

802.52

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, May 07, 2008 12:23 PM
To: Verne, B. Michael
Subject: Question about 802.52 assessment

Mike,

I am working on a transaction which I believe is exempt under HSR Rule 802.52, but I would like to confirm my analysis.

Target is a foreign issuer, organized under the laws of and with principal offices in Country X. Buyer, likely a US person, is purchasing approximately 25% of the voting securities of Target. A foundation (Foundation) owns 100% of the voting securities of Target. As detailed below, Foundation is controlled by the federal government of Country X and two of the states thereof. A simplistic background of how Foundation came to hold Target is as follows. Foundation was created as part of a comprehensive project for the smooth termination of certain mining activities which is heavily influenced by the federal government and the relevant states. Foundation purchased Target as part of a buyout of the shares of a company (Company) for nominal consideration. Company had significant environmental problems and other liabilities, and its net value was close to zero at time of purchase by Foundation. Foundation was established with the following mandate: divide Company into "green" and "red" business, and then sell off the profitable green businesses and use the profits from those sales to address the environmental problems and liabilities of the red businesses. Target holds the green business.

As noted above, Foundation holds 100% of Target outstanding voting securities. In addition, Target has a supervisory board and an executive board. The supervisory board is similar in function to the board of directors of a US issuer, and Foundation has the right to appoint 50% of the supervisory board, with the other 50% made up of employee representatives as required by Country X law. Among other duties, the supervisory board appoints the executive board, which is then responsible for day to day operations similar to officers of a US issuer. On this basis, it seems clear that Foundation controls Target.

Based on the following facts, I am of the view that Country X and two of the states thereof control Foundation, and therefore 802.52 applies. A foundation structure in Country X is often used as a means of holding a charitable trust, but this Foundation has a business purpose. Foundation also has a supervisory board (or an entity very similar in function) and an executive board. The Foundation Charter dictates the constitution of the supervisory board. Based on the terms of the Charter, certain members of the board are nominated based on their office within the federal government or states thereof, and the federal government and states thereof have the right to appoint certain additional board members. On this basis, the supervisory board consists of more than two-thirds representatives from or appointed by the federal government of Country X and states thereof. The supervisory board appoints the executive board members who manage the business on a day to day basis, and also approves business plans, budgets and other significant decisions, and otherwise supervises the overall management of Foundation. With respect to the economic interests in Foundation, although it is not a charitable trust there are no membership units. Any profits are retained by Foundation to fund the clean up and deal with the liabilities of the red businesses. In addition, upon dissolution of Foundation, one-third of the assets would go to the federal government of Country X and two-thirds to states thereof, to be used either to address the burdens of the red business or for other charitable purposes.

I believe that Foundation is most similar to a US non-corporate entity. If so, the federal government of Country X and states thereof would be deemed to control because they receive 100% of the assets of the Foundation upon dissolution. Alternatively, if you analyze Foundation as a trust, it would also be deemed to be controlled by the federal government and states thereof because these entities retain a reversionary interest and because they have the right to appoint more than 50% of the supervisory board (akin to trustees). Finally, I don't think that Foundation should be viewed as a corporate entity, but even if it was, the federal government and states thereof would be deemed to control because they have the right by Charter to appoint more than half the supervisory board of the foundation.

5/7/2008

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On these facts, please let me know if you agree that Foundation is controlled by a foreign government, and because Foundation controls Target the proposed acquisition of Target shares is exempt under 802.52.

Many thanks,

[REDACTED]

AGREE THIS IS
EXEMPT UNDER 802.52
BM
5/7/08