

802.7

[Redacted]  
ATTORNEYS AT LAW

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November 3, 2003

Via Courier

Mr. B. Michael Verne  
Premerger Notification Office  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

2003 NOV - 3 A 11: 14

FEDERAL TRADE  
COMMISSION  
PREMERGER NOTIFICATION  
OFFICE

Re: Hart-Scott-Rodino Act Filing Requirements

Dear Mr. Verne

We are writing to confirm our understanding of an earlier conversation between you and the undersigned about the premerger notification filing requirements relating to a proposed acquisition of convertible debentures and the stock of a corporation the only assets of which are limited partnership and limited liability company interests.

The Sellers, two partnerships, propose to sell to Buyer: (1) 100 percent of the voting securities of Corporation A, and (2) certain subordinated convertible debentures. The total purchase price exceeds \$50 million. Corporation A's only assets consist of (1) a 49.3 percent interest in Limited Liability Company B ("LLC-B"), (2) 46.7 percent of the limited partnership units in Limited Partnership C ("LP-C") and (3) indemnity rights against others under one or two contracts. LLC-B is the sole general partner of LP-C and holds a 0.01 percent general partnership interest in LP-C. Corporation A's interests do not confer "control" for HSR purposes over either LLC-B or LP-C as Corporation A does not have the right to 50 percent or more of the profits of either entity or the right to 50 percent or more of the assets of either entity in the event of dissolution. See 16 C.F.R. § 801.1(b).

The subordinated convertible debentures are convertible into limited partnership interests of LP-C. We have assumed that the acquisition of the convertible debentures is exempt from the HSR filing requirements under Section 7A(c)(2) of the Act which exempts acquisitions of obligations that are not voting securities. Since these convertible debentures do not entitle the holder either currently or upon conversion to vote for the election of directors (they are convertible into limited partnership interests not stock of a corporation) they are not voting securities and thus qualify for the 7A(c)(2) exemption.

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Based on our conversation, we believe that the acquisition of the stock of Corporation A is also exempt pursuant to 16 C.F.R. § 802.4. Rule 802.4(a) provides:

“An acquisition of voting securities of an issuer whose assets together with those of all entities it controls consist or will consist of assets whose purchase would be exempt from the requirements of the act pursuant to Section 7A(c)(2) of the act, Sec. 802.2, Sec. 802.3 or Sec. 802.5 of these rules is exempt from the reporting requirements if the acquired issuer and all entities it controls do not hold other non-exempt assets with an aggregate fair market value of more than \$50 million.”

This rule details how certain exempt and non-exempt assets are treated for purposes of applying the rule, but does not describe how non-controlling interests in other entities are handled. As you explained, however, the PNO's position is that the value of non-controlling interests in other entities should not be included when valuing nonexempt assets for purposes of applying Rule 802.4. As explained in Interpretation 214 in the PREMERGER NOTIFICATION PRACTICE MANUAL (3d ed. 2003), non-controlling interests in a corporation are ignored for purposes of calculating the amount of non-exempt assets held by the acquired issuer (though the acquisition of this non-controlling corporate interest must be analyzed separately as a “secondary acquisition”). Similarly, non-controlling interests in a partnership or an LLC are also ignored for valuing non-exempt assets held by the acquired issuer and would only be a factor in the HSR analysis if the acquisition resulted in the acquiring party holding 100 percent of the partnership or LLC.

The only other assets held by Corporation A are indemnity rights, which if not exempt under section 7A(c)(2) of the Act, have a fair market value far below \$50 million. Thus, the acquisition of the stock of Corporation A would qualify for the 802.4 exemption.

Buyer may acquire additional interests in LLC-B and LP-C from entities other than Sellers prior to, or perhaps simultaneous with, closing the Corporation A and convertible debenture purchase from Sellers. As a result of these other transactions, Buyer may end up with more than 50 percent of the interests in LLC-B or LP-C, though Buyer will not hold 100 percent of the interests in either LLC-B or LP-C as a result of any of these transactions. We do not believe that these other potential acquisitions change the application of the section 802.4 exemption to the transaction described in this letter between Buyer and Seller.

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Please confirm our understanding of the HSR analysis in this transaction. We very much appreciate your help on this matter; do not hesitate to contact the undersigned at [REDACTED] if you have any questions.

Very truly yours,

[REDACTED]

By:

[REDACTED]

cc:

[REDACTED]

AGREE -  
B. Michael Verne  
11/4/03

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