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Verne, B. Michael

From: [REDACTED]
Sent: Friday, March 11, 2011 11:55 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR Advice

Hi Mike,

As we discussed earlier this week, we represent a public institution ("Institution") that is wholly-owned by a foreign sovereign nation ("Sovereign") which is interested in acquiring a reportable amount of voting securities of a U.S. issuer. The Institution, which was established as an independent legal body, has the authority to invest funds allocated for investment by the Sovereign. For the reasons stated below, we believe that for the purposes of the HSR Act, the Institution is an "agency" of the Sovereign, and therefore not an "entity" subject to the HSR Act.

Under the HSR Act and Rules, a government "agency" is not subject to the Act, even if it is in corporate form; however, a corporation that is engaged in commerce but controlled by a foreign governmental "agency" is an entity subject to the Act. ("A corporation controlled by an agency, which itself is not an agency, is an entity. An agency which is a corporation is not [an entity]." Informal Staff Opinion 0008001 (Aug. 8, 2000).)

In informal interpretations, the PNO has looked to the corporation's enabling legislation to determine whether it was created as an "agency" of the government or a corporation engaged in commerce. (Interpretation 11, ABA Premerger Notification Practice Manual (4th ed. 2007) ("Premerger Manual") The PNO has agreed that entities with similar independent legal personality are government agencies where they are formed under specific legislation (Informal Staff Opinion 0811007 (Nov. 17, 2008); Informal Staff Opinion 9503021 (Mar. 23, 1995)); their Boards of Directors are largely appointed by the government (Informal Staff Opinion 0903003 (Mar. 4, 2009); Informal Staff Opinion 9302006 (Feb. 18, 1993)); their Chief Executives are appointed by the government (*Id.*); their government must approve their investment plans and budgets (*Id.*); they are chartered for the purpose of pursuing a public interest, such as making investments on behalf of the government (Informal Staff Opinion 0805002 (May 6, 2008)); and/or the power to dissolve the organization is confined to the government. (Informal Staff Opinion 9503021 (Mar. 23, 1995)).

Here, the enabling legislation of the Institution sets forth the creation of a public body wholly owned by the Sovereign and subject to its supervision; the Institution receives funds from the Sovereign for the purpose of investing those funds in the public interest; the Institution is responsible for establishing investment policy for the Sovereign; the Institution's Board of Directors are state employees appointed by government decree; and the Institution's investment funds vest in the Sovereign upon the Institution's dissolution or liquidation.

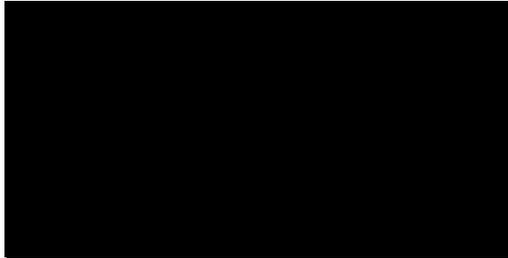
Second, for HSR purposes, the touchstone for determining whether an entity is a "corporation" is whether that entity issues "voting securities," with "voting securities" defined as "any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer." 16 C.F.R. §801.1(f)(1)(i). The Institution's organizational document makes no provision for voting securities. Rather, the appointment of the Institution's directors is entirely within the control of the Sovereign. Since the Institution does not issue voting securities, it should not be considered an "entity" potentially subject to the HSR Act.

Based upon these two arguments, we believe that the Institution itself is not an "entity" subject to the reporting requirements of the HSR Act. Therefore, any acquisitions made by the Institution itself or by any non-corporate subsidiaries controlled by the Institution, would not be subject to the HSR Act.

It also follows from this that acquisitions in excess of the HSR threshold of U.S. assets or of a U.S. issuer may be reportable if those acquisitions are made by a corporation controlled by the Institution ("Investment Corporation"). However, in the case of such acquisitions, no information would be required from the Institution or any of its other holdings that are not controlled by the Investment Corporation. This is supported by Interpretation 11 in the Premerger Manual, which concluded that "if the government organization is not an 'entity' under the [HSR] Act, it cannot be an acquired or acquiring person subject to the Act." Furthermore, in Interpretation 32 of the Premerger Manual, the PNO also concluded that an "agency" of a foreign state is not an entity under the HSR rules, but a corporation engaged in commerce and controlled by the "agency" is an entity under the Rules. In such an instance, "if the corporation is required to file, it would be its own UPE."

Lastly, we note that while the Institution is treated as a governmental agency for HSR purposes, and not a corporation engaged in commerce, the HSR analysis does not have any bearing on the treatment of the Institution under other regulatory regimes. The HSR analysis flows from the very specific legislative and regulatory regime that is unique to the HSR Act.

Please let me know if you disagree with the above analysis. As always, thank you for your time and assistance.



AGREE -
BM
3/14/11

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