

April 18, 1989

Memorandum to the Files:

Advice from Federal Trade Commission Premerger
Notification Office Concerning Issues of
"Beneficial Ownership" and "Control"

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FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

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On April 18, 1989, [redacted] and I spoke with Patrick Sharpe, an attorney with the Premerger Notification Office of the Federal Trade Commission, to request an informal interpretation pursuant to 16 C.F.R. § 803.30 of the Premerger Notification Rules ("Rules") promulgated under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"). The facts I described to Mr. Sharpe, the substance of our discussions, and the advice he rendered are set forth below.

Facts

One corporate person ("A") holds 40% of the voting securities of a corporation ("C"). Another corporate person ("B") owns 25% of the voting securities of C. There are two relevant contractual relationships between A and B relating to the shares of C held by B. First, for a fixed period of time (roughly five months) A has the right to dispose of the shares held by B and has the right to vote the shares held by B in connection with any transaction involving the sale of C or the sale of A's and B's shares of C. Second, A has an arrangement with B such that at a fixed future date (approximately two months in the future) A can call (i.e., acquire at a predetermined price) notes to be issued by B convertible into the voting securities of B. In the event that A does not call the notes of B, B has the right to put to A similar convertible notes. In either event, the conversion of the notes into voting securities of B would result in A controlling B and thereby holding C shares now owned of record by B. I noted that A, in its Schedule 13D filing, describes itself as the beneficial owner of the shares of C nominally owned held by B.

Discussion

I asked Mr. Sharpe whether A would be viewed under the Act and Rules as the beneficial owner of the

shares of C held by B and therefore as holding those shares pursuant to 16 C.F.R. § 801.1(c) and therefore controlling C pursuant to 16 C.F.R. § 801.1(b)(1). Mr. Sharpe directed me to the indicia of beneficial ownership set forth in Statement of Basis and Purpose issued with the Rules (which indicia include the right to obtain the benefit of any increase in value or dividends, the risk of loss of value, the right to vote the stock or to determine who may vote the stock, and the investment discretion including the power to dispose of the stock). Mr. Sharpe noted that B retains the market risk of gain and loss and the right to dividends and that A has the right to vote the shares of C held by B. I emphasized that the right to vote the shares explicitly applies to a vote in connection with the sale of C but less clearly applies to the right to vote in an election of directors. I noted that prior to the annual meeting of stockholders in 1988, B gave its proxy to A to vote the shares of C held by B. However, no annual meeting is anticipated for 1989 prior to the sale of C. Mr. Sharpe noted further that A has the power to dispose of B's shares of C.

Mr. Sharpe commented that he would like to discuss this set of facts with his colleagues before rendering any advice and at my request agreed to call me back later in the afternoon.

Advice

A short time later, Mr. Sharpe called to report that he had had an opportunity to consult with others in the Premerger Notification Office, including principally Mr. Sipple, and that he could now advise us that, if the proxy or contractual right held by A to vote B's shares of C was irrevocable, A would be viewed under all the facts as being the beneficial owner of B's shares of C and therefore A would be viewed as controlling C. I advised Mr. Sharpe (and since I have confirmed by review of publicly available documents) that the contractual arrangement which gives A the right to dispose of B's shares of C and to vote B's shares in connection with any approval of a sale of C is not revocable by B for a fixed period extending at least until the exercise date of the put arrangement and apparently extending until a fixed date approximately three months in the future. Like any contractual arrangement or proxy, the right can be revoked by consent of both parties, but B does not have the right unilaterally to revoke A's right to vote B's shares. I

mentioned again to Mr. Sharpe that A's right to vote the B shares did not explicitly include the right to vote in an election for directors of C, and Mr. Sharpe confirmed that he had mentioned that fact to Mr. Sipple. While the public documents could be read to permit A to vote B's shares of C in an election for directors, it appears most likely that the parties simply did not consider director elections since no election is anticipated before the sale of A's and B's shares of C. This description conformed to Mr. Sharpe's understanding of the facts and he confirmed that on these facts A held B's shares of C.

I thanked Mr. Sharpe for his cooperation in giving us prompt advice on this matter and said that I would confirm that advice in writing if we decided to rely on that advice in making a determination as to the reportability of a transaction.

[REDACTED]

I concur with
this. BS,
called [REDACTED]
4-20-89