

**Gillis, Diana L.**

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**From:** Walsh, Kathryn E.  
**Sent:** Tuesday, May 26, 2015 1:59 PM  
**To:** [REDACTED]; Berg, Karen E.  
**Cc:** Johnson, Janice C.; [REDACTED]; Gillis, Diana L.; Whitehead, Nora  
**Subject:** RE: Issues under Sections 802.63(a), 801.15(a), and 802.9 affecting analysis of possible need for post-consummation filing

[REDACTED] we agree with 1 through 3. As for 4, we agree that if you acquired shares under 802.63, those would not be counted towards the 10% threshold of 802.9.

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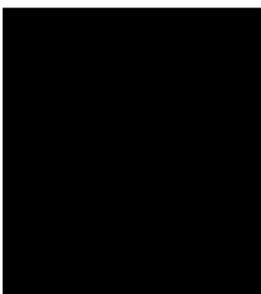
**From:** [REDACTED]  
**Sent:** Tuesday, May 26, 2015 1:51 PM  
**To:** Walsh, Kathryn E.; Berg, Karen E.  
**Cc:** Johnson, Janice C.; [REDACTED]  
**Subject:** RE: Issues under Sections 802.63(a), 801.15(a), and 802.9 affecting analysis of possible need for post-consummation filing

Kate and Karen:

I have been giving further thought today to the fourth question below regarding Section 802.9. Under that rule, the numerator for purposes of calculating the relevant percentage is the number of voting shares the acquirer would "hold" as a result of the proposed acquisition. Under Section 801.15(a), assuming my straightforward reading as reflected in my second question below is correct, shares that were exempt under Section 802.63(a) when acquired are deemed thereafter not to be "held" by their acquirer for size-of-transaction purposes. It seems to me that, if the shares are not "held" for this purpose, they likewise should not be considered "held" for purposes of Section 802.9 absent any statement to the contrary in the statute or rules (which I am not finding). Do you agree?

Also, do you anticipate being able to get back to me today on any or all of these questions?

Thanks again.



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**From:** [REDACTED]  
**Sent:** Tuesday, May 26, 2015 12:46 AM  
**To:** Walsh, Kathryn E.; 'Berg, Karen E.'  
**Cc:** 'Johnson, Janice C.'; [REDACTED]  
**Subject:** Issues under Sections 802.63(a), 801.15(a), and 802.9 affecting analysis of possible need for post-consummation filing

Kate and Karen:

Janice Johnson told me Friday afternoon that she would be out of the office this week and advised me to write to the two of you with some questions that pertain to an analysis we are trying to complete as quickly as practicable of a possible need for a post-consummation HSR filing by an investment fund we represent.

First, I would like to confirm that, under Section 802.63(a), the analysis is not "all or nothing" and that shares held by a holder can be divided between exempt and non-exempt depending on whether the shares were received in exchange for debt acquired before or after a bankruptcy announcement. I recall being told this by the PNO in the past but currently am unable to find an informal opinion saying this explicitly. In the situation we are analyzing, the vast majority of the shares our client received as a result of a bankruptcy reorganization were received in exchange for debt acquired before the bankruptcy announcement. We would like to make certain that this quantity of shares is exempt even if a much smaller number of shares received in exchange for debt acquired after the bankruptcy announcement are not exempt. Janice indicated over the phone that she believed that this analysis is correct but suggested I confirm this with you in writing.

Second, I also would like to confirm that, under Section 801.15(a), the shares that were exempt under Section 802.63(a) when acquired do not have to be counted subsequently towards the size-of-transaction threshold in valuing the acquirer's total holdings for HSR purposes when acquiring additional shares in the issuer. Janice indicated over the phone that she believed this also is correct but again suggested I confirm with you in writing.

Third, I would like to confirm that this same number of shares will continue to be treated as exempt pursuant to Section 802.63(a) so long as the holder continues to hold no less than this quantity of shares, even if the holder from time to time sells some shares it holds in the issuer in question. In other words, I would like to confirm that it is not necessary to ascertain as time passes whether the specific shares acquired in the exempt acquisition have been retained. I do not believe that Janice had an opportunity to study this question Friday, although we did touch on it very briefly over the phone.

Fourth, I would like to know whether or not the shares that are exempt under Section 802.63(a) and thus (if I am correct as to the second point above) not counted towards the size-of-transaction threshold under 801.15(a) are nevertheless counted towards the 10% threshold in Section 802.9. I did not raise this question with Janice on Friday; it has only occurred to me since then that it might affect the analysis of our client's situation.

I would be happy to discuss these issues with either or both of you today (Tuesday) if you think that a phone call would be helpful.

Thanks.

