

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, February 04, 2014 12:53 PM
To: Verne, B. Michael; Walsh, Kathryn
Cc: [REDACTED]
Subject: 801.1(a)(2)

Mike and Kate,

We represent a foreign issuer ("Corporation A") that intends to acquire a controlling interest in another foreign issuer in exchange for consideration in excess of the reporting thresholds. Corporation A is an entity engaged in commerce. The acquisition is not exempt under Sections 802.4, 802.50, or 802.51.

Corporation A is controlled by Joint Stock Corporation B ("JSCB") because JSCB holds more than 50% of Corporation A's voting stock. Although JSCB was formed as an independent joint stock company, it is wholly-owned by a foreign government and was established for the purpose of holding interests of the state. JSCB acts solely pursuant to decisions of the president, the government as sole shareholder, and its government-appointed directors.

Under the HSR Act and Rules, a government "agency" that is a corporation is not an entity. A corporation controlled by an agency, which itself is not an agency, is an entity. (Informal Staff Opinion 0008002 (Aug. 9, 2000)).

PNO has looked to a corporation's enabling legislation or charter 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)). In informal interpretations, the PNO has agreed that corporations with independent legal personalities, including joint stock companies, are "agencies" when formed under specific national legislation (Informal Staff Opinion 0811007 (Nov. 17, 2008)); their directors are largely appointed by the government (Informal Staff Opinions 9302006 (Feb. 18, 1993), 0811007 (Nov. 17, 2008)); their chief executives are appointed by the government (Informal Staff Opinion 9302006 (Feb. 18, 1993)); the government must approve their investment plans and annual budgets (*id.*); they are established for the purpose of pursuing a public interest, such as making investments on behalf of the government (Informal Staff Opinions 1103006 (March 14, 2011), 9302006 (Feb. 18, 1993)); their property is the property of the government (Informal Staff Opinion 1109018 (Sept. 20, 2011)); their employees are employees of the government (Informal Staff Opinions 0708004 (Aug. 16, 2007), 1103006 (Mar. 14, 2011)); the power to dissolve the corporation is confined to the government (Informal Staff Opinion 1103006 (March 14, 2011)); and their investment funds vest in the state upon dissolution (*id.*).

Here, JSCB was established by the government as a "continuation" of the government for the purpose of holding shares of state-owned enterprises and collecting dividends from them. JSCB performs solely state tasks in the interest of the government as required by federal law.

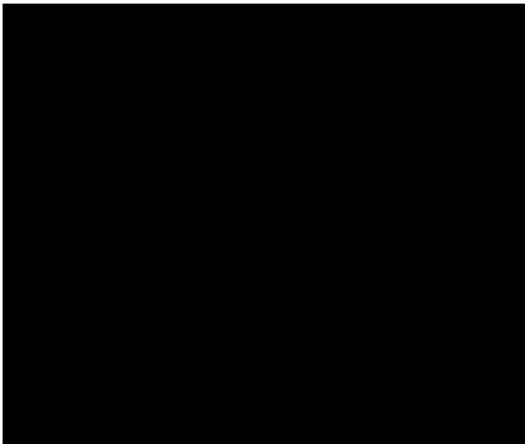
JSCB's board members are appointed by the government and recognized as "representatives of the interests of the [federal government]." Directors have included senior government officials (*e.g.*, until recently, the chairman also served as deputy prime minister). The board receives voting directives from the government. Material decisions require government approval, including investments, (*e.g.*, acquisitions, divestitures), agendas for shareholder meetings, and payment of dividends. In addition, JSCB's management employees are subject to certain reporting requirements designated for government officials such as disclosure of sources of income.

JSCB's investment activity is carried out in compliance with the decisions of the president, the government, and the government-appointed board. JSCB's dividend policy is also determined by the president and the government (*e.g.*, presidential decree requires JSCB to invest in state-owned companies for the purpose of recapitalization or privatization;

recent year dividends were paid to the federal budget pursuant to order of the president). All property held by JSCB is effectively regarded as property of the state. The government instructs JSCB regarding the acquisition or disposal of assets. JSCB's goods and services are procured in accordance with federal law procedures for municipal and state needs. The government has the sole power to dissolve JSCB and, in such event, profits vest in the state.

Based on the above, we believe JSCB is an agency of the government and not an entity engaged in commerce within the meaning of 801.1(a)(2). Nonetheless, an acquisition in excess of the reporting thresholds by Corporation A, a foreign issuer controlled by an agency, and not itself an agency, is subject to the reporting requirements of the Act if not otherwise exempt. Accordingly, if Corporation A is required to file, it would file as its own UPE. (Interpretation 32, ABA Premerger Notification Practice Manual (4th ed. 2007)).

Please let us know if you agree with the above analysis or require additional information. As always, thank you for your time and assistance.



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