

801.1(b)

Verne, B. Michael

From: [REDACTED]  
 Sent: Monday, September 14, 2009 3:57 PM  
 To: Verne, B. Michael  
 Subject: RE: UPE of a Trust

Hi Mike,

Thank you very much for your response. I hope you don't mind a few follow-up questions. I am trying to figure out the ultimate parent entity of an operating company that would be the acquired entity in an asset acquisition. The chain of ownership/control is as follows:

- OPERATING COMPANY (which would be the acquired entity holding the assets being acquired) is *controlled* by HOLDING COMPANY.

- HOLDING COMPANY's outstanding voting securities are *held* as follows: 47% by natural person Mr. A; 33% by natural person Mr. B; the remaining 20% by three separate trusts, all of whom have the same settlor (Mr. A) and the same co-trustees (Mr. B and another natural person, Mr. C).

- All three trusts are irrevocable trusts in which the settlor does NOT retain a reversionary interest in the corpus, such that the trust itself would be deemed to *hold* the assets and voting securities constituting the corpus of the trust per 801.1(c)(3). As such, no one natural person or trust holds 50% or more of the outstanding voting securities of HOLDING COMPANY by itself.

- Each of the trusts is set up identically, such that Mr. A (the settlor) is able to remove and replace the trustee. However, Mr. B (who is one of the co-trustees of all three trusts), has the power to resign and name his successor. If Mr. B did resign and name his successor, Mr. A would have the ultimate power to remove and replace that successor trustee.

- Mr. A is the father of Mr. B; Mr. B is not a minor.

My questions are as follows:

1. With respect to the three trusts, would Mr. A be deemed the UPE of each trust? Does the fact that Mr. B (as co-trustee) can resign as co-trustee and replace his successor (even if that appointment would still be subject to Mr. A's ultimate power to remove and replace trustees) affect the UPE analysis?

2. Assuming that Mr. A is the UPE of the trust, Mr. A would hold 47% of HOLDING COMPANY and would also be the UPE of the three trusts who, together, hold 20% of HOLDING COMPANY. Would you aggregate (i) the 47% that Mr. A *holds* with (ii) the 20% that is held by the trusts that Mr. A *controls*, such that Mr. A would be the UPE of the HOLDING COMPANY? Or instead, since the trusts *hold* their own assets/securities per 801.1(c)(3) (even though they are *controlled* by Mr. A), would it be deemed that no person *holds* more than 50% of the outstanding voting securities of HOLDING COMPANY and that HOLDING COMPANY is the UPE of OPERATING COMPANY?

I very much appreciate your guidance on this matter. If you require additional information or if you would like to discuss this further, please do not hesitate to contact me at [REDACTED]

Thank you very much,  
[REDACTED]

9/15/2009

1. Mr. A would be deemed to be the UPE of the three trusts. Mr. B's ability to resign and name a successor trustee would not change the analysis.

2. Mr. A would be deemed to hold the 20% in the trusts. You would aggregate that 20% with the 47% that Mr. A holds directly, so he would be the UPE of HOLDING COMPANY.

B  
9/15/09