801.1(a)

[redacted]

[redacted]

December 23, 2005

Via Hand Delivery

Nancy M. Ovuka
Compliance Specialist
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: December 12-13, 2005 telephone calls

Dear Nancy:

I am writing to confirm the advice that you provided to [redacted] in New York) and me in the above-referenced telephone calls. In these calls, we posed the following scenarios and you provided the following advice. Please refer to the attached diagrams that illustrate each of these steps.

STEP 1: Merger

Mr. A controls A-1. A-1 creates A-2, A-3, A-4 (which itself creates Various A-4 Subs) and Merger Sub. Merger Sub will merge into Target B (a public corporation that is its own UPE). Target B is the surviving entity but would be controlled by Mr. A. Mr. A and Target B will file under the HSR Act.

HSR Question Re Step #1: None.

STEP 2: Target B Sells Assets & Voting Securities

State "X" has a "State Board" that manages retirement funds for public employees and other state institutions of "State X." Assume that State Board is a state agency under the laws of State X, and is not itself a corporation engaged in commerce.

State Board, along with A-2, forms C-1. State Board has a 99% interest in C-1's profits and in C-1's assets upon dissolution. A-2 has the other 1% interest. C-1 then forms C-2, which then forms C-3 and the Other Various Subs. C-3 then forms a variety of direct and indirect subsidiaries, including Propco LLCs and Propco LPs. (There will be more than 200 Propco LLCs and Propco

[redacted]

[redacted]

LPs in all.) As reflected in the diagram, it is possible that the limited partners in each of the Propco LPs may include corporations; if so, then the corporate limited partner would have an interest of 1% (or less).

Also as reflected in the diagram, all entities below C-1 are 100% owned by C-1 (directly or indirectly).

Immediately after the Step 1 merger, and pursuant to an agreement that is contingent on the Step 1 merger, Target B will sell various assets and voting securities to entities below C-2. More specifically, Target B will sell various assets (consisting of improved real property and related equipment) to the Propco LLCs and Propco LPs, and also will sell various other assets (along with the voting securities of several corporations 100% owned by Target B) to the Other Various Subs.

Please assume further that the commerce and size-of-transaction tests are satisfied, and the size-of-person test does not apply (transaction > $200 million).

> **HSR Question Re Step #2**: Is Target B's sale of various assets and voting securities to Propco LLCs + Propco LPs + Other Various Subs subject to compliance under the HSR Act?
>
> **Answer**: No.
>
> **Analysis**: With reference to Section 7A(c)(4), Rule 801.1(a)(2) and the Statement of Basis and Purpose accompanying the promulgation of the HSR Rules, acquisitions by a state agency are not subject to HSR compliance, at least where the state agency is not itself a "corporation engaged in commerce." Absent clarification from the Commission to the contrary, the PNO applies this principle, by extension, to acquisitions by non-corporate entities controlled directly or indirectly by any such state agency unless there is an intervening corporation in the control chain.
>
> Here, a state agency controls C-1, which in turn controls (directly or indirectly) each of the actual acquiring entities (Propco LLCs + Propco LPs + Other Various Subs). C-1 and the acquiring entities all are non-corporate entities, as are the other entities in the chain of control above the acquiring entities and below C-1 (with the exception of corporations that serve as nominal limited partners in the Propco LPs). Thus, HSR would not apply in the case of acquisitions by the Propco LLCs and the Other Various Subs, where there are no intervening corporations in the chain of control. Similarly, HSR would not apply in the case of acquisitions by Propco LPs, even though they have nominal corporate limited

[redacted]

partners, as those corporate limited partners have an ownership interest of 1% or less and, accordingly, would not "hold" any of the assets being acquired by the Propco LPs.

STEP 3: Lease of Real Property & Equipment

Pursuant to an agreement that is contingent on Step #1 and Step #2, the Propco LLCs and Propco LPs will take the real property and equipment acquired in Step #2 and lease all of it (the "Propco/A-4 Lease") to the Various A-4 Subs. The Propco/A-4 Lease will have an initial term of 20 years, with the lessees having two 10-year renewal options.

The Propco/A-4 Lease will be subject to a temporary lease of these same properties from the Propco LLCs and Propco LPs to Target B ("Propco/Target Lease") until such time as the Various A-4 Subs are prepared to operate the businesses. This temporary arrangement is anticipated to last a few months in most cases, but in some cases may take up to one year.

Assume that: (i) the commerce test is met; (ii) the size-of-transaction test would be met if the transaction were viewed as a reportable acquisition; and (iii) the size-of-parties test would be met or would not apply.

Question Re Step #3: Assuming that the Propco/A-4 Lease does not exhaust the useful life of the real property but would exhaust the useful life of the personal property ("FF&E") covered under the lease. Assume also that, under the terms of the Propco/A-4 Lease, the Various A-4 Subs must replace worn-out FF&E with new FF&E that becomes part of the leased equipment and must be turned over to Propco LLCs and Propco LPs at lease termination. Would the entering into of the Propco/A-4 Lease be an "acquisition" under HSR, at least with respect to the FF&E originally included under the lease, because such lease would in fact exhaust the remaining useful life of that FF&E?

Answer: No.

Analysis: HSR only applies in the case of an "acquisition". In the case of assets covered by a new lease, HSR applicability depends on whether the lease effects the present transfer of beneficial ownership of the assets covered by the lease. The PNO considers a variety of factors in making this determination, among which is the question of whether the lease is anticipated to exhaust the remaining useful life of the property so leased. Here, although the lease in fact would exhaust the remaining useful life of the FF&E, the lessee is obligated to replace that FF&E with new FF&E that becomes part of the leased property (and reverts to the lessor at the conclusion of the lease). For HSR purposes, such an arrangement would be tantamount to the lease simply not exhausting the

[redacted]

remaining useful life of the FF&E in the first place. Therefore, it would not be viewed as a factor suggesting the present transfer of beneficial ownership of the leased FF&E.

(As noted, the PNO considers a "variety of factors" as identified in Interpretation #28 of the ABA Premerger Notification Practice Manual 3d in its overall analysis. For purposes of this confirmation, please assume that the other relevant factors do not themselves suggest the present transfer of beneficial ownership.)

I understand that the PNO does not confirm informal advice in writing. However, if this letter misconstrues or misrepresents our conversions in any way, I would appreciate it if you would call me at the number provided above as soon as reasonably possible. Thank you for your assistance on this matter.

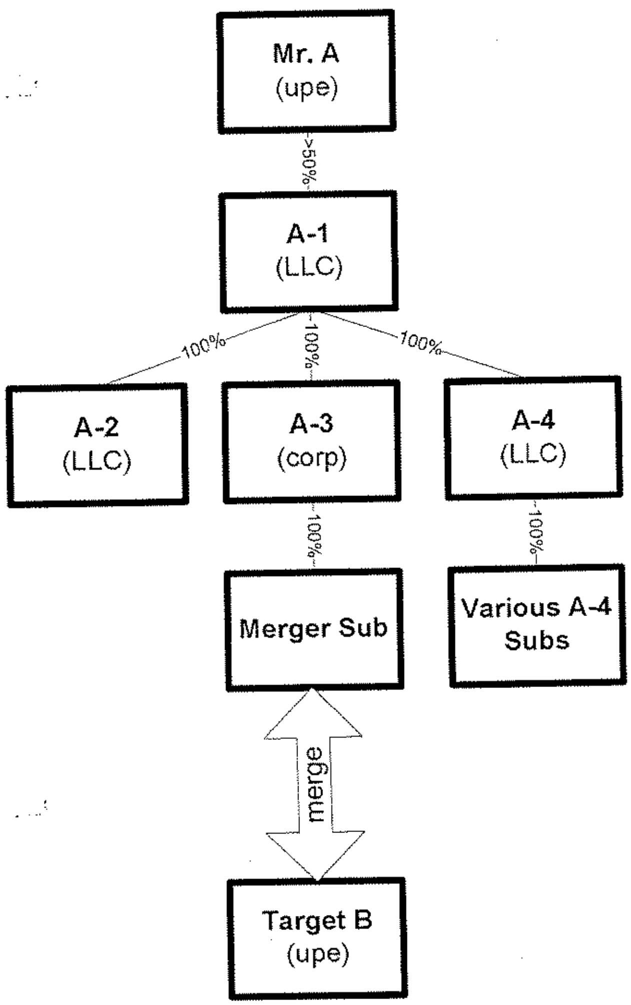
Sincerely,

[redacted]

Attachment

01/03/06
Agree w/ conclusions.
N. Ovuka
M. Verne concurs

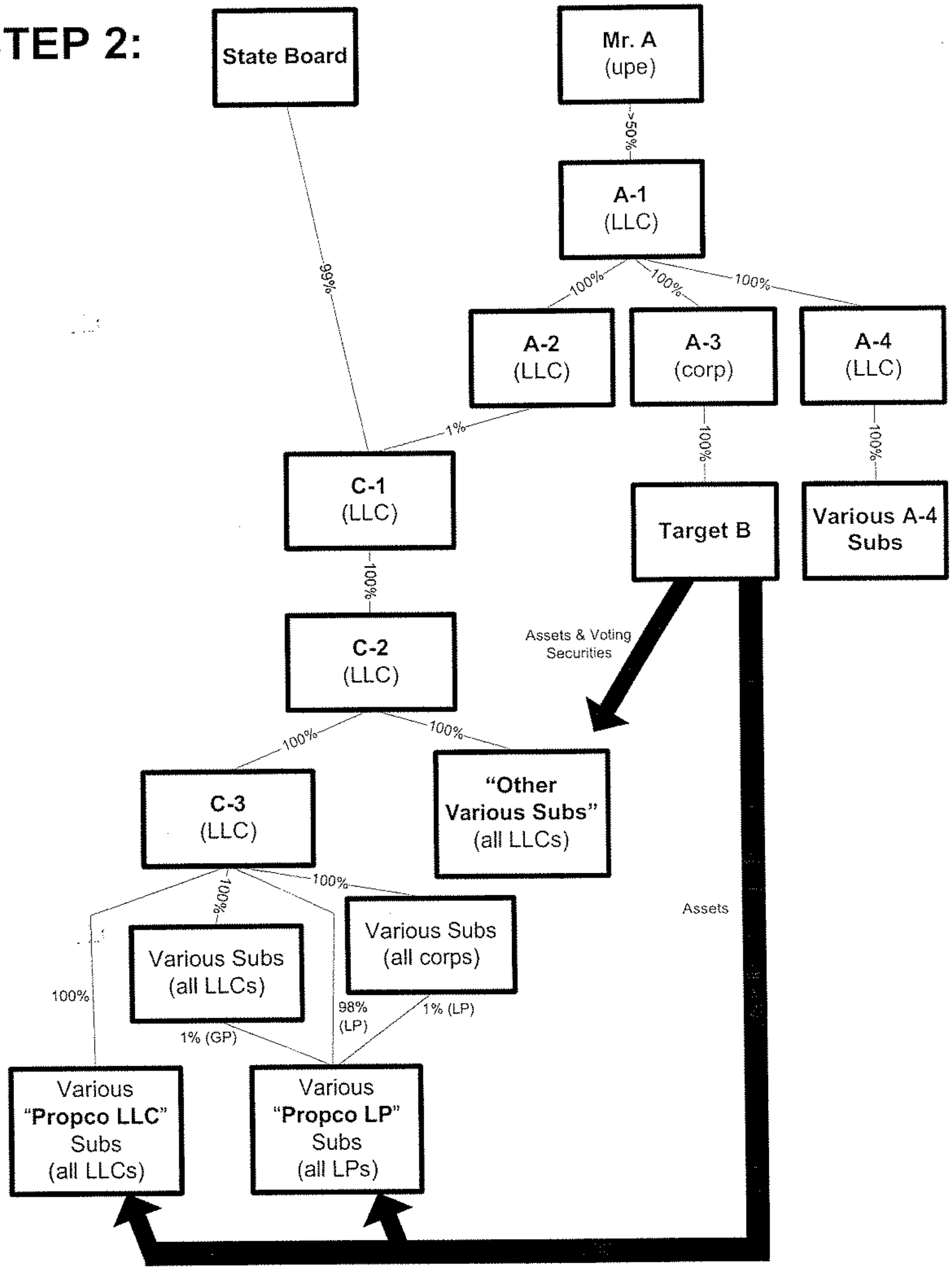
STEP 1:



NY01: 1086821

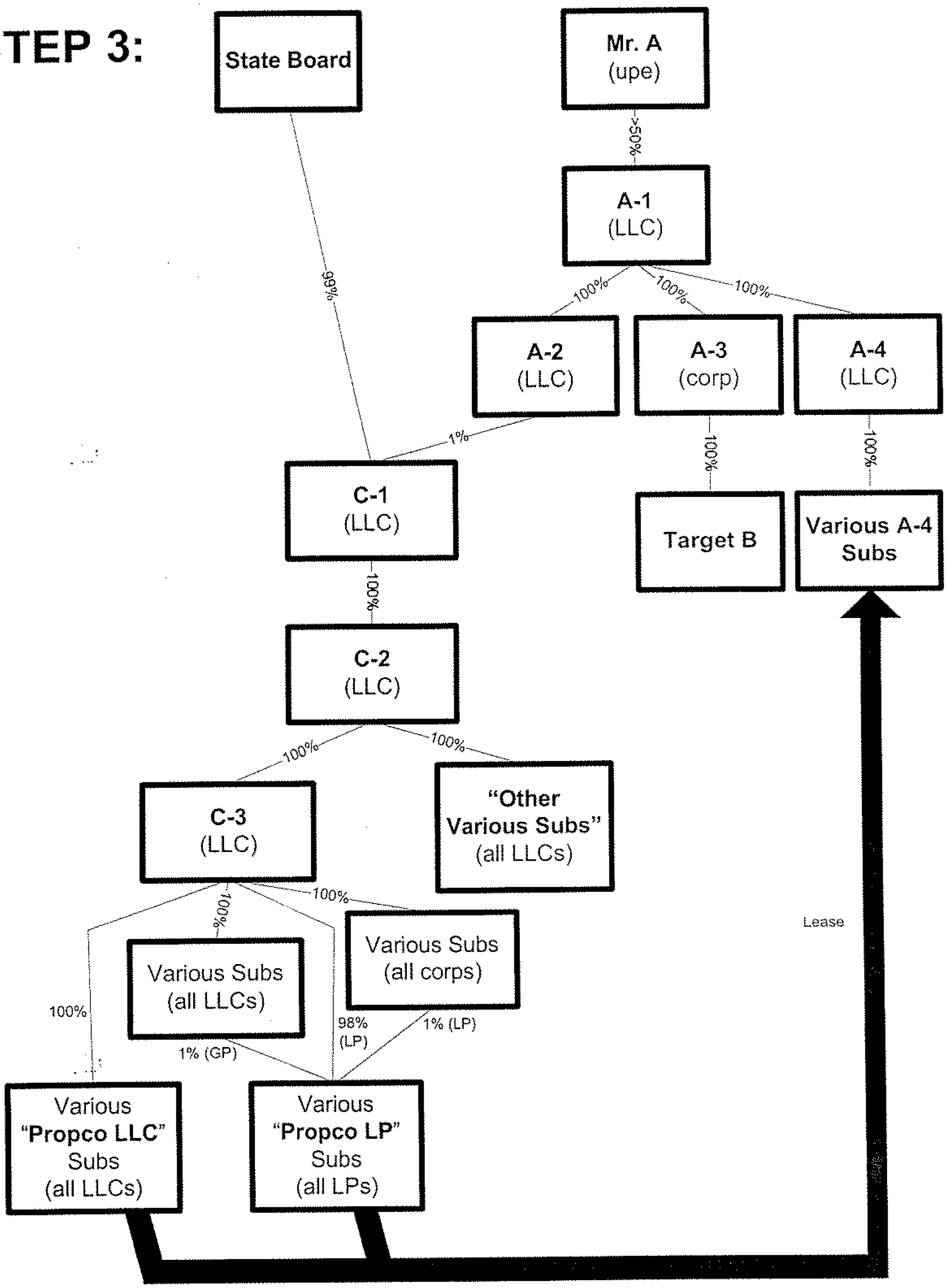
[redacted]

STEP 2:



[redacted]

STEP 3:



[redacted]