802.50
802.51

Verne, B. Michael

From: [redacted]
Sent: Wednesday, June 25, 2008 12:02 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: Informatl opinion

Mike, in regard to the following fact situation please confirm:

Company A and Company B are both foreign entities and there own UPE's. Company A holds a minority interest in Company and therefore is not its UPE. Company A, based upon arm's length bargaining, sells product to Company B and Company B is not Company A's agent. The transaction takes place outside the United States. Neither company is in a "macquilladora" relationship with the United States for the subject product.

Company B sells the product it purchased from Company A "in or into" the United States. Issue, does this product count toward the amount found in the exemption section 802.50 or 802.51 for Company A?

Analysis: Companies A and B are their own UPE's because neither one holds 50 percent or more of the others voting stock and/or power to appoint board members. Since Company B is not acting as an agent for Company A and title as well as beneficial ownership to the product passes outside the United States, Company B's sales "in or into" the United States should not be attributable to Company A. This complies with the "bright line" test that has been used by the Premerger Notification Office for numerous years. Furthermore, this subject was discussed as a possible rule change by the Premerger Office and was rejected due to the difficulty in tracing foreign sales from one person to another. See PNPM, opinion 235 (3rd edition) where the foreign producer had no control over the decisions and no ability to influence the location of the ultimate sale or price of the product that eventually rached the United States; and opinions 236 and 237 re beneficial ownership passed outside the United States.

Conclusion: Company B's sales "in or into" the United States are not attributable to Company A for purposes of section 802.50 or 802.51.

AGREE
BMV
6/25/08
