically stated, that both trusts are irrevocable and that Corporate Officer does not have the right to remove and replace the trustee of either trust.

Trust 1 – he is not the settlor or the trustee; rather a beneficiary and Investment Director. Because he is not the settlor, he can't have a reversionary interest in the trust. He is able to make investment decisions for the trust and to vote shares of Company A held by the trust in his fiduciary role as Investment Director. I don't think that is enough to say he holds the corpus of the trust.

Trust 2 – he is not the settlor or the trustee; rather one of the beneficiaries and Investment Director. So, in this trust, he also can't have a reversionary interest. As Investment Director he makes investment decisions on behalf of the trust. He is further insulated from the vote of the Company A shares, by having his sibling share that responsibility as a co-member of the Business Advisory Committee, with the trustee as a tie-breaker. Again, we don't think any of this is enough to say that he holds the corpus of the trust.

Bmw
4/3/19

KW/DG RONCW