From: Gillis, Diana L.
To: [redacted] Walsh, Kathryn E.; Berg, Karen E.
Cc: [redacted]
Subject: RE: Question on Foreign Vehicles as "Entities"
Date: Tuesday, August 23, 2016 9:42:00 AM

We view C as an entity, the others are foreign agencies.

From: [redacted]
Sent: Monday, August 22, 2016 1:21 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Gillis, Diana L.
Cc: [redacted]
Subject: Question on Foreign Vehicles as "Entities"

Dear Kate, Karen and Diana.

We have a question concerning whether a particular purchaser, closely affiliated with a foreign government, qualifies as an "entity" under the HSR Rules. We understand that an acquisition by a purchaser that does not qualify as an "entity," as that term is defined by 16 C.F.R. Section 801.1(a)(2), cannot be subject to a filing obligation under the Act. That Rule states that "entity" shall not include any "foreign state, foreign government, or agency thereof (other than a corporation engaged in commerce)." We also understand that a corporate or noncorporate entity controlled by an agency which is itself not an agency, is an "entity" whose acquisitions could be subject to filing obligations.

We further understand that in determining whether a particular vehicle will qualify as an agency, we should look to a number of factors in making that determination, including (i) whether the vehicle is formed under specific national legislation; (ii) whether directors are largely appointed by the government; (iii) whether chief executives are appointed by the government; (iv) whether the government must approve investment plans and budgets; (v) whether the vehicle is established for the purpose of pursuing a public interest, such as making investments on behalf of the government; (vi) whether its property is treated as the property of the government; (vii) whether employees are treated as employees of the government; (viii) whether the power to dissolve the vehicle is confined to the government; and (ix) whether the investment funds and assets vest with the government upon dissolution. These factors are then weighed in undertaking the assessment. We would be grateful for your guidance in determining whether the investment vehicle described below should be treated as an "entity" under Rule 801.1(2).

We are evaluating a potential investment to be made by a foreign corporation ("C") engaged in the business of equity financing via direct investments. C is wholly owned by another foreign corporation ("P"), specifically formed for the purposes of facilitating C's investments. P is, in turn, owned on a 50/50 basis by two state-affiliated vehicles ("A" and "B"). Below, please find the application of the relevant factors to A, B, P, and C:

As to "A"

(i) A, a state-owned "public institution," was formed under specific governmental enabling

legislation;
(ii) A's entire board is seated by decree of the state's executive branch;
(iii) A's managing director is appointed by decree of the state's executive branch;
(iv) While the government does not have specific veto rights over investment plans and budgets, its entire board and management is comprised of people seated or appointed by state decree;
(v) A has been formed as a public commercial and industrial institution of the state;
(vi) A's property is not technically treated as property of the state;
(vii) A's employees are not technically viewed as employees of the state;
(viii) The state's parliament has the power to dissolve A.
(ix) Upon dissolution, A's asset will vest with the state, though the state may choose to direct the assets elsewhere.

As to "B"

(i) B is a "special public entity," created by state law;
(ii) B does not have a board of directors;
(iii) The managing director is appointed by decree of the state's executive branch, and may be removed by state decree; assistants to managing director are appointed by decree from the president;
(iv) B's budget must be submitted to the state's ministry of the economy for approval;
(v) B has been established to serve the country's general interest and economic development, and to support the public policies established by the state;
(vi) B's property is not technically treated as property of the state;
(vii) B has employees from both the private sector and the state, though they are all paid by B, and not the state;
(viii) As noted above, B was established by state law, and may only be dissolved by state law;
(ix) Terms of dissolution, and any related distribution of assets would need to be established by the law governing such dissolution.

As to "P"

(i) P, a corporation, was formed pursuant to state law;
(ii) P has a 15-person board; 4 appointed by state decree to represent the state; 4 elected by P's shareholders (or the board itself) to represent B; 2 appointed by state decree to represent the state's regions; 3 appointed by state decree based on economic and financial knowledge (one of whom shall by the managing director); and 2 appointed by the staff of P;
(iii) P's managing director is appointed by state decree;
(iv) The directors representing the state and B (described above) each have veto powers over budgets and business plans;
(v) P was formed as a financial institution to facilitate equity financing to promote growth and economic development;
(vi) P's property is not technically treated as property of the state;
(vii) P's employees are not on the government payroll
(viii) P may be dissolved by shareholder vote after a board recommendation; P may also be dissolved by action of the parliament;

(ix) In the event of dissolution, the assets of P would be distributed to A and B.

As to "C"

(i) C, a corporation, was not formed pursuant to state law (but in furtherance to the state law authorizing the establishment of P);
(ii) C has a 10-person board; 3 appointed by state decree to represent the state; 3 elected by C's shareholder (or the board itself) to represent B; 3 independent directors elected by C's shareholder (or by the board itself) after prior agreement with B; and P's managing director serves on the board;
(iii) C's managing director is appointed by its board; in practice, C's managing director is P's managing director (who, as noted above, is appointed by state decree);
(iv) C's directors who represent B have veto power over budgets and business plans;
(v) C's corporate purpose is to engage in equity financing;
(vi) C's property is not technically treated as property of the state;
(vii) C has no employees;
(viii) C may be dissolved by shareholder vote after a board recommendation;
(ix) In the event of dissolution, C's assets would be distributed to P (as the sole shareholder of C).

We believe that upon weighing the relevant factors, none of A, B, P or C should be viewed as an entity, but ask for your guidance on the matter. If there are other factors that should be evaluated in the analysis, in addition to those detailed above, let us know. If you would like to have a call to discuss, please let me know and we can arrange for a call at a mutually convenient time.

Kind regards,