

Haynes, Lanea

From: Berg, Karen E.
Sent: Friday, November 17, 2017 12:31 PM
To: Gillis, Diana L.
Subject: FW: HSR Inquiry

From: Berg, Karen E.
Sent: Wednesday, October 04, 2017 3:27 PM
To: [REDACTED] Walsh, Kathryn E.; Whitehead, Nora; Gillis, Diana L.; Shaffer, Kristin
Cc: [REDACTED] Carson, Timothy; Sheinberg, Samuel I.
Subject: RE: HSR Inquiry

Apologies for the delay in responding.

Informal Interpretation 0211015 no longer reflects the position of the PNO. 7Ac1 is not available under these facts because Bank B is exiting the business of issuing and servicing credit cards.

7Ac11, which is applied by way of Rule 802.64, is an exemption for institutional investors and is also unavailable under these facts because the acquisition by Bank A is not for the purpose of investment, but rather to augment its credit card business. Unfortunately, Informal Interpretation 0902004 is not a helpful one, and we will be taking it down.

Karen

From: [REDACTED]
Sent: Friday, September 29, 2017 1:19 PM
To: Berg, Karen E.
Cc: [REDACTED]
Subject: HSR Inquiry

Ms. Berg -

We are seeking the PNO's confirmation regarding the exemption from the filing obligation under the HSR Act of the acquisition of credit card portfolios by Bank A from Bank B. For purposes of this inquiry, assume that the size of persons and size of transaction tests are met.

Facts:

Under the terms of a purchase agreement, Bank A would purchase all or substantially all credit card receivables, accounts, and related account assets including, the related books and records ("Assets") that Bank B owns. In addition to other banking services, Bank A is in the business of issuing credit cards. It acquires credit card portfolios in the ordinary course of its business. It would be purchasing the credit card accounts to operate as a portion of its normal and customary business, and not for purposes of reselling said accounts.

After the closing, Bank B intends to stop offering its own credit cards and collecting the resulting receivables. Bank B (and/or Bank B's affiliates) will enter into a joint marketing agreement ("JMA") with Bank A for the provision of credit cards to Bank B's (and its affiliates') customers. The JMA will provide that Bank A and Bank B will co-market credit cards, both to Bank B's (and its affiliates') existing customers and to new customers. Bank B will continue, after the closing, to offer and solicit other consumer loans and products. Bank B will have the right to again offer its own credit cards only after the JMA terminates. The following sets out the continuing credit card-related aspects of Bank B's operations under the JMA as well as other aspects of its continuing operations post-closing:

Bank B will jointly market/cobrand the credit card portfolio being sold as well as new accounts solicited under the JMA. Such marketing activities will include retaining Bank B's logo on the face of the credit cards and requiring Bank B's approval of all marketing materials that contain Bank B's marks. The receivables and accounts generated by the jointly marketed credit cards branded as Bank B credit cards will be owned and serviced by Bank A.

Bank B will cross-sell the credit cards to its new and existing customers when those customers sign up for deposit accounts. Bank B (and its affiliates) will also cooperate and assist Bank A in the solicitation of credit cards to new and existing customers via other channels as mutually agreed.

Bank B will enter into a new agreement with Visa in support of the JMA with the aim to encourage credit card portfolio growth.

Bank B will receive payments from Bank A for new credit card customers that Bank A obtains as a result of Bank B's (and its affiliates') efforts.

Bank A will not be acquiring any equipment or tangible personal property from Bank B other than the Assets, nor will any employees of Bank B be transferred to Bank A.

For a period of time after the sale, Bank B, along with its service vendor, will act as an interim servicer of the credit card accounts that have been sold to Bank A.

Analysis:

7A(c)(1) acquisition in the ordinary course of business:

In Informal Interpretation 0211015, the acquiring bank was acquiring the entire credit card portfolio of the target bank ("except possibly for certain non-performing accounts"), along with the related books and records. The target bank was no longer going to retain any of its credit card accounts post-closing. The target was going to retain its employees, furniture and equipment and was going to service its customers post-closing during a transition period. The letter requesting the informal interpretation said that after the closing the target would not be able to issue its own credit card accounts. Both buyer bank and the target would be able to seek new accounts for cards with the target bank's name, with each company having the right to approve marketing material developed by the other. The acquiring bank would own the new accounts, but would pay the target a per-account fee plus a percentage of receivables.

In that letter, the letter's author said that in a phone conversation, the PNO had indicated that the "continued general credit card activity described" and the target bank's ability to be involved with private label credit card programs, even though the target had no stated present intent to do so, "meant that [the target bank] was not exiting the [credit card] business." It is not clear from the letter whether the right to be involved with private label credit card programs, even though the target had no stated intent to do so, had any bearing at all on the analysis. The transaction was exempt from filing as an acquisition of goods or realty in the ordinary course of business under 7A(c)(1).

7A(c)(11) acquisition by a bank for the purpose of investment:

In Informal Interpretation 0902004, the acquiring bank was purchasing all or substantially all of the credit card accounts of the target and would then operate those accounts, as a portion of its normal and customary business. The target's credit card customers would become the acquiring bank's customers and the acquiring bank would own the receivables, just as in the case of the intended transaction described above. Just as in the case of Bank A and Bank B, described above, the acquiring bank was not acquiring all of the assets of the target, but it was acquiring all or substantially all of the credit card accounts of the target. In that case, the PNO applied the exemption set forth in 7A(c)(11), which exempts an acquisition by any bank solely for the purpose of investment, of assets in the ordinary course of its business. In that case, the PNO apparently agreed with the applicability of the "solely for the purpose of investment" exemption even though the acquiring bank was going to operate the assets, presumably because (a) acquiring credit card accounts was in the ordinary course of the buyer's business and (b) the acquiring bank was not intending to sell the credit card accounts.

Conclusion:

Based on the interpretations above, we believe that that the proposed transaction would be exempt from an HSR filing for the following independent reasons:

1. Even though Bank B is selling all or substantially all of its credit card accounts and would no longer issue its own new credit cards or service the receivables (other than interim servicing), by virtue of its ongoing marketing and sales activities pursuant to the JMA described above, Bank B will continue to remain in the credit card business and, pursuant to Informal Interpretation 0211015, the transaction should be exempt from filing as an acquisition by Bank A of goods or reality in the ordinary course of business under 7A(c)(1).

2. Because Bank A is a bank, the transaction should be exempt from filing under 7A(c)(11) as an acquisition by a bank, solely for the purpose of investment of assets in the ordinary course of its business, as was the case in Informal Interpretation 0902004.

We would appreciate it if you would confirm your agreement with our conclusion.

