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Verne, B. Michael

From: [REDACTED]
Sent: Friday, October 12, 2012 2:13 PM
To: Verne, B. Michael
Subject: CONFIDENTIAL - Non-Stock Non-Profit Corporation Question

CONFIDENTIAL

Mike -

Hope all is well.

We have a question relating to the acquisition of membership interests of a Michigan non-profit membership corporation. As the PNO has reviewed in prior informal interpretations, the Michigan statute pertaining to governance of non-profit, membership (i.e., non-stock) corporations MCL § 450.2505, set out below, allows for such a corporation's organizing documents to provide for either the election or appointment of directors by the members. Further, MCL § 450.2506, also set out below, allows for multiple classes of membership, and specifies that the corporation's organizing documents may provide for either the election or appointment of directors within each member class separately.

MCL § 450.2505 (2) provides that, "[t]he articles of incorporation or a bylaw adopted by the shareholders, members, or incorporators of a corporation organized on a stock or membership basis may specify the term of office and the manner of election or appointment of directors. If the articles of incorporation or bylaws do not so specify the term of office or manner of election or appointment of directors, the first board of directors shall hold office until the first annual meeting of shareholders or members. At the first annual meeting of shareholders or members and at each subsequent annual meeting the shareholders or members shall elect directors to hold office until the succeeding annual meeting, except in case of the classification of directors permitted under this act."

MCL § 450.2506 provides that "(1) The articles of incorporation or a bylaw adopted by the shareholders or members of a corporation organized upon a stock or membership basis may provide that in lieu of annual election of all directors the directors be divided into 2 or more classes, to be elected or appointed for such terms and in such manner as therein specified. If the articles of incorporation or the bylaws do not so specify the term of office for the classes of directors, the term of office of directors in the first class shall expire at the first annual meeting of shareholders or members after their election, and that of each succeeding class shall expire at the next annual meeting after their election corresponding with the number of their class. At each annual meeting after such classification, a number of directors equal to the number of the class whose term expires at the time of the meeting shall be elected to hold office until the next annual meeting corresponding with the number of their class. (2) A corporation having more than 1 class of shares or membership may provide in its articles of incorporation or a bylaw adopted by each class of shareholders or members for the election of 1 or more directors by shareholders or members of a class, to the exclusion of other shareholders or members."

The PNO has taken the position in prior informal interpretations that where, pursuant to Section 450.2505, the membership interests in a Michigan non-profit membership corporation entitle the members to vote for the election of directors, the acquisition of such membership interests is treated as the acquisition of voting securities. (See, e.g., FTC Informal Interp. #0707021, available at <http://www.ftc.gov/bc/hsr/informal/opinions/0707021.htm>; FTC Informal Interp. #0609014, available at <http://www.ftc.gov/bc/hsr/informal/opinions/0609014.htm>; FTC Informal Interp. #0111012, available at <http://www.ftc.gov/bc/hsr/informal/opinions/0111012.htm>.)

It would be consistent with these interpretations to conclude that, where a corporation's articles of incorporation or bylaws specify that membership interests do not entitle the holder to vote for the election of directors, but rather provide for the appointment of directors, an acquisition of such membership interests is not considered to be the acquisition of voting securities.

Our question pertains to the following hypothetical facts:

- NPCorp currently is organized as a Michigan non-profit membership corporation with a single class of members. NPCorp's articles of incorporation and bylaws entitle the holders of its membership interests to vote for the directors with one vote per member.
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- NPCorp will be reorganized as a non-profit membership corporation with two classes of members.
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- NPCorp's current members collectively will hold all of the ClassA membership units, which will be substantially identical to the pre-transaction membership units. That is, each ClassA member will be entitled to one vote per member for the ClassA directors, which always will constitute a majority of the NPCorp board of directors.
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- Member, which is a non-profit corporation with no previous relationship to NPCorp, will become the sole ClassB member, holding all of the ClassB membership units. Pursuant to the articles of incorporation and bylaws of NPCorp, as amended, Member will appoint the ClassB directors, which will constitute under all circumstances less than half of the NPCorp Board of Directors. Member's initial appointees would be as identified in the definitive agreement implementing the acquisition. Thereafter, Member's appointees would require ratification by the NPCorp Board pursuant to a sequential process that would include up to three slates of different nominees presented by Member, with the NPCorp Board of Directors approving one of the three.

We believe that, consistent with the informal interpretations cited above, the ClassB membership interests are not voting securities within the meaning of 16 C.F.R. § 801.1, and that Member's acquisition of the ClassB membership units should be treated as the acquisition of non-voting securities, the acquisition of which is not subject to the reporting requirements of the HSR Act. Please let us know if you agree.

Thanks very much for your thoughts. If you have any questions or if you need any additional information, please let me know.

Best regards -

[Redacted signature]

[Redacted block]

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10/24/12

K. WALSH CONCURS

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