

801.1(a)(2)

Verne, B. Michael

From: [REDACTED]
Sent: Monday, September 19, 2011 11:06 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Questions re: Sec. 801.1(a)(2) and HSR Analysis related to a Proposed Transaction

Mike –

We represent Entity A, which, through its wholly-owned indirect subsidiary, Entity B, intends to acquire an approximate 17% interest in a corporation and 17% of a related LLC, for a total consideration exceeding the current size-of-transaction threshold. Entity A is wholly-owned by a foreign province (the "Province"), and was established per its enabling statute for the purpose of managing the funds of its depositors, the Province and its public bodies (and their pension funds), and at the same time contributing to the Province's economic development. For the reasons stated below, we believe that for purposes of 16 C.F.R. Sec 801.1(a)(2), which states that "the term entity shall not include any foreign state, foreign government, or agency thereof (other than a corporation or unincorporated entity engaged in commerce)," Entity A is an "agency" of the Province, and therefore, not an "entity" subject to the HSR Act.

Entity B is a to-be-formed Delaware LP. We would appreciate your assistance in determining whether Entity B also qualifies as an "agency" of the Province, and therefore would not be considered an "entity" subject to the HSR Act. We understand that prior to August 18, 2011, non-corporate entities wholly-owned by an agency of a foreign government would not have been subject to the HSR Act (See Informal Staff Opinions #0412011 and #0604003) but that under the current Rule 801.1(a)(2), this is no longer the case.

ENTITY A:

The following facts are applicable to Entity A:

- (1) Entity A was formed under specific legislation
- (2) Most of its Board of Directors are appointed by and can be removed by the Province, with the President and CEO chosen by the rest of the board members and approved by the Province
- (3) Entity A is chartered for the purposes of "receiving monies on deposit as provided by law and managing them with a view to achieving optimal return on capital within the framework of depositors' investment policies while at the same time contributing to [the Province's] economic development"
- (4) Entity A sets the investment policy for its portfolios and assists its depositors with respect to their allocation between the portfolios
- (5) The power to dissolve Entity A resides with the Province
- (6) The property belonging to Entity A is the property of the Province, but Entity A may use the property as security or encumber it as though it were not the property of the Province
- (7) Members of the Board, and officers and employees of Entity A cannot be sued for any official act performed in good faith in the exercise of their functions

Based on the above, and in conjunction with our review of Informal Staff Opinion #1103006 and Interpretation 11, ABA Premerger Notification Practice Manual (4th ed. 2007)("Premerger Manual"), we believe Entity A is an "agency" of the State, and therefore, is not an "entity" subject to the HSR Act. Please confirm whether you agree with this analysis.

ENTITY B:

The following facts are applicable to Entity B:

- (1) Entity A's enabling legislation states that all wholly-owned subsidiaries are mandataries of the Province and the provisions of Entity A's enabling legislation are applicable to its wholly-owned subsidiaries
- (2) Entity B's purpose is to serve as a vehicle to hold investment interests separate from the Province

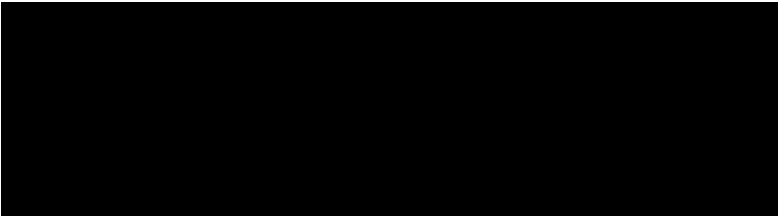
- (3) The Board of Directors (or equivalent) and Chief Executive will be appointed by Entity A and will report to Entity A
- (4) Neither the Province nor Entity A will have the right to approve of Entity B's regulations, investment plans or budgets
- (5) Entity A will hold the right to dissolution of Entity B
- (6) Any ownership rights of any property held will ultimately reside with Entity A
- (7) Entity B's officers and employees cannot be sued for any official act performed in good faith in the exercise of their functions

Based on the above facts, would Entity B qualify as an "agency" of the Province, and therefore be exempt from the HSR Act because it is not an "entity"?

Additionally, if the acquisition to be made by Entity B is reportable under the HSR Act, based on our review of Informal Staff Opinion #1103006, Interpretation 11, Premerger Manual, and Interpretation 32, Premerger Manual, we believe no information would be required from Entity A (assuming it is an "agency" of the State) or any of Entity A's other controlled holdings, provided those holdings are not commonly controlled by Entity B's (holding company) parent, which is itself a wholly-owned subsidiary of Entity A. Can you please confirm that this is correct?

Thank you in advance for your help.

Best regards –



AGREE THAT B IS
NOT AN ENTITY.
K. WALSH CONWAS.
BN
9/20/11

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