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§ 7A(G)(8)

October 15, 1987

BY HAND

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Dear Sirs:

Pursuant to 16 C.F.R. § 803.30, I request a formal interpretation concerning the application of the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") and the regulations promulgated thereunder to the transaction described below.

Description of the Transaction

A, the acquiring company, seeks to acquire more than 10% of the voting securities of B, a bank holding

company that owns an FDIC-insured bank and has a class of securities subject to the registration requirements of the Securities and Exchange Commission. As a result, the transaction will be subject to the Change in Bank Control Act (the "CIBCA"), which requires that the appropriate federal banking agency be given prior notice and opportunity to review and ultimately disapprove an acquisition of control. 12 U.S.C. § 1817(j)(1). In this case, the appropriate federal banking agency would be the Board of Governors of the Federal Reserve System (the "Board").

Under the CIBCA, control is defined as "the power, directly or indirectly, to direct the management or policies of an insured bank or to vote 25 per centum or more of any class of voting securities of an insured bank." 12 U.S.C. § 1817(j)(8)(B). However, the regulations promulgated by the federal banking agencies pursuant to the CIBCA provide that any proposed transaction that would result in A owning, controlling, or having the power to vote 10 percent or more of any class of B's voting securities is presumed to result in the power to direct the management or policies of an insured bank or bank holding company if any of B's securities are subject to the registration requirements of the Securities Exchange Act of 1934 or no other person will

own a greater proportion of that class of voting securities immediately after the transaction. 12 C.F.R. §§ 125.41(b)(2) (regulations of the Board), 5.50(d)(1) (regulations of the Comptroller of the Currency), and 303.4(a) (regulations of the FDIC). Since B has securities registered under the Exchange Act, A's acquisition of 10 percent or more of B's common stock would fall within the presumption of control. As a matter of practice, this presumption of control is virtually irrefutable.

Accordingly, A intends to purchase 9.9% of B's outstanding voting securities, and then to notify the Board that it proposes to acquire additional voting securities of B. Any such additional acquisitions of B would take place only after Board review under the CIBCA.

Application of the HSR Act

A and B both meet the HSR Act's size-of-person test, and the \$15 million size-of-transaction test will be satisfied once A acquires approximately four percent of B's outstanding voting securities. Accordingly, A must file HSR notification and observe a waiting period prior to acquiring \$15 million worth of B's voting securities unless an exemption is available.

Pursuant to 16 C.F.R. § 802.8(b)(1), transactions that require agency approval under the CIBCA are exempt from the requirements of the HSR Act if copies of the information and documentary material filed with the bank regulatory agency are filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed acquisition. However, the staff has suggested that because the initial 9.9% acquisition of B's voting securities would exceed \$15 million but would not require Board approval under the CIBCA, the exemption provided by § 802.8(b)(1) is not available to A.

I respectfully request that the staff reconsider this view. Under the facts as described above, Congress (through its enactment of the CIBCA) and the federal banking agencies (through their promulgation of regulations) have made the judgment that banking agency approval is not required until A proposes to acquire 10 percent or more of B's common stock. By promulgating § 802.8(b)(1), the Federal Trade Commission has determined that review by the appropriate federal banking agency substitutes for the HSR review process. It is entirely anomalous, therefore, for the staff to require HSR notification for transactions that

do not cause A's holdings to rise to the level that requires review by the federal banking authorities.

If you believe, however, that § 802.8(b)(1) does not exempt this transaction, I request your views as to whether A may claim the investment exemption, 16 C.F.R. § 802.9, for its purchases of up to 9.9% of B's outstanding voting securities. In this context, it is essential to recognize that A does not have, and cannot have, a present intention of "participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 801.1(i)(1). In fact, it would be prevented by law from doing so. As interpreted by the Board, the first definition of control under the CIBCA (power to "direct the management or policies of an insured bank") would prohibit any such participation and thus any conduct by A that would be inconsistent with an investment intent under the HSR Act. Moreover, the very broad definition of "controlling influence" applied by the Board under Section 2(c) of the Bank Holding Company Act (the "BHCA") (12 U.S.C. §§ 1841 et seq.) would have a similar impact. In short, not only does A have a present investment intention, it is prevented by the CIBCA and the BHCA from engaging in conduct inconsistent with an investment intent.

A's conduct would change if, and only if, it receives federal banking agency approval to acquire control of B. In our view, the rules should permit an acquiring person to claim the investment exemption under these circumstances, because they focus on present intentions and clearly contemplate that a person's intent may change.

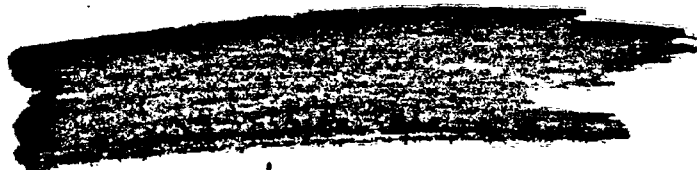
According to the Statement of Basis and Purpose,

"If a person makes an exempt acquisition 'solely for the purpose of investment' and later decides to participate in the management of the issuer, this change in intent does not require filing with respect to the exempt purchase, because the act applies only at the time of an acquisition." 43 Fed. Reg. 33,466 (July 31, 1978) (emphasis added).

Please do not hesitate to contact me at 956-7571

if you have questions about this matter.

Sincerely,



Informed that ^{writes} ~~states~~ that acquisitions below the control threshold in the bank acquisitions are not exempt from HSR under § 7A(c)(2) or § 802.8 of the HSR rules since such acquisitions are not subject to regulation by ~~the~~ and review by a banking authority. Thus, acquisitions made before regulatory approval is required are subject to HSR. The writer was also informed that the exemption only exemption was not available to a bank buying shares of another bank when it intends to ~~acquire~~ acquire shares giving it the power to influence management.