

January 4, 1983

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NOTIFICATION
OFFICE

Dana Abrahamsen
Premerger Notification Office
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 22580

Re: January 4th 1983 Telephone
Conversation

Dear Dana:

In a conversation this morning, I requested an informal opinion with respect to two different factual situations:

Factual Situation No. 1

Company A will acquire 50% of the outstanding voting securities of Company B. This transaction will be valued at less than \$15 million. Company B's last 100 filing, dated July 3, 1982, indicates that Company B has \$31 million in assets. However, Company B has prepared an estimated balance sheet, in connection with this transaction, which reflects only \$22 million in assets. Moreover, Company B is currently preparing its 10K form which will also reflect assets of \$22 million.

Discussion

You have advised that the total assets of Company B shall be as stated on the last regularly prepared balance sheet of Company B (Rule 801.11(c)(2)). The determination of whether or not a balance sheet is regularly prepared is a question of fact. A balance sheet does not have to be public nor must it be

filed in order to be regularly prepared. However, it must be a document upon which the board of directors regularly relies. A balance sheet prepared for purposes of a transaction usually is not a regularly prepared balance sheet. In the factual scenario described above, if, prior to consummation of the transaction, a regularly prepared balance sheet, such as the balance sheet contained in a 10K filing, were to indicate that Company B had less than \$25 million in assets, a Hart-Scott-Rodino filing would not be required.

Factual Situation No. 2

(a) Individual A will acquire 40% and Individual B will acquire 10% of a company with more than \$25 million in net annual sales or total assets. However, the transaction will be valued below \$15 million. Individuals A and B will enter into a voting trust. Individual A will be the trustee and will have the power to vote the shares of Individual B.

(b) In the same facts as (a), Individuals A and B will enter into a shareholder's agreement pursuant to which Individual A will have the power to direct how the shares of Individual B will be voted and the power to prevent Individual B from selling his stock without Individual A's approval. Individual B will bear the risk of loss of value and have the benefit of any increase in value in the stock.

Discussion

(a) A Hart-Scott-Rodino filing is not required because the voting trust agreement will not give Individual A beneficial ownership of Individual B's stock.

(b) It is a close factual question as to whether this type of agreement would give Individual A beneficial ownership of Individual B's stock. Relevant factors to this determination include whether consideration exists for the agreement and whether Individual A will have the risk of loss or the benefit of gain with regard to the shares of Individual B. If beneficial ownership were imputed to Individual A, a Hart-Scott filing would be required as Individual A would then control the acquired company (i.e., hold 50% of its outstanding voting securities).*

* Individual A's ability to elect one-half of the board of directors is insufficient to give control, as defined in the Hart-Scott rules, because it does not give Individual A the power to elect a majority of the board.

Dana Abrahamsen

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I believe this accurately describes our conversation and the informal opinion which you rendered today; If it does not, please contact me as soon as possible. !