

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Wednesday, July 08, 2009 2:41 PM  
**To:** Verne, B. Michael  
**Subject:** Escrow Agreements  
**Attachments:** PI-#2208639-v1-Informal\_Staff\_Opinion\_\_(767941-1\_07\_08\_2009\_02\_33\_09\_PM).PDF

<<PI-#2208639-v1-Informal\_Staff\_Opinion\_\_(767941-1\_07\_08\_2009\_02\_33\_09\_PM).PDF>>

Mike:

Does the attached Informal Staff Opinion dated February 6, 2006, as amended with additional commentary on December 8, 2006, still reflect the FTC's current policy regarding escrow agreements?

Hope your website is soon back up and running normally.

Thank you for your assistance.



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<b>Rule(s):</b>	801.2
<b>Staff:</b>	Michael Verne, Nancy Ovuka
<b>Response / Comments:</b>	<p><b>Amended 12/08/2006</b> – The conclusion in the letter may be misinterpreted to suggest something less compelling than the need for an ironclad escrow arrangement. A non-reportable number of shares may be acquired pending expiration of the waiting period (unless this would confer control of the issuer). However, the escrow arrangement for shares that are subject to the Act must insulate the acquiring person from receiving beneficial ownership of the stock, including taking title, voting the shares, collecting dividends, disposing of the shares, etc. It also must contain an unwind provision allowing the escrow agent to sell the stock to a third part should the acquisition be challenged. N. Ovuka – M. Bruno concurs.</p> <p>02/02/2006 – Yes.</p>
	<b><u>Original Image File</u></b>


From: (redacted)  
 Sent: Thursday, February 02, 2006 8:16 AM  
 To: Verne, B. Michael  
 Cc: (redacted)  
 Subject: HSR Question re: Escrows

Mike,  
 I'm writing to follow up on a discussion we had earlier this week regarding escrow arrangements in the context of a foreign tender offer. Please assume that the Acquiring Person and the Acquired Person are non-U.S. persons, both satisfy the size of persons test, and the size of transaction test is satisfied.

I understand that, pending HSR clearance, tendered shares may be acquired so long as any shares at or in excess of 50% are placed in an escrow account that explicitly precludes the acquirer from exercising any voting rights or receiving dividends. Any such escrow arrangement must be structured so that the shares must be sold by the escrow agent if the FTC or DOJ successfully challenges the transaction.

Please let me know if I have characterized the PNO's position accurately.

That particular letter was fact specific to a particular transaction and is not meant to imply that we endorse the use of escrow accounts for any purpose. This transaction involved a French tender offer, which under French law required shares to be tendered in a time frame that was in conflict with the HSR waiting period. As a matter of comity, we allowed the escrow. Otherwise, the acquiring person would have either had to violate French law or US law. As a general rule, we don't allow escrow arrangements except in very unusual circumstances. The only other occasion I remember since 2006 involved a merger which was not problematic, but resulted in a secondary acquisition that raised antitrust concerns. In order not to hold up the merger, we allowed the secondary acquisition to be closed into escrow until the antitrust review was completed. I know that years ago, the PNO was more liberal in allowing these arrangements. However, we later found that they were being abused by some investment funds and being used to establish a market position prior to the expiration of the HSR waiting period. That is not an allowable reason to establish an escrow account.

  
7/8/09