

MEMORANDUM

2001 MAY 25 P 2: 25

TO: File

FROM: [REDACTED]

DATE: May 25, 2001

RE: Hart-Scott-Rodino Exemption Analysis

Is the acquisition of voting securities by 'A' under the following facts exempt under Section 7A(c)(10)?

A is the ultimate parent entity of 'A' and has control of B, an LLC. B also has minority members P, Q, and R, which are not controlled by A. B holds about 5% of the outstanding voting securities of X, a corporation, and other entities within 'A' together hold another 1% of the voting securities of X. B also holds an option to acquire an additional 20 million shares of the voting securities of X (the "Option Shares"), which is exercisable in two tranches of 10 million shares each in late July and late August 2001.

A has an agreement with X (the "Management Agreement") that provides that, if A controls, directly or indirectly, a certain number of the outstanding shares of X and meets certain other conditions, A will be entitled to control a management committee providing day-to-day management of X. (The management committee does not substitute for the board of directors to such a degree that A "controls" X under Section 801.1(b)(2) of the Hart-Scott-Rodino Rules.) The amount of outstanding voting securities of X currently held by B and other entities controlled by A is sufficient to meet the conditions imposed by the Management Agreement and provide a "cushion" of additional shares that permits A to finance other investments or activities.

P, Q, and R would like B to distribute to them their ratable portion of outstanding voting securities of X held by B, numbering about 32 million shares, but they cannot force B to do so. A would like B to exercise its option, but would like P, Q, and R to contribute their allocated share of the option price and cannot force them to do so. If they were to participate in funding the option, P, Q, and R would prefer that B distribute to them their allocated portions of the option so that they may exercise such portions independently (using their own financing). Their allocable portions of the option would confer rights to obtain about 8 million Option Shares (less than half of the total 20 million Option Shares). (A has the right to fund the exercise of portions of the option allocated to P, Q, and R if they fail to do so.)

For its part, A needs to make sure that B retain sufficient shares (a) to permit A to continue to control the management committee of X pursuant to the Management Agreement and (b) to continue to provide the "cushion" that A uses to meet other financing obligations.

[REDACTED]

A has determined that B's [redacted] level of shareholding if B distributes to P, Q, and R no more than approximately 75% of their ratable portion of the voting securities of X held by B (i.e., approximately 24 million shares) and if B exercises the portion of the option allocable to A and thereby acquires approximately 12 million Option Shares.

A has therefore agreed with P, Q, and R that (1) B will distribute to P, Q, and R 75% of their ratable portion of the outstanding voting securities of X held by B, and (2) B will assign to P, Q, and R their agreed allocations of the option to acquire the Option Shares, if they desire it. At the same time, A has determined to fund the portion of the option that remains with B, and P, Q, and R have agreed that the Option Shares purchased with such funding would be allocated to A, though still held by B. Pursuant to these agreements, B would acquire between approximately 12 million and 20 million Option Shares from X and would transfer to P, Q, and R about 24 million shares of X voting securities already held by B. As a result of these transfers, therefore, B's (and 'A's) shareholdings and percentage interest in X would decline.

P, Q, and R desire that the distribution of the shares already held by B occur sooner than the option-exercise dates, so that they may refinance their portions of the loan that financed B's original acquisition of the shares (and thereby reduce their interest expense). A is willing to permit a distribution before the exercise dates on condition that P, Q, and R commit to funding their portions of the option, so that X would have the benefit of the additional capital and so that A would not need to fund those portions of the option.

The parties are unaware of any other transactions by X or other parties that would affect the total number of outstanding voting securities of X at the time the foregoing acquisitions occur.

Section 7A(c)(10) of the Clayton Act provides an exemption from premerger notification requirements for "acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of the outstanding voting securities of the issuer." This exemption was designed to exempt stock splits and pro rata distributions, but it has also been applied by the FTC to situations like IPOs, in which a current shareholder purchases additional voting securities of the issuer but, because of the separate purchases by new investors and others, the current shareholder's percentage interest declines.

In light of this treatment of integrated transactions that involve distinct acquisitions, and in light of the fact that B's percentage holdings of the voting securities of X will decline as a result of the combined exercise of the options and distribution of the shares to P, Q, and R, 'A's acquisition of voting securities through the exercise of the option will be exempt from the reporting requirement. This result does not change even though B's exercise of the option would occur after its distribution of the outstanding shares (and its shareholdings in X would, over two months' time, first decline and then increase), because B's holdings would decline on a net basis as a result of the integrated transaction.

[redacted] P, Q, R TIED TO THE OPTION MUST BE EXERCISED ONCE THE DISTRIBUTION IS MADE?

ARE THE DISTRIBUTIONS TO BE EXERCISED SUCH THAT THE OPTION MUST BE EXERCISED ONCE THE DISTRIBUTION IS MADE?

5/29
Reformed caller that (c)(10) does not apply because of the time delay NMO MV concurs