

801.13(a)

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DISPATCH NUMBER

December 23, 2003

FEDERAL TRADE  
COMMISSION  
PREMERGER NOTIFICATION  
OFFICE

2003 DEC 23 A 11:13

**VIA FACSIMILE (202-326-2624) AND EMAIL**

Michael Verne, Esquire  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Confirmation of Recent Advice Regarding Rule § 801.13(b)

Dear Mr. Verne:

This letter confirms our telephone conversation of Friday, December 19, 2003, regarding the filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act" or the "Act"), and the rules promulgated thereunder, 16 C.F.R § 801.10 et seq. (the "Rules"), as the same relate to two asset acquisitions occurring between the same parties.

To summarize and as discussed, Bank A proposes to acquire substantially all of the VISA® credit card loan portfolio of Bank B for a purchase price of approximately \$50 million (the "Transactions"). For a variety of business reasons, the parties anticipate consummating the Transactions in two separate closings, one to be held as soon as possible in December 2003 covering approximately \$20 million in loan assets (the "First Closing"), and a second closing scheduled to occur in January 2004 for the remaining \$30 million of loan assets (the "Second Closing"). Each of the First and Second Closings will occur under the terms of separate purchase agreements executed between the parties at the same time prior to the First Closing (the "Purchase Agreements").

For the purposes of this inquiry, assume that, when considered together, the Transactions meet both the Act's Size-of-the-Persons and the Size-of-the-Transaction jurisdictional thresholds. Also and as discussed, assume that independent legitimate business reasons exist for structuring the Transactions in two closings and that this dual closing structure is not an artifice

December 23, 2003

Page 2

to avoid a filing under the Act. Similarly, assume that the decision to use separate Purchase Agreements to cover each closing was also reached for independent legitimate business reasons.

As discussed, the question I posed is whether a filing under the Act is required in connection with the First Closing. Stated differently, will the First Closing and the Second Closing be required to be aggregated so as to require a filing under the Act prior to consummating the First Closing? The language of Rule § 801.13(b) governs aggregation for asset acquisitions and appears on its face to require aggregation only in certain instances where the first acquisition was consummated within 180 days before the signing of the letter of intent or purchase agreement for the second acquisition. Rule § 801.13(b)(2). Nevertheless, I understand that it has been the policy of the PNO for some time to aggregate seriatim asset acquisitions in certain instances not expressly required by Rule § 801.13(b). Specifically, if the acquisitions occur pursuant to a single purchase agreement, the PNO generally has required aggregation, the language of Rule § 801.13(b)(2) notwithstanding. See, e.g., §5.04[6][c][2] AXINN, FOGG, STOLL & PRAGER (Rev. Ed. 2002); ABA Premerger Notification Practice Manual (3<sup>rd</sup> Ed. 2003), Interpretation No. 254. At the same time, if the acquisitions occur pursuant to separate purchase agreements, aggregation is generally not required, unless the avoidance provisions of Rule § 801.90 are at play. See, ABA Premerger Notification Practice Manual (3<sup>rd</sup> Ed. 2003), Interpretation Nos. 150, 154 and 254.

In our discussion, you stated that since the acquisitions were to occur pursuant to separate purchase agreements and assuming that Rule § 801.90 avoidance considerations were not at issue, the parties could consummate the First Closing without making a filing under the Act. However, and as discussed, the parties will file under the Act prior to consummating the Second Closing if, considering the two Transactions together, the Act's jurisdictional thresholds are met and no exemption is available. At the time of making any such required filing, the parties' filings would cover both the First Closing and the Second Closing and the prior acquisition would be noted therein.

Please review this letter and call to let me know as soon as possible if I have misunderstood our conversation. I look forward to hearing from you at your earliest convenience, as the parties anticipate consummating the First Closing prior to December 31, 2003. I can be reached at [REDACTED]. Thank you in advance for your time and consideration in this matter.

Very truly yours,

[REDACTED]

AGREE.  
B. [Signature]  
12/27/03

[REDACTED]