

801.10
802.4

January 3, 2008

VIA FACSIMILE AND EMAIL

Michael Verne, Esq.
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Application of Hart-Scott-Rodino Rules and Regulations

Dear Mike:

I am writing to follow up on a general inquiry of your office regarding the interpretation of the Hart-Scott-Rodino Act and the rules and regulations interpreting it. In general, the question has to do with rules regarding the determination of the value of the transaction where the entity to be acquired, Company B, a publicly traded company, has substantial cash, cash equivalents and marketable equity and debt securities on its books as assets which pursuant to Rule 802.4 would exempt the transaction from the Hart-Scott-Rodino notification requirements.

Company A and Company B are both software companies in complementary businesses that meet the size-of-person requirement. However, we are seeking confirmation about the method for determining whether or not the transaction would satisfy the size-of-transaction requirement based on our interpretation of Rule 802.4. We represent Company A, the acquirer, in this transaction.

Structure of Transaction:

In December 2007, Company B entered into an Agreement and Plan of Merger (the "Merger Agreement") with Company A, and Company C, a Delaware corporation and wholly-owned subsidiary of Company A ("Merger Sub"), pursuant to which Merger Sub will be merged with and into the Company B (the "Merger"), with the Company B continuing as the surviving entity. Pursuant to the Merger Agreement, at the effective time of the Merger, each share of the Company B's common stock will be converted into the right to receive \$7.20 cash and each outstanding option will be converted into the right to receive \$7.20 cash less the exercise price of such option. As reported in Company B's last Form 10-K, as of March 31, 2007, Company B had 9,542,063 shares of common stock outstanding. The closing price of Company B's stock on the day prior to the execution of the Merger Agreement was \$3.72 (Market Price value of \$35,496,474.00). The Acquisition Price is approximately \$68,702,853.00 prior to adjusting for outstanding stock options and other closing adjustments. The closing price as of today is \$5.79 giving Company B a Market Value as of the date of this letter of approximately \$55,248,544.00.

The proposed transaction is subject to the completion of due diligence by Company A, which condition must be satisfied or waived by January 10, 2008, and Company A's ability to obtain a satisfactory commitment from its primary lender to finance the purchase price, which condition must be satisfied or waived by Company A on or prior to January 18, 2008. Company A has the right to terminate the Merger Agreement if either of these conditions is not satisfied by such dates. The transaction is also subject to approval by Company B's shareholders. It is possible but unlikely that the closing will be within the 45 day period beginning from the date of the Merger Agreement.

Determination of Transaction Size

Pursuant to Rule 801.10, the value of an acquisition of voting securities is the value of the voting securities that will be held as a result of the acquisition. According to the Valuation Guide promulgated by the FTC, "If the stock is publicly traded, the value of the shares to be acquired is either Market Price or Acquisition Price, whichever is greater. For transactions subject to rule 801.30 (e.g., open market purchases, tender offers, conversions, or exercises of options or warrants) Market Price means the lowest closing quotation during the 45 calendar days prior to closing. For transactions not subject to rule 801.30 (*generally, acquisitions pursuant to a contract or letter of intent such as we have in this transaction*), Market Price is the lowest closing quotation during that portion of the same 45-day period that begins one day before execution of the contract or letter of intent. If Acquisition Price is not determined, Market Price governs the value of the transaction. If Market Price is indeterminable because closing is more than 45 days away, and the Acquisition Price is determined, then Acquisition Price is the value of the transaction. If neither Market Price nor Acquisition Price is determined, Fair Market value determines the value."

Rule 801.10 further provides that the Acquisition Price is "determined" if the parties have agreed upon the consideration, or if the amount of consideration (e.g., by reason of post-closing adjustments or contingent future payments) can be reasonably estimated. Company A therefore believes that the Acquisition Price of the transaction has been determined and the value of the transaction is approximately \$68,702,853.00 prior to adjusting for outstanding stock options and other closing adjustments. Based on the size of the transaction test, the notification threshold is met.

Applicability of Rule 802.4 to Company B

Rule 802.4 states in pertinent part:

"An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to Section 7A(c) of the Act, this part 802, or pursuant to §801.21 of this chapter, is exempt from the reporting requirements if the acquired issuer or unincorporated entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than \$50 million (as adjusted). The value of voting or non-voting securities of any other issuer or interests in any non-corporate

entity not included within the acquired issuer does not count toward the \$50 million (as adjusted) limitation for non-exempt assets."

For purposes of fair market valuation of Company B under the HSR Act, Company A is required to make a good faith determination of what a third-party would pay for the voting securities of Company B in an arm's length transaction between a willing buyer and a willing seller. In November of 2006, the Board of Directors of Company B determined that a tender offer for all the shares of Company B for \$5.50 per share was inadequate and not in the best interests of Company B's shareholders. Given that the Board of Directors of Company B has approved the Merger, Company A takes the position that the Acquisition Price closely proximates the Fair Market value of the Company B prior to deducting the value of certain exempt assets.

Company A accordingly believes that this transaction is exempt from the reporting requirements since Company B does not hold non-exempt assets with an aggregate fair market value of more than \$59.8 million. Company A takes this position based on the Fair Market value of the nonexempt assets of Company B when it deducts from the fair market value of all of the assets Company B the following exempt assets on the books of Company B as of November 30, 2007:

CASH AND EQUIVALENTS	\$10,313,587
CORPORATE BONDS	\$8,107,257
TAXABLE MUNICIPAL BONDS	\$2,156,853
GOVERNMENT BONDS	\$2,629,179
COMMERCIAL PAPER	\$1,500,000
TIME DEPOSITS	\$14,587
<u>RESTRICTED CASH DEPOSITS</u>	<u>\$142,815</u>
TOTAL	\$24,864,278

Accordingly, Company A takes the position that the Company B holds non-exempt assets with an aggregate fair market value of approximately **\$43,838,575** prior to any pre and post closing adjustments. It is my understanding that based on Rule 802.4, the transaction would be exempt if the fair market value of the non-exempt assets of Company B and its subsidiaries is below \$59.8M.

We are requesting confirmation that Company A's position regarding this interpretation of Rule 802.4 is correct and can be the basis upon which we should decide whether or not the contemplated transaction would be subject to the Hart-Scott-Rodino notification requirements.

Letter to Michael A. Verne, Esq.
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I would appreciate a telephone call or an email with regard to our analysis of Rule 802.4 as it applies to Company B. My direct dial number is [REDACTED] and my email address is [REDACTED]. Thank you in advance for your assistance in this matter.

Very truly yours,

[REDACTED]

I agree that the transaction is not reportable, but you are mixing apples and oranges in your explanation of the analysis. Rule 802.4 has nothing to do with the size-of-transaction which is \$68.7 MM. Despite the fact that the size-of-person and size-of-transaction tests are both satisfied, the acquisition is exempt under 802.4 because the fair market value of the non-exempt assets held by the acquired issuer does not exceed the \$59.8 MM limitation in that rule.

BW
1/7/08