

7A(c)(4)

801.15

Verne, B. Michael

From: [REDACTED]
Sent: Monday, December 05, 2011 12:29 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Question Regarding Revised 801.1(a)(2)

Hi, Mike -

I have a question concerning a follow-on acquisition related to the proposed transaction that you discussed with [REDACTED] in the attached email exchange. Appropriate HSR filings were made for the transaction (the structure of the transaction changed slightly, as described below) and the HSR waiting period was terminated early. My current question relates to the recent changes to 801.1(a)(2) and whether Fund B's current holdings of voting stock in Corporation B must be aggregated with the value of any additional voting stock in Corporation B that Fund B may acquire in the future.

Subsequent to the termination of the HSR waiting period for the transaction you discussed with Sandy, Corporation A (which was controlled by Fund A as set forth below) was merged into a newly created wholly owned subsidiary of Corporation B (which was controlled by Fund B as set forth below), with Corporation A surviving as a wholly owned subsidiary of Corporation B. Fund A and other Corporation A shareholders received cash and voting securities in Corporation B in exchange for their shares in Corporation A. Post-transaction, Corporation B became its own UPE with Fund A and Fund B each holding approximately 40% of Corporation B's outstanding voting securities and other third parties holding the remaining Corporation B voting securities.*

We understand that Fund B now is considered an "entity" under revised rule 801.1(a)(2), since it is a "non-corporate entity engaged in commerce" that is not itself an agency of the government, although it is controlled by a state agency. Fund B may acquire additional voting securities of Corporation B in the future. Fund B currently holds voting securities of Corporation B, the initial acquisition of which was exempt pursuant to 7A(c)(4) and old 801.1(a)(2). Suppose that Fund B's current holdings of Corporation B voting securities, if aggregated with Corporation B voting securities that Fund B intends to acquire, will result in Fund B holding voting securities of Corporation B valued in excess of \$66 million (or the adjusted threshold then in effect). Assume that such a proposed acquisition will increase Fund B's per centum share of Corporation B outstanding voting securities. As stated above, Fund B currently holds less than 50% of the outstanding voting securities of Corporation B.

Is Fund B required to make an HSR filing in connection with such an acquisition of Corporation B voting stock? Although 7A(c)(4) is not one of the exemptions explicitly listed in 801.15(a), it seems counter-productive to require aggregation and, potentially, an HSR filing when the initial acquisition of the Corporation B voting stock currently held by Fund B was exempt. The state agency and Fund B have not changed, and Fund B even controlled Corporation B at one point because it held 50% or more of Corporation B's outstanding voting stock. While we understand that the rationale for the change to 801.1(a)(2) was to create uniformity in the treatment of corporate and non-corporate entities controlled by state agencies, by not also amending 801.15, the change could impose an HSR filing requirement based on a past acquisition that was not reportable under the prior version of the regulation. Thus, an interpretation that does not expand the scope of HSR to trigger a filing based on a previously non-reportable transaction seems warranted on these facts.

*You advised that the main transaction was not exempt under either 7A(c)(4) or 802.30(a). Since Fund A and Fund B were (and are currently) non-corporate entities controlled by a state agency, however, they were not considered "entities" for purposes of old 801.1(a)(2) and thus, Corporation B reported as the acquiring person and Corporation A reported as the acquired person. The acquisition of Corporation B shares by Fund A was exempt under 7A(c)(4) and old 801.1(a)(2). The acquisition of Corporation B shares by the other Corporation A shareholders did not meet the HSR size-of-transaction threshold.

As always, many thanks for your guidance. Please let me know if you have any questions or would like to discuss the transaction described above.

Best regards,

██████ – aggregation would be required because as you noted 801.15(a) does not include 7A(c)(4), however, you said that Fund B held more than 50% of Corp B at one point. If Fund B filed for and crossed the 50% threshold at some point during the year following ET, it can rely on 802.21 to acquire any amount of additional shares. Here is the relevant discussion:

Acquisitions exempt under section 7A(c)(4) because they involve transfers to or from a Federal agency or from a State or political subdivision are deemed held for purposes of later acquisitions. If the later acquisition involves the transfer of assets of, or voting securities issued by, a Government agency, it will also be exempt. On the other hand, if a Government agency were to make an exempt transfer of voting securities of a non-governmental issuer, and if the acquiring person were later to purchase additional voting securities of the same Issuer, all the holdings of that issuer's voting securities by the acquiring person must be aggregated by the acquiring person to determine its holdings. This aggregation is appropriate because the fact that voting securities were acquired from a governmental entity does not affect the possible use of such securities by the acquiring person to influence or control the issuer.

BW
12/5/11