

802.4

Verne, B. Michael

From: [Redacted]  
Sent: Monday, April 21, 2008 4:31 PM  
To: Verne, B. Michael  
Cc: [Redacted]  
Subject: Confirmation of Advice

Dear Mike,

Thank you for talking with me today about the HSR reportability of a transaction involving Exchange Traded Funds (ETFs). The rules applicable to this analysis are 802.1(b), 802.4, 802.9, and 802.21.

Our client, Hedge Fund A, intends to purchase voting securities in ETF B; as a result of this purchase Hedge Fund A will hold more than \$63.1 million in voting securities of ETF B, and more than 10% of its voting securities (thus disqualifying Hedge Fund A from the passive investment exemption of Rule 802.9). ETF B's assets consist solely of cash and voting securities of other persons which ETF B acquires in the ordinary course of its business and holds solely for investment purposes; ETF B does not own more than 50% of the outstanding voting securities of any person.

Rule 802.4 provides that an acquisition of voting securities of an issuer (here, ETF B) whose assets consist of assets whose purchases would be exempt pursuant to 7(A)(c)(2) is exempt if the acquired issuer (here, ETF B), including all entities it controls, does not hold other non-exempt assets with an aggregate fair market value of more than \$ 63.1 million. ETF B's cash is exempt under Rule 801.21. Further, ETF B's holdings of voting securities in persons that it does not control do not count towards the \$63.1 million limitation for non-exempt assets, pursuant to 802.4. ETF B has no assets other than its cash and minority stock positions. As a result, the acquisition of ETF B's voting securities is not subject to reporting under the HSR Act.

*Agner -  
BM  
4/22/08*

Please let me know if you disagree with the formulation above.

Thanks

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