801.40
802.30
802.51

Verne, B. Michael

From: [redacted]
Sent: Thursday, July 08, 2010 10:25 AM
To: Verne, B. Michael
Subject: RE: question re joint ventures, 802.51

Correct, SPV is foreign and none of A, B or C will control it.

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Thursday, July 08, 2010 10:18 AM
To: [redacted]
Subject: RE: question re joint ventures, 802.51

Two questions – is SPV foreign as well? I assume that none of A, B or C will control SPV?

From: [redacted]
Sent: Wednesday, July 07, 2010 3:49 PM
To: Verne, B. Michael
Subject: question re joint ventures, 802.51

Dear Mike,

I have a question about which is the triggering event in a multi-step transaction, and would appreciate your advice.

Target has two major shareholders (call them A and B), not under common control. A holds approximately 30% of the shares of Target and B holds about 25%. A, B and Target are all non-US.

A third shareholder, C, wishes to invest in Target, by buying some of the shares held by A and B. In order to accomplish this, C will purchase approximately 10% of the shares held by A and B (likely 5% from each). C is also a non-US person, and not under common control with A or B.

The parties wish to combine their shareholdings in a new joint venture – a special purpose vehicle. I believe this SPV will hold nothing other than the shares in Target held by A, B and C. Combined shareholding in Target by the SPV will be around 55%. The SPV may later make a bid for the remaining 45% of Target.

My analysis is as follows, please let me know if you agree.

(1) The purchase of 10% of the shares of Target by C from A and B would not trigger a filing obligation, as this acquisition is exempt under 802.51(b).

(2) The creation of the SPV will not trigger a filing for A, B, or C as acquiring persons, as each will continue to hold through the SPV the interests each already held in Target and nothing else.

(3) However, at the time that A, B and C contribute their shares to the SPV, a filing is triggered for the SPV as an acquiring person for its interest in Target, as it will hold 55% of the shares of Target, which is non-US but has US sales above the current threshold. The triggering event for the HSR filing is the contribution to the SPV of 50% of the shares of Target.

Please let me know if you need any further information to complete your analysis.

Best regards,

[redacted]

Then everything is exempt. You are correct that C's acquisition of 10% of Target from A and B is exempt under § 802.51(b). I would view the contribution of Target shares to SPV as part of the formation, so under § 801.40(a), SPV is an acquired person only and not an acquiring person with respect to the shares of Target. Since A, B and C are all foreign, the acquisition of less than 50% of foreign SPV by each would also be exempt under § 802.51(b). If SPV will hold 55% of Target in aggregate as a result of the formation, the subsequent acquisition of the remaining 45% (if it occurs at a later date) would be exempt under § 802.30(a).

BM
7/8/10