801.1(c)
802.63

Verne, B. Michael

From: [redacted]
Sent: Tuesday, March 30, 2010 10:17 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: HSR Question

Michael,

We kindly request that you review the following facts and answer the following questions. Please feel free to contact me with any questions you may have. Thank you very much.

Our questions arise from the following facts:

The Parent Entity ("PE") has three wholly owned subsidiaries – Sub-A, a corporation, Sub-B, a corporation, and Sub-C, a limited liability company. PE owns 100% of the shares of Sub-A and 30% of the shares of Sub-B. Sub-A owns the remaining 70% of the shares of Sub-B. Sub-B owns 100% of the membership interests in Sub-C.

PE and all its subsidiaries entered into a Loan Agreement whereby a group of eight banks ("Bank Group") provided PE and its subsidiaries with a loan. One of the banks acts as the Collateral Agent for the Bank Group. As collateral for the loan, the PE, in the Pledge Agreement, pledged to the Bank Group 100% of its interest in the shares and membership interest of all of the subsidiaries. Additionally, as collateral, Sub-A pledged 100% of its interest in Sub-B and Sub-B pledged 100% of its interest in Sub-C. The Pledge Agreement granted the Collateral Agent, on behalf of the Bank Group, a power of attorney to execute irrevocable proxies to take control of all of the pledged shares and interests upon default of the loan. The assets of all of the subsidiaries were also pledged as collateral.

The Loan Agreement provides that the banks of the Bank Group appoint and authorize a Collateral Agent bank to act on their behalf under the related agreements, including the Pledge Agreement. The Pledge Agreement provides that upon an event of default the voting rights of the pledged shares become vested in the Collateral Agent, which shall then have the sole right to exercise such voting rights. Further, the Pledge Agreement states that all rights to dividends become vested in the Collateral Agent upon default, but that the dividends shall be held in trust from the benefit of all of the banks.

Pursuant to the loan agreement, actions taken by the Bank Group to modify, amend or waive the Loan Agreement, Pledge Agreement or any other agreement, requires the consent of the banks holding more than 50% of the loan obligation. No single bank holds more than 50% of the loan obligation. While the Collateral Agent has been appointed and authorized to act on the Bank Group's behalf, this ability to act could be modified by a vote of the banks holding the majority of the loan obligation. Thus, the Collateral Agent's ability to vote the pledged shares may be limited by the banks holding majority of the loan obligation.

The PE and the subsidiaries defaulted on the loan. Irrevocable proxies were executed in favor of the Collateral Agent giving it the right to vote the shares and to receive dividends. The Bank Group, through the Collateral Agent, never foreclosed on the shares. The Bank Group never took ownership of the shares and never registered the shares in the name of any member of the Bank Group. The PE still

owns the shares, but the PE's shares are voted by the Collateral Agent pursuant to the Irrevocable Proxies. The Collateral Agent, on behalf of the Bank Group, removed the old board of directors for Sub-A and Sub-B and elected a new board of directors for Sub-A and Sub-B.

The new boards of directors of Sub-A and Sub-B want to sell all of the assets of Sub-C to a third party. The transaction may require an HSR filing.

Issue 1

Our issue is determining whether the original PE is the UPE or if the Bank Group's exercise of control over the shares changes the UPE analysis.

Under 801.1(b) control means *holding* 50% or more of the outstanding securities in an issuer and 801.1(c) provides that *holding* includes beneficial ownership. Pursuant to the Statement of Basis and Purpose a person may have beneficial ownership when they have "the right to obtain the benefit of any increase in value or dividends, the risk of loss of value, the right to vote the stock or to determine who may vote the stock, the investment discretion (including the power to dispose of the stock)." Here, the Bank Group, through the Collateral Agent, does have the right to dividends, the right to vote and the power to dispose of the stock, but does not have the risk of loss of value (because it does not own the stock).

Under 801.1(b)(2) a person may have control if they have the contractual power to designate 50% or more of the directors. Here, the banks of the Bank Group, through the Collateral Agent, has the power to vote all of the pledged shares and can, and did, appoint all of the directors of Sub-A and Sub-B.

Questions:

1. Is the Bank Group, as represented by the Collateral Agent, the beneficial owner of the shares? If so, does Bank Group "hold" the shares by virtue of being the beneficial owner of the shares of Sub-A and Sub-B? Yes

2. If the Bank Group does hold the shares as beneficial owner, who would be the UPE? The Collateral Agent's right to vote the shares and collect dividends is on behalf of the Bank Group and its ability to take these actions can be limited at any time by the banks holding the majority of the loan obligations. Would the UPE be Sub-A because it controls 70% of the shares of Sub-B (which then controls 100% of Sub-C)?

3. Does the fact that the Collateral Agent, on behalf of the Bank Group, has the right to elect more than 50% of the directors of Sub-A and Sub-B change the analysis of who is the UPE? It would seem not because the Collateral Agent is still controlled by the banks of the Bank Group and no single bank has more than 50% control.

Issue 2

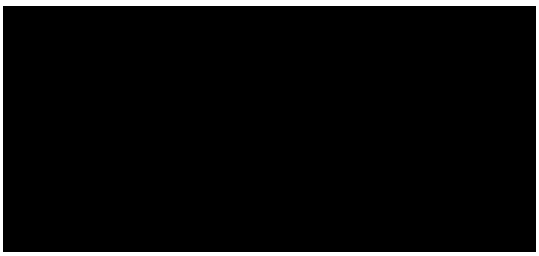
Pursuant to 802.63, for creditors, "an acquisition of collateral or receivables, or an acquisition in foreclosure, or upon default . . . shall be exempt from the requirements of the act if made by a creditor" in a bona fide credit transaction in the ordinary course. California Commercial Code section 9-610

allows a secured party to sell or otherwise dispose of any or all collateral under commercially reasonable terms, subject to various provisions of the Commercial Code. While this is not a formal foreclosure sale under the Commercial Code, it is similar and has the same effect since the Bank Group took control of the shares and is compelling Sub-C to sell its assets under threat of foreclosure.

Question:

Given that the Bank Group has taken control of the voting rights of the shares, threatened foreclosure on the shares and assets of the subsidiaries and is effectuating this sale of assets based on this control, could this sale of assets to a third party fall under the exemption provided in 802.63?

Regards,



Issue 1

1) Yes – I think the bank group does have beneficial ownership of the three subs. No filings required because this is a bona fide debt workout under 802.63

2) Sub A would be the UPE in the sale of Sub C's assets to a third party.

3) Does not change the analysis

Issue 2 The sale of C's assets would not be covered by 802.63 because the third party is not a creditor.