

11.90
Lender is considered U.P.E.
NEWCO MUST file to acquire
TARGET.

(VC)

[REDACTED]

March 23 1989
Freedom of Information Act

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PER
NOTIFICATION
OFFICE

Mr. Victor Cohen
Federal Trade Commission
Bureau of Competition
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Cohen:

In accordance with your suggestion which you made in our telephone conversation on Wednesday, March 22, 1989, I am writing to request the advice of your office as to the transaction described below.

NEWCO, a newly formed corporation with no assets or revenues, has an agreement to merge with TARGET, a publicly owned company whose stockholders will receive cash for their shares upon consummation of the merger which NEWCO will borrow from Lender. Under these circumstances, normally no filing would be required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), since the size of person test would not be satisfied. The merger would be consummated within a few weeks. However, Lender, which has agreed to provide financing for the cash merger price, desires to control a majority of the Board of Directors of NEWCO after the acquisition until its loan is repaid.

In order to avoid the delay observance of a waiting period would cause, which is unacceptable to TARGET, Lender proposes to enter into an agreement with NEWCO which will provide that after the acquisition (but as described below, only upon expiration of the applicable waiting period under the Act) Lender may designate a majority of the Board of NEWCO.

Under the circumstances described above, upon consummation of the acquisition of TARGET, no filing under the Act would technically be required since the acquiror, NEWCO, would have assets and sales of less than \$10 million, and since no person would own 50% or more of the voting securities or have a contractual right to designate 50% or more of the directors at the time of acquisition, NEWCO would be its own ultimate parent entity. However, to avoid any appearance that the future

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designation of directors by Lender would constitute an avoidance under Rule 801.90, if you advise that it is appropriate we would propose that before Lender could have a right to designate 50% or more of the Board of NEWCO, that a filing be made by Lender (as ultimate parent of NEWCO) and a waiting period be observed. Although obtaining the contractual power to designate directors is not normally an event requiring a filing, we believe this methodology would allow NEWCO to consummate the acquisition without observing a waiting period (which it could clearly do absent an agreement regarding designation of directors by Lender) yet prohibit Lender from exercising control over NEWCO until a filing has been made and the waiting period has expired. If the Commission believed the right to designate the majority of the directors should not be approved for antitrust reasons, NEWCO would continue to have a majority of its directors elected other than by designation by Lender.

We would appreciate your advice with respect to this matter at your earliest convenience so that we may proceed accordingly. Please call if you have any questions.

Very truly yours,

A large black rectangular redaction box covers the signature and name of the sender.