

## **Sheinberg, Samuel I.**

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**From:** HSRHelp  
**Sent:** Monday, May 2, 2022 10:09 AM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora  
**Subject:** FW: Question Regarding State Agencies Under HSR Rule 801.1(a)(2) and HSR Act Section 7A(c)(4)

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**From:** Musick, Vesselina <vmusick@ftc.gov>  
**Sent:** Monday, May 2, 2022 10:09:15 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** RE: Question Regarding State Agencies Under HSR Rule 801.1(a)(2) and HSR Act Section 7A(c)(4)

We do not agree; in our view, Corporation A is an entity.

Kind regards.

**Vesselina Musick**

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**From:** [REDACTED]  
**Sent:** Friday, April 29, 2022 10:22:09 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** Question Regarding State Agencies Under HSR Rule 801.1(a)(2) and HSR Act Section 7A(c)(4)

Dear PNO,

We would like to confirm that Corporation A qualifies as an agency of a foreign government and therefore is not an entity under HSR Act section 7A(c)(4) and Rule 801.1(a)(2). Rule 801.1(a)(2) provides that “the term ‘entity’ shall not include any foreign state, foreign government, or agency thereof (other than a corporation or noncorporate entity engaged in commerce), nor the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation or unincorporated entity engaged in commerce).” We understand that the PNO’s view is that the fact that a government agency is a corporation “engaged in commerce” (for example the FDIC) does not change its status as a nonentity for purposes of the HSR Act, but that corporate or non-corporate entities not themselves government agencies but instead controlled by an agency, would be considered entities under the Act. Here, we believe that Corporation A qualifies as a foreign government agency for the following reasons:

Corporation A was established by legislation of a government of a foreign country (the “Act”). The Act establishing Corporation A governs a public employee retirement system that manages the retirement benefits of certain government employees in the foreign country. The Act established a dual governance model for certain pension plans under which Corporation A was established as administrator of the pension plans and trustee of the pension funds, and Corporation B was established to be responsible for pension plan design, setting contribution rates and benefits. Dissolution of Corporation A and B can only be accomplished by an additional act of the legislative body that passed the Act, and in case of such dissolution the assets of Corporation A and B would vest in successor entities identified or provided by the legislature.

The Act specifies that Corporation A may pass by-laws and resolutions of its own regulating its proceedings and affairs, and that the composition of its board and method for choosing board members are as specified by the by-laws of Corporation B. The composition of Corporation B’s board and method for choosing its board members are also specified by Corporation B’s by-laws. The composition of the initial boards of Corporation A and B was set by government executives. Therefore, membership on the boards of Corporation A and B springs from the Act.

Both Corporation A and Corporation B are corporations without share capital, meaning that they have no shareholders and are not owned by any party including by any government entity, or the employers or employee members of the pension plan. As is expressly stated in their governing legislation, neither Corporation A nor Corporation B are “crown agencies” meaning they are not (in their jurisdiction of formation), owned, controlled or operated by the relevant

foreign government and do not operate under the authority of such foreign government, which in our view does not preclude Corporation A from qualifying as an agency established by and organized under the laws of a foreign sovereign government under HSR Act 7A(c)(4) and Rule 801.1(a)(2). We would further note that Corporation A and Corporation B are exempt from tax on investment income in their jurisdiction of formation which is in part based upon their role in administering the applicable pension plans for the benefit of government employees.

In sum, each of Corporation A and B are corporations established pursuant to the Act to administer and provide pension benefits primarily to public employees, and their duties and obligations arise from that Act. Corporation A and B were established without share capital and therefore do not have owners per se, and their creation and the delineation of their object and powers pursuant to Act establishes that each corporation, and in particular for our purposes in applying HSR Rule 801.1(a)(2), Corporation A, should be viewed as an agency established and organized under the laws of a foreign sovereign government. For these reasons, our view is that Corporation A is not an entity under HSR Rule 801.1(a)(2).

Please confirm whether you agree with this assessment.

Many thanks,

[Redacted signature]

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[Redacted signature]