

7A(c)(10)
802.51

February 11, 2004

Nancy M. Ovuka, Compliance Specialist
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303
6th Street and Pennsylvania
Avenue, N.W.
Washington, D.C. 20580

Re: Applicability of HSR Filing Requirements to Proposed Corporate Restructuring

Dear Ms. Ovuka:

This letter will confirm the advice you provided verbally earlier today regarding whether a proposed corporate restructuring would necessitate a filing under the Hart-Scott-Rodino ("HSR") Act.

The relevant facts are provided below.

I. Pre-Transaction Structure

Company A, a corporation, is currently controlled by Company B. Company B owns approximately 53.85 percent of the shares and, because of its "double" voting rights, 71.66 percent of the voting rights in Company A. The remaining shares and voting rights in Company A are widely held by institutional investors and individual shareholders.

Company B is a holding company existing solely for the purpose of owning its interest in Company A. Family A holds 51 percent of the shares of Company B and Company C holds the remaining 49 percent of Company B. We do not know the precise manner in which Family A holds its interest in Company B but, as you and I discussed, regardless of whether Family A or Company B is currently the ultimate parent entity ("UPE") of Company A for HSR purposes, the answer to the question of whether a filing is required remains the same.

Company A, Company B and Company C are "foreign persons" under the HSR Rules.¹ Family A is also a "foreign person" under the HSR Rules. In addition, Company A is a "foreign issuer" under the HSR Rules.²

II. Proposed Restructuring

The essence of the proposed restructuring is that Family A and Company C will exchange their current indirect interests in Company A for direct holdings in Company A.

Company B will be merged into Company A. Family A and Company C will exchange their shares in Company B for shares in Company A. Upon completion of the restructuring, Family A will hold 27.48 percent of the shares and 28.58 percent of the voting rights in Company A; Company C will hold 26.38 percent of the shares and 27.46 percent of the voting rights in Company A. (The "double" voting rights currently held by Company B will be eliminated.) Institutional investors and public shareholders will continue to hold the remaining shares and voting rights in Company A.³ Family A will be able to nominate three members of Company A's board of directors and Company C will be able to nominate three members of Company A's board. Family A and Company C have agreed to vote for the board members nominated by the other. These six board members, however, will constitute a minority of Company A's 13-member board.

In short, as a result of the restructuring described above, Company A will become its own UPE.

For the purposes of our discussion, we assumed that Company C's and Family A's "acquisition" of voting shares in Company A would meet the HSR size-of-persons and size-of-transaction tests.

III. Analysis

Based on the facts presented above, and assuming that Family A is the UPE of Company A, you advised that the proposed corporate restructuring would be exempt from the HSR filing requirements. The merger of Company B into its subsidiary, Company A, would be exempt under Section (c)(10) of the HSR Act.⁴ The acquisition

¹ The term *foreign person* means a person the ultimate parent entity of which: (A) is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States; or (B) if a natural person, neither is a citizen of the United States nor resides in the United States. 16 C.F.R. §801(e)(2)(i).

² The term *foreign issuer* means an issuer which is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States. 16 C.F.R. §801.1(e)(2)(ii).

³ A small portion of the shares are held by Company A as treasury shares.

⁴ Section (c)(10) of the HSR Act exempts "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 outstanding voting securities of the issuer."

of shares in Company A by Company C and Family A would be exempt on the basis of 16 C.F.R. §802.51(b)(1).⁵ Under §802.51(b)(1), the acquisition of voting securities of a foreign issuer by a foreign person is exempt from the HSR filing requirements if, *inter alia*, the acquisition will not confer "control" of the issuer. In the transaction at hand, Company A is a foreign issuer; Family A and Company C are "foreign persons;" and neither Family A nor Company C will control Company A after the proposed restructuring. As a result, no HSR filing would be required.⁶

Finally, you advised that even if the various parties to this proposed corporate restructuring were United States persons and issuers⁷ (and, as a result, §802.51(b)(1) would not apply) it would still be the case that no HSR filing would be necessary. This is because the Premerger Office would interpret Section (c)(10) of the HSR Act as exempting the restructuring from the HSR filing requirements. Neither Family A's nor Company C's share of the voting securities of Company A will increase as a result of the proposed restructuring. In fact, because the double voting rights currently held by Company B will be eliminated, the voting rights held by Family A and Company C will actually be reduced. While Family A and Company C currently own 51 percent and 49 percent, respectively, of an entity (Company B) holding 71.7 percent of the voting rights in Company A, Family A and Company C will hold only 28.6 percent and 27.5 percent, respectively, of the voting rights in Company A after the restructuring.⁸

⁵ The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the [HSR] act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) having an aggregate total value of over \$50 million; or made aggregate sales in or into the United States of over \$50 million in its most recent fiscal year. 16 C.F.R. §802.51(b)(1).

⁶ Even if Company B is currently the UPE of Company A, no HSR filing would be required. The merger of Company B into its subsidiary, Company A, would be exempt under Section (c)(10) of the HSR Act. (and the "acquisition" of voting shares in Company A by Company C and members of Family A would, as before, be exempt under 16 C.F.R. §802.51(b)(1).

⁷ The term *United States person* means a person the ultimate parent entity of which: (A) is incorporated in the United States, is organized under the laws of the United States or has its principal offices within the United States; or (B) if a natural person, either is a citizen of the United States or resides in the United States. 16 C.F.R. §801.1(e)(1)(i). The term *United States issuer* means an issuer which is incorporated in the United States, is organized under the laws of the United States or has its principal offices within the United States. 16 C.F.R. §801.1(e)(1)(ii).

⁸ The transaction will result in Family A and Company C holding, on a combined basis, approximately 53.86 of the shares of Company A after the restructuring is complete, as opposed to 53.85 percent (through Company B) before the restructuring. This minor increase in the shares held by Family A and Company C is due to technical adjustments. As noted, however, the percentage of *voting rights* held by Family A and company C will actually be reduced significantly.

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Thank you for your assistance with this matter. Please let me know if you need any additional information.

Sincerely,

2/12/04
Advised writer by telephone
that I agree w/ the
conclusions contained in
the letter.

N. Ovuka
M. Verne concurs.