

Connecticut Attorney General Opinion No. 1990-15

Attorney General, Richard Blumenthal

April 30, 1990

Hon. Francisco L. Borges
State Treasurer
55 Elm Street
Hartford, CT 06106

Dear Mr. Borges:

You have requested our advice with reference to an investment of twenty-five million dollars from five State retirement funds¹ which you made in entities which acquired assets comprising the Firearms Division of Colt Industries, Inc. You question whether, due to the size of the investment and the participants, a notice filing with the Federal Trade Commission must be made under the Hart-Scott-Rodino Anti-Trust Improvement Act of 1976, codified at 15 U.S.C. e 18a(a). Specifically, you ask whether this transaction falls under the exemption for a state, 15 U.S.C. e 18a(c)(4). After reviewing the pertinent facts and the federal and state statutes and regulations, it is our opinion that the transaction is exempt from the filing requirement of 15 U.S.C. e 18a(a) as a transfer to or from the State.

Section 18a(a) of Title 15 of the United States Code provides:

(a) Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person unless both persons . . . file notification pursuant to rules under subsection (d)(1)² and the waiting period described in

subsection (b)(1) has expired, if --

* * *

(3) as a result of such acquisition, the acquiring person would hold —

(A) 15 per centum or more of the voting securities or assets of the acquired person, or

(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of \$15,000,000.

Exemptions to the foregoing Federal Trade Commission notification requirement are enumerated in subsection (c) to 15 U.S.C. e 18a. In relevant part, it states:

(c) The following classes of transactions are exempt from the requirements of this section —

...

(4) transfers to or from a Federal

agency or a State or political

subdivision thereof;...

In addition, the Federal Trade Commission adopted regulations defining the terms used in 15 U.S.C. e 18a. "Person" is defined to mean "an ultimate parent entity and all entities which it controls directly or indirectly." 16 C.F.R. e 801.1(a)(1). Although "entity" is defined to include a trust, excluded from the meaning of this term are, *inter alia*, any of the states. 16 C.F.R. e 801.1(a)(2).

Thus, transfers to or from a state are exempt from the notification provision of 15 U.S.C. e 18a(a). Therefore, we must determine whether transfers of funds from the above-referenced five state retirement funds by the State Treasurer in exchange for the shares are tantamount to transfers to or

from the State.

In considering this issue, we note at the outset that the Judges Retirement Fund is established directly in the State Treasury and the Treasurer is the custodian of the Fund. Conn. Gen. Stat. e 5l-49e. The State Employees Retirement System, the Municipal Employees Retirement System, and the Probate Judges and Employees Retirement Fund are administered by the State Retirement Commission. Conn. Gen. Stat. ee 5-l55a and 45-29q. The State Retirement Commission is within the Retirement Division of the Office of the Comptroller for administrative purposes, and it is clearly a state agency.³ The Treasurer is required to invest the State Employees Retirement Fund and the Municipal Employees Retirement Funds A and B in accordance with Conn. Gen. Stat. e 3-l3d. The Treasurer is also the custodian with power to invest the Probate Judges and Employees Retirement Fund. Conn. Gen. Stat. e 45-29p. The Teachers Pension Fund is administered by the Teachers Retirement Board created by Conn. Gen. Stat. e l0-l83l. The administrative expenses of the teachers retirement system are paid out of appropriations by the General Assembly, Conn. Gen. Stat. e l0-l83r(l), and the benefits payable from the system are paid out of the retirement fund which consists of contributions paid by members and appropriations by the General Assembly. Conn. Gen. Stat. e l0-l83r(2). All funds of the Teachers Retirement System are in the custody of the State Treasurer who is required to invest such portion of the Fund as is not required for current disbursement. Conn. Gen. Stat. e l0-l83m.

Accordingly, for each of the retirement funds included in the investment transaction, there is a specific statutory mandate that such fund shall be under the custody of the State Treasurer who is vested with power to invest and reinvest each such fund. See Conn. Gen. Stat. ee 3-l3d, 5-l56(a), 7-447, l0-l83m, 45-4h(b), 45-29p, 45-29q, and 5l-49e.

It is clear that the Treasurer as an elected official is a member of the executive branch of state government. Conn. Const. art. IV, e 22. The Constitution empowers the Treasurer to "receive all monies belonging to the state, and disburse the same only as he may be directed by law." Id.

The Treasurer is authorized to "invest as much of the State's trust funds as are not required for current disbursements in accordance with the provisions of section 45-88 or the provisions of this part [Part I of ch. 31 of the General Statutes]." Conn. Gen. Stat. e 3-13d. Conn. Gen. Stat. e 45-88 sets forth the various types of investments permitted by a trustee. Section 45-88(a)(4) allows that trust funds "may be invested or reinvested in any ... stocks, ... or other securities, selected by the trustee, ... with the care of a prudent investor." As a trustee, the Treasurer takes and holds the legal title to trust property. 89 C.J.S. Trusts e 3 (1955). Thus, the Treasurer holds legal title to the five retirement funds discussed herein for the benefit of the contributors and ultimate pensioners to the respective retirement funds. The legislature has also imposed certain restraints and safeguards on the investment of state trust funds by the Treasurer, including the requirement that all investments by the state treasurer shall be reviewed by the investment advisory council. Conn. Gen. Stat. e 3-13a(c).

From the foregoing, it is apparent that the Treasurer has authority and control over the investment of the state trust funds generally and the particular retirement funds in question here. See, e.g., Conn. Gen. Stat. e 3-13b. We note that these particular trust funds are not incorporated pension trusts, but are placed in the complete care, custody, and control of the State acting through its Treasurer. This explicitly includes the authority to invest and reinvest such funds. See Conn. Gen. Stat. ee 3-13d, 5-156(a), 7-447, 10-183m, 45-29p, 51-49e.

It is also important to note the nature of each of the five

specified retirement funds. Four of the funds are subsidized directly by the State through appropriations from the general fund. See Conn. Gen. Stat. e 5-156a, 10-183r, 45-4i, and 51-49d. The remaining retirement fund, the Connecticut Municipal Employees' Retirement Funds A and B, receive contributions from each participating municipality. Conn. Gen. Stat. e 7-44l. Thus, each of these funds is established through substantial contributions by the State or a political subdivision thereof.

Thus, based upon the totality of these facts, it is our opinion that an investment of the retirement funds you have specified in the manner you have described would constitute a transfer to or from the State. As such, this investment transaction would be exempt under 15 U.S.C. e 18a(c)(4).

We trust this completely addresses your concerns.

Very truly yours,

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

William J. Prenskey
Assistant Attorney General

CNR/WJP/bjg

¹ The Assistant Treasurer-Investments has informed us that the retirement funds included in this investment are the State Employees Retirement Fund established under Conn. Gen. Stat. e 5-152 et seq; the Connecticut Municipal Employees' Retirement Funds A and B established under Conn. Gen. Stat. e 7-425 et seq; the Connecticut Probate Judges' and Employees' Retirement Fund established under Conn. Gen. Stat. e 45-29b; the Judges' and Compensation Commissioners' Retirement Fund established under Conn. Gen. Stat. e 51-49e; and the Teachers'

Pension Fund established under Conn. Gen. Stat. e 10-183b et seq.

² 15 U.S. C. e 18a(d) provides:

(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code, consistent with the purposes of this section --

(l) shall require that the notification required under subsection (a) of this section, be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws;...

³ The Retirement Commission is subject to the Uniform Administrative Procedure Act ("UAPA"), Conn. Gen. Stat. e 5-155a(e), is an "agency" within the meaning of the UAPA, Conn. Gen. Stat. e 4-166(l), and is a "public agency" within the meaning of the Freedom of Information Act, Conn. Gen. Stat. e 1-18a(a). It also has none of the attributes of a board of trustees or corporation which is independent of state or local government. See New Hampshire Retirement System v. Sununu, 489 A.2d 615 (N.H. 1985).