

802.23

802.51

802.4

Verne, B. Michael

From: [REDACTED]
Sent: Monday, April 19, 2010 9:37 PM
To: Verne, B. Michael
Subject: HSR Question

Mike,

I am writing to confirm my understanding of our telephone conversation of earlier today and to raise an additional question concerning the situation described below .

FACTS:

Acquiring Person A launched a cash tender offer ("Offer") to purchase up to a specified number of voting securities of Company C. Company C is incorporated in Canada and has principal offices in the U.S. and Canada. Person A subsequently amended the tender offer to acquire up to 100% of Company C's shares at the same price. Person A then filed HSR for acquisition of control of Company C and received early termination.

Person A then amended its tender offer again, making several changes, including increasing the offer price and assigning the right to purchase certain shares of Company C to two entities as follows:

- (i) To an acquisition vehicle indirectly controlled by Person A – the right to purchase Company C shares validly deposited and not withdrawn under the Offer; and
- (ii) To a specified natural person (who is a Canadian citizen), in his capacity as sole trustee of a Trust T – the right to purchase those Company C shares validly deposited and not withdrawn under the Offer which, if otherwise taken up by Person A, would result in Company C becoming a non-Canadian controlled entity under the Investment Canada Act upon consummation of the Offer. Person A will provide the trustee with the funds necessary to acquire its portion of the Company C shares deposited under the Offer by way of a loan. The trustee will hold the Company C shares it purchases for the benefit of Trust T and will have legal title to such Company C shares. The trustee will be entitled to vote the Company C shares acquired in whatever manner he wishes in the best interests of the beneficiary of Trust T.

Person A intends to purchase the shares acquired by Trust T at such time as doing so would not result in Company C (or a subsidiary) becoming "non-Canadian" within the meaning of the Investment Canada Act.

QUESTION:

In view of (ii) above, which entity is deemed to hold the Company C shares purchased by the trustee? For example, is it the trustee, Trust T itself, or the settlor of Trust T?

For purposes of the following HSR analysis, I will refer to this entity as the "Trust Entity."

HSR ANALYSIS:

You stated that, pursuant to 802.23, Person A need not file another HSR. However, if the Trust Entity is not controlled by Person A but rather is part of a separate Acquiring Person, then 802.23 does not apply to exempt the Trust Entity, and the Trust Entity would need to make a separate HSR filing for acquisition of Company C shares if the statutory HSR thresholds in 15 U.S.C. § 18a(a)(2) are exceeded. The determination of who "controls" the Trust Entity turns on the appropriate definition in 801.1(b).

You also stated that since Company C has principal offices in the U.S., it is a U.S. issuer even though it also has principal offices outside the U.S., so the exemption in 802.51 would not apply. Further, assuming that Company C

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holds U.S. assets valued at more than \$63.4 million, the Trust Entity would not be able to rely on 802.4 to exempt it from the obligation to file HSR.

Thanks and regards,

AGNEZ
4/20/10

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