

301.11(e)
301.40

March 27, 1989

VIA FEDERAL EXPRESS

Informed party I am not an attorney

Patrick Sharpe, Esq.
Compliance Specialist
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

RECEIVED
MAR 28 11 13 AM '89
PREMERGER
NOTIFICATION
OFFICE

Re: Hart-Scott-Rodino Filing Criteria
Our File Reference: EBR5 2.7

Dear Mr. Sharpe:

Thank you so much for your time and patience in carefully reviewing various details of a leveraged buy-out transaction which I discussed with you by telephone on March 22, 23, and 24, 1989. I am writing to confirm the analysis you and I discussed and the conclusions reached. All the parties to the transaction will be relying on these conclusions in determining whether a filing will be necessary under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino").

OVERVIEW

A new corporation ("New Corp.") will be formed involving two foreign corporations ("X Corp." and "Other Corp.") and approximately twenty to thirty natural persons. New Corp., through an acquisition vehicle, will buy-out the stock of an existing corporation ("Old Corp."). All but one or two of the natural person shareholders plan to form a voting trust which will hold less than 50% of the voting securities of New Corp. The complete transaction will proceed through a series of steps involving a wholly-owned acquisition vehicle and mergers.

Note: I verified that no one person will hold 50% or more of New Corp including X Corp and other Corp.

Patrick Sharpe, Esq.
March 27, 1989
Page 2

ANALYSIS

Part I: Formation of New Corp.

1. The formation of New Corp. should be analyzed under FTC Rule 801.40, 16 C.F.R. §801.40. (All Rules cited herein are FTC Rules regarding Hart-Scott-Rodino and can be found at 16 C.F.R. §801 et seq.)

2. The valuation of the size-of-person of New Corp. is evaluated utilizing Rule 801.40(c). Rule 801.11(e) is not applicable to determine the size of the corporation formed (the "acquired person") under Rule 801.40.

3. Rule 801.11(e) is applicable to any "acquiring person" under Rule 801.40 who does not have a regularly prepared balance sheet. Although the comments in the March 6, 1987 Federal Register, 52 Fed. Reg. 7066 et seq. (1987), regarding Rule 801.11(e) suggest that it is not available under Rule 801.40, this comment was meant to refer only to the new corporation being formed and not to the acquiring persons.

4. In evaluating the size-of-person of natural "acquiring persons" in a Rule 801.40 transaction, the criteria of Rule 801.11(d) are utilized. The FTC has no other guidelines for evaluating the assets of a natural person. However, the general rule is that book value is utilized for size-of-person tests, whereas fair market value is used for size-of-transaction tests. Accordingly, the book value of the natural person's assets as characterized in Rule 801.11(d) is the relevant measurement.

5. If the natural person does not have a regularly prepared balance sheet, Rule 801.11(e) applies to subtract from the valuation, those assets being used as consideration for the acquisition. This is true even though the natural person is not a "newly-formed entity", mentioned on page 7069 of the March 6, 1987 Federal Register, 52 Fed. Reg. 7069 (1987).

6. In the proposed transaction, all but one or two of the natural person shareholders will form an irrevocable voting trust with a reversionary interest

Patrick Sharpe, Esq.
March 27, 1989
Page 3

(required by Delaware law). However, because the trust cannot be formed until the individuals have acquired the shares in New Corp., the voting trust cannot exist until after the Rule 801.40 corporation has been formed. Thus, the voting trust is not an entity to be evaluated as an "acquiring person" under Rule 801.40.

7. One of the parties to the transaction, X Corp., is a foreign corporation which currently holds warrants which are 90% paid and debt of Old Corp. X Corp. also has a limited technology exchange agreement with Old Corp. X Corp. will exchange the Old Corp. warrants for New Corp. warrants, which are over 90% paid, will permit New Corp. to have the benefit of a rollover of the debt (subject to negotiated modifications in terms) and will expand the scope of technology exchange. It will not receive any securities which are presently entitled to vote in the election of directors. X Corp. did not want to be a shareholder because of the possible effects of certain laws and policies of its native country. X Corp. will contribute significantly in technological research and development of New Corp. In structuring the governance of New Corp., the debt and technology participation of X Corp. were considered very significant. A corporate governance agreement is being prepared which provides that X Corp. may appoint two directors to the seven member board and the affirmative vote of such directors is required for certain significant corporate decisions. As you confirmed, under this structure, X Corp. is not an "acquiring person" to be evaluated under Rule 801.40.

8. Compiling the above and other factors, the formation of New Corp. evaluated under Rule 801.40 consists of the following possible "acquiring persons": Other Corp., with over \$100 million in assets; and the natural person shareholders, none of whom holds \$10 million in assets. Accordingly, no Hart-Scott-Rodino filing is required for the formation of New Corp.

Part II: Acquisition of Old Corp. by New Corp.

9. New Corp. will form a wholly-owned subsidiary "Acquisition Corp." as an acquisition vehicle. This formation does not require reporting under Hart-Scott-Rodino.

Patrick Sharpe, Esq.
March 27, 1989
Page 4

10. Acquisition Corp. will acquire the shares of Old Corp. New Corp. is the ultimate parent entity of Acquisition Corp. Accordingly, this step is analyzed for purposes of Hart-Scott-Rodino as an acquisition by New Corp. of voting securities of Old Corp.

11. The natural person shareholders, approximating twenty to thirty in number, collectively hold over 50% of the voting securities of New Corp. These shareholders, with the exception of one or two, Mr. CEO and possibly Mr. Chief Financial Officer ("Mr. CFO"), will form an irrevocable voting trust with a reversionary interest. The voting trust will hold less than 50% of the voting securities of New Corp. Accordingly, the voting trust is not an ultimate parent entity of New Corp.

12. The voting trust will designate either Mr. CEO or both Mr. CEO and Mr. CFO as the voting trustees. Assuming, for example, Mr. CEO alone is the trustee, Mr. CEO will not be attributed with the shares of the trust in addition to his own shares, because he does not "hold" the shares of the trust. Similarly, if Mr. CEO and Mr. CFO are both trustees, neither one of them nor both of them will have attributed to their individual holdings, the holdings of the voting trust. Neither Mr. CEO nor Mr. CFO is an ultimate parent entity of New Corp. because each holds only his own shares which constitute less than 50% of the shares of New Corp.

13. Under the circumstances discussed above, the formation of the voting trust does not affect the Hart-Scott-Rodino analysis of the proposed transaction.

14. New Corp. is a newly formed entity which does not have a regularly prepared balance sheet. Therefore, Rule 801.11(e) can be invoked in measuring the size-of-person of New Corp. Accordingly, the value of the consideration being utilized to consummate the acquisition can be subtracted from the total assets of New Corp. This subtraction brings the value of assets of New Corp. below \$10 million. Therefore, the statutory threshold of Hart-Scott-Rodino would not be met and no filing would be required. This conclusion would hold even if the other thresholds are met; i.e. even if the acquired corporation, Old Corp. has over \$100 million in

Patrick Sharpe, Esq.
March 27, 1989
Page 5

annual net sales or total assets and if over 15% or over \$15 million of stock or assets were being acquired.

Conclusion

The assumptions and analyses set forth herein based on our telephone discussions, lead to the conclusion that the above series of steps for the contemplated leveraged buy-out does not generate a Hart-Scott-Rodino reporting requirement for New Corp., X Corp., Other Corp., or any other parties to the transactions described above. If we do not hear from you by the end of the day on March 30, 1989, we will proceed accordingly.

Thank you again for your extensive time and assistance in analyzing this transaction.

Very truly yours,

[REDACTED]

[REDACTED]

I concur with
this letter. This appears
to be covered under
section 401.11(e).
called

3-31-89

[REDACTED]