801.1(b)
801.1(c)
802.64
802.9

Verne, B. Michael

From: [redacted]
Sent: Friday, February 01, 2008 1:10 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: Rule 802.64 and 802.9 Exemptions; Rule 801.1(b) and (c)Beneficial Ownership and Control Definitions


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Please confirm that you agree with the analysis and conclusions stated below, or advise as to any differing conclusions and the reasons for same, with respect to application of provisions in the FTC Premerger Notification Rules on the exemption for certain Institutional Investors in Rule 802.64, the exemption for acquisitions solely for purposes of investment in Rule 802.9, and the definitions of beneficial ownership and control in Rule 801.1(b) and (c), based on the presumed facts set forth below.

We note Informal Opinions 42, 51, and 56 published in ABA Section of Antitrust Law, Premerger Notification Practice Manual (4th ed. 2007) (copies attached), and Informal Opinion 0705015,

http://www.ftc.gov/bc/hsr/informal/opinions/0705015.htm, each of which appears to be relevant to and supports the analysis and conclusions stated below. Please advise if you know of other significant Informal Opinions that we should consider with respect to this matter.

Statement of Presumed Facts

1. Advisor is an investment advisor registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940.

Advisor is controlled by a publicly traded holding company (Parent), that presently holds 95 percent of the voting securities of Advisor.

Parent has other wholly owned or controlled subsidiaries that operate advisory and broker-dealer businesses outside the United States, and are not registered with the Securities and Exchange Commission. Parent also owns a controlled subsidiary that operates a small printing business.

Except as described below, none of the foregoing entities own securities of Issuer1 (as defined below).

2. Advisor has two advisory affiliates, A1 and A2, each of which (i) is an unincorporated entity, (ii) is an investment advisor registered with the Securities and Exchange Commission and (iii) engages in the same investment activities as are described below. Advisor has a

right to 50 percent or more of the profits of A1, and to 50 percent or more of the assets of A1 upon dissolution. Advisor presently has a right to less than 50 percent of the profits of A2, and to less than 50 percent of the assets of A2 upon dissolution. Advisor may acquire additional interests in A2 in the near future such that Advisor will have the right to 50 percent or more of the profits of A2, and/or 50 percent or more of the assets of A2 upon dissolution. Advisor has wholly owned or controlled subsidiaries that provide administrative, shareholder servicing, transfer agent and distribution services solely with respect to Advisor's advisory and mutual fund businesses.

3. Advisor, A1 and A2 each manage and invest, on a discretionary basis, the assets of registered mutual funds, private funds and institutional accounts including accounts of pension plans, government plans, charitable foundations, family trusts and partnerships.

4. Except as described below with respect to test accounts, Advisor does not invest in equity securities on its own behalf and, except in rare and temporary circumstances, for example to correct a trade error, does not purchase, sell, or hold equity securities for its own account.

5. One exception to the foregoing is that, from time to time, Advisor, A1, and A2 establish and manage certain proprietary accounts solely for the purpose of testing proposed investment strategies prior to offering those strategies to clients. Advisor, and A1 and A2, each acquire and hold all voting securities in test accounts solely for purposes of investment.

6. Many institutional clients of Advisor, A1, and A2 are organized as trusts, including various pension plans or deferred compensation plans of businesses and other organizations. As to each such trust client, Advisor, A1, and A2 do not serve as trustee, do not have any contractual power to designate the trustees of the trust, and are not a beneficiary or settlor of the trust.

7. Advisor, A1, and A2 also serve as investment advisor or subadvisor to U.S. mutual funds. Mutual funds managed by Advisor, A1, and A2 typically are organized as separate series of one or more Delaware statutory trusts or Massachusetts business trusts and are registered with the Securities and Exchange Commission as investment companies under the Investment Company Act of 1940 (1940 Act). Each mutual fund for which Advisor, A1, and A2 provide investment advisory or subadvisory services has its own stated investment objectives. With respect to mutual funds organized as series of a Delaware statutory trust or Massachusetts business trust, such series are treated for all practical purposes, including for 1940 Act purposes and accounting purposes, as a separate client and distinct entity. Advisor also serves as advisor or subadvisor to non-U.S. funds that are not registered under the 1940 Act, including funds for which a non-US affiliate of Parent serves as investment advisor.

8. Advisor, A1, and A2 each is authorized by separate investment management agreements with mutual funds and other clients as described above, to exercise voting rights with respect to the voting securities that are acquired and held in accounts of such clients and mutual funds, but each client or mutual fund has the ability to revoke such authority and take back those voting rights if and when it chooses to do so.

9. Advisor recently determined that, on an aggregate basis, the clients and mutual funds referenced above hold more than 15 percent of the voting securities of a particular issuer (Issuer1). This includes all voting securities held in client and mutual fund accounts for which Advisor, A1 and A2 serve as investment advisor or subadvisor, as described above. Due to the ownership structure described above, Advisor, A1 and A2 report holdings on an aggregate basis for purposes of their Schedule 13G filings with the Securities and Exchange Commission.

10. No single client or mutual fund of Advisor, A1, or A2 presently holds more than 15 percent of the voting securities of Issuer1 or any other single issuer. Advisor, A1, and A2 do not anticipate that any single client or mutual fund would in the future acquire or hold more than 15 percent of the voting securities of any issuer.

Summary of Conclusions

Applying Rule 802.64, which provides an exemption for certain institutional investors, the provisions of Rules 801.1(b) and (c) on beneficial ownership and control, and the guidance in the Informal Opinions referenced above, we have reached the following pertinent conclusions for which we seek your confirmation and/or comment.

1. Advisor, A1, and A2 each is deemed to be an institutional investor under Rule 802.64(a), by virtue of registration with the Securities and Exchange Commission as an investment advisor.

2. Even if Parent is not be deemed to be an institutional investor under Rule 802.64(a) by virtue of the fact that it holds a small printing business as described above, such ownership would not affect the other conclusions stated herein with respect to Advisor, A1, and A2, including that each still would be deemed to be an institutional investor under Rule 802.64(a) and would not be deemed to hold voting securities acquired for clients and mutual funds as described above.

3. Advisor, A1, and A2 do not hold the voting securities that each acquires for clients and mutual funds for which each serves as an advisor or subadvisor, and beneficial ownership of same is deemed to remain with each such client and mutual fund, despite the fact that each has a revocable right to exercise voting rights for such shares. As stated in Informal Opinion 0705015, "where an investment advisor has only 'the right to buy and sell the shares on behalf of the client and the right to vote the shares by proxy,' such an investment management

arrangement 'is not enough to confer beneficial ownership to the investment advisor,' and therefore the investment advisor would not be deemed to 'hold' (as used in the Act) the voting securities beneficially owned by its clients."

4. Advisor, A1, and A2 do not hold the voting securities that each acquires for trust clients described above, and each is not deemed to control any such trust, by virtue of the fact that Advisor, A1, and A2, each is not the trustee, beneficiary, or settlor of any such trust, and does not have the contractual right to designate the trustees of any such trust.

5. The 15-percent maximum threshold for the Institutional Investor Exemption, set forth in 16 C.F.R. 802.64(b)(4), is applied separately to each client and mutual fund as described above, and not to the aggregate amount of voting securities held by all such clients and mutual funds.

6. Advisor presently does not control A2 and thus does not need to aggregate any voting securities that A2 may hold in test accounts with voting securities that Advisor and A1 hold in such accounts, for purposes of applying the 15-percent threshold in Rule 802.64, the 10-percent threshold in Rule 802.9, or the minimum size-of-transaction threshold in the HSR Act.

7. As a result, as long as no single client or mutual fund as described above acquires or holds in excess of 15 percent of an issuer's voting securities, Advisor, A1, and A2 may continue to rely on the Institutional Investor Exemption, even if two or more such clients or mutual funds in the aggregate hold more than 15 percent of the issuer's voting securities.

8. Advisor is deemed to hold the voting securities in test accounts of Advisor and A1 as described above, and Advisor will be deemed to hold voting securities in test accounts of A2 at such time as Advisor may acquire control of A2. With respect to acquisitions of voting securities in test accounts: (i) Advisor may not rely on the 15-percent threshold in the Institutional Investor Exemption; (ii) Advisor may rely on the 10-percent threshold in Rule 802.9 provided that such acquisitions satisfy the other requirements thereof; and (iii) as to any such acquisition for which the exemption in Rule 802.9 does not apply, and in the absence of another applicable exemption, such acquisitions are subject to the normal size-of-transaction and (if applicable) size-of-party thresholds in the HSR Act. Nevertheless, Advisor, and A1 and A2, need not aggregate voting securities of a particular issuer that they hold in test accounts with voting securities of such issuer that they acquire for the accounts of clients and mutual funds as described above.

Please advise that you concur with the analysis and conclusions based on the presumed facts stated above, or advise as to any differing conclusions and the reasons for same, or call if you wish to discuss

1. Investment advisors registered under the Investment Advisers Act of 1940 are not institutional investors for purposes of 802.64. 0705015 (point 1) is incorrect. I misread it to say investment companies. The point of that interpretation, however, was to determine beneficial ownership, not to determine that investment advisors are institutional investors for purposes of 802.64. See the following language in 43 FR 33450 (July 1, 1978):

Comment 1090 also suggested partnerships holding voting securities for investment, investment advisers, and insurance company separate accounts as candidates for institutional investor
status. The specific inclusion of insurance company separate accounts is unnecessary because
subparagraph (a)(5) defines insurance companies as institutional investors, and because under
§ 801.1(c)(7) insurance companies hold all voting securities in their separate accounts. Thus,
insurance company special accounts are in effect covered by the exemption given the insurance
company. Partnerships holding voting securities for investment and investment advisers were
rejected because no adequate reasons for affording institutional investor status to such entities were
advanced, and because the safeguards characterizing the entities listed in § 802.64(a) do not appear
to be present. These two types of entities, of course, may avail themselves of the exemption afforded
by section 7A(c)(9) when appropriate.

2. See #1. You are correct, however, that the investment advisors do not hold the voting securities acquired for clients and mutual funds despite the fact that they can buy and sell on behalf of the clients and have a proxy to vote the shares.

3. Correct

4. Correct

5. Correct

6. Correct

7. Advisor, A1 and A2 do not need to rely on the institutional investor exemption because they don't hold the voting securities.

8. All correct.

BW
2/5/08