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April
~~March~~ 16, 2009

VIA US MAIL AND FAX NUMBER (202.326.2624)

Michael B. Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th Street and Pennsylvania Avenue NW
Washington, DC 20580

Re: "Size-of-the-Person" Jurisdictional Test and Payment of Extraordinary Dividend

Dear Michael:

This letter is written to summarize and to confirm the guidance and informal opinions that you have shared with us during a phone conversation on February 20, 2009 regarding the "Size-of-the-Person" jurisdictional test under the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, as amended (the "HSR Act"), and the Commission's implementing regulations thereunder, and in particular, how the Premerger Office would analyze the consequences of the distribution of a premerger extraordinary dividend on the parties' Premerger Notification obligations.

FACTS

As I described in our conversation, Company A intends to acquire 100% of the voting capital stock of Target through either a merger or a stock purchase in a transaction that the parties have preliminary valued at approximately \$100 million. Target is its own ultimate parent entity and is not engaged in manufacturing. Company A has assets in excess of \$200 million. Target regularly prepares month-end balance sheets. Target's most recent February 2009 month-end balance sheet reflects approximately \$14.5 million in total assets. Of its assets, Target holds several million dollars in "excess" cash – in the sense that the "excess" cash is not currently necessary to support the day-to-day operational working capital needs of Target. Target may declare and pay an extraordinary dividend of at least a portion of its excess cash to its shareholders sometime in March resulting in Target having less than \$13.0 million in assets as reflected on its next regularly prepared balance sheet as of March 31, 2009.

ANALYSIS

For a proposed transaction valued in excess of \$65.2 million and up to and including \$260.7 million to be reportable under the HSR Act, the parties to the transaction must meet the



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“Size-of-the-Person” jurisdictional test. In this regard, if an acquiring person with over \$130.3 million in total assets or annual sales intends to acquire the voting securities or assets of a person not engaged in manufacturing, the acquired person must have at least \$13.0 million in total assets as reflected on its last regularly prepared balance sheet. Furthermore, Section 801.90 of the Commission’s implementing regulations provides that “[a]ny transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the [HSR Act] shall be disregarded, and the obligation to comply shall be determined by applying the [HSR Act] and these rules to the substance of the transaction.”

Opinion No. 195 of the Premerger Notification and Practice Manual (Third Edition 2003) responds to a question submitted to the Premerger Notification Office inquiring whether a Section 801.90 problem arises where shortly before the closing of a transaction an acquired person “declares an extraordinary (and accelerated) dividend that reduces its size below \$10 million [(\$13 million as currently inflation adjusted)] on its next regularly prepared balance sheet which is prepared by the time of closing.” In response to the question, Opinion No. 195 states that it does not view the extraordinary dividend as a device for avoidance in that the HSR Rules of Practice instructs that the size of the person is to be determined by referring to its financial statements prepared in accordance with the accounting principles normally used. If the statements had been prepared on a regular basis in accordance with the person’s normal accounting practices and show that the person does not satisfy the relevant “Size-of-the-Person” jurisdictional test, the proposed transaction would not be reportable.

DISCUSSION

Based on the facts of the proposed transaction, if the parties were to close the transaction prior to the preparation of the regularly prepared balance sheet that reflects the reduction in assets following the payment of the dividend described above, the HSR Act and its implementing rules would mandate that the parties make the appropriate premerger notification filings with the Federal Trade Commission and Department of Justice. (The other jurisdictional elements of the HSR Act are satisfied). However, based on Opinion No. 195, and prior informal interpretations rendered by the Federal Trade Commission staff, you confirmed that if the acquired person would issue an extraordinary dividend such that its total assets as reflected on its regularly prepared balance sheet would be less than \$13.0 million, the parties to the proposed transaction would fail to satisfy the “Size-of-the-Person” jurisdictional test under the HSR Act.

As we discussed during our phone conversation on February 20, while the cash that would be subject to the extraordinary dividend is excess in the sense that it is not necessary for Target’s day-to-day working capital needs, Target would likely not be issuing the dividend in the absence of the proposed transaction with Company A. That said, in light of the proposed transaction, Target will be making the extraordinary dividend regardless of any HSR implications. The timing of the issuance of that dividend, however, may be, at least in part, motivated by the consequences of the dividend on the parties’ obligations under the HSR Act. In this regard, Opinion No. 194 of the Premerger Notification and Practice Manual is instructive in

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opining that the parties' decision to delay a closing until a target's next balance sheet reflecting a reduction in total assets would not be viewed as a potential transaction or device for avoidance. According to Opinion No. 194, the Size-of-the-Person jurisdictional test is a bright line test applied at the time of closing, and "[p]ostponing the closing date until a new regularly prepared balance sheet is available that would cause the transaction to fail the Size-of-the-Person test would not result in violation of Section 801.90."

CONCLUSION

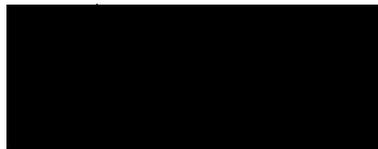
We understand that the issuance of the extraordinary dividend does not raise avoidance issues under Section 801.90 of the HSR Act and implementing rules even though the issuance of the dividend occurs shortly before a proposed transaction and results in the failure of the acquired person meeting the "Size-of-the-Person" jurisdictional test. So long as the extraordinary dividend is actually distributed, a regularly prepared balance sheet prepared in the ordinary course of business and consistent with Target's past practice reflects the issuance of the dividend prior to closing, and the balance sheet accurately reflects Target's size, the "Size-of-the-Person" threshold will not be exceeded and there is no reason to implicate Section 801.90 on these facts.

We understand that the Premerger Notification Office staff concurs with this interpretation of the HSR Act and its implementing rules and regulations.

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Please let us know if you have any questions concerning this letter or require any additional information. If you disagree with the above analysis in any manner whatsoever, please call me at your earliest convenience to discuss the issues in further detail. As always, we very much appreciate your attention to this matter.

Very truly yours,



AGNES -
BV
4/21/09

