

801.1(c)

801.15

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, February 04, 2010 9:39 AM
To: Verne, B. Michael
Cc: Johnson, Janice C.; [REDACTED]
Subject: HSR Reporting Requirements re 401(k) Plan Distribution of Voting Securities
Attachments: 0403015.pdf

Mr. Verne,

Would you be available later today or tomorrow, or at a convenient time next week, for a conference call with your colleague Janice Johnson, my colleague [REDACTED] and me to discuss potential HSR reporting requirements relating to the distribution of company stock by a 401(k) plan to an executive of the company?

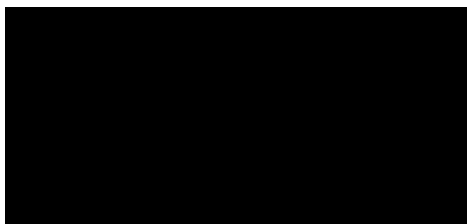
The circumstances that we would like to discuss are the following:

1. A large company (the "Company") has (i) adopted a 401(k) plan (the "Plan") for its employees in compliance with section 401 of the Internal Revenue Code, (ii) established a trust to hold Plan assets, and (iii) appointed a trustee (the "Trustee") to manage the Plan.
2. Each Company employee may elect to contribute a portion of his or her salary to the Plan. Among the investment options that an employee may elect under the Plan is an option that authorizes the Trustee to use a portion of such employee's contributions to purchase some of the Company's publicly traded voting securities.
3. A Company senior executive (the "Executive") has contributed to the Plan for many years during which he has elected to authorize the Trustee to purchase Company voting securities.
4. The Executive has held for more than 5 years about 5% of the Company's voting securities worth in excess of \$100 M. During that time, he has not acquired any Company securities in a reportable transaction under the HSR Act.
5. The Executive reaches 70½ years of age, which triggers the requirement under the Plan and applicable IRS regulations for a mandatory distribution to him by the Trustee. Electing to take a portion of the distribution in Company securities (which is an option available under the Plan), the Executive receives from the Plan 5,000 shares of Company securities with a value of \$100,000.

We are trying to understand how to apply FTC Rules 801.1(c), 801.15(a) and 802.35 while taking into consideration the informal staff opinion that is located on the FTC's website at <http://www.ftc.gov/opinions/0403015.htm>. (A copy of the informal staff opinion is attached for your convenience.)

Please let us know a convenient time for you and Janice when [REDACTED] and I can call you to discuss any HSR reporting requirements that would apply to the Trustee's distribution of Company stock to the Executive.

Thank you for your assistance.



I don't recall the letter you referenced in your first e-mail. Obviously, there is a dearth of detail. That's the problem with some of the letters in the database. 401-K plans are generally trusts that are deemed to hold the stock they acquire, not the plan participants. The only factors I can think of for coming out the way we did are: 1) if the "major shareholder" controlled the trust by being able to designate the trustee(s); 2) the "major shareholder" controlled the issuer who in turn could designate the trustee(s); or 3) the 401-K was structured so that each participant was able to vote, receive dividends and sell the stock held in his account. In those cases the shareholder would hold the voting securities in the trust. In your transaction, the executive would have to aggregate his current holdings with the distribution he receives from the 401-K because he does not currently hold the stock in the trust and neither 802.10 nor 7A(c)(10) is listed in 801.15. I hope this is helpful. If we still need to talk let me know.

BM
2/4/10