

FMNRules: ~~801.10~~ ~~802.20~~ ~~802.9~~
801.10(c); 802.20(-); 802.9; Filing Fee

MEMORANDUM

TO: Alice Villavicencio, Esq ^e
Federal Trade Commission

FROM: [REDACTED]

RE: Hart-Scott-Rodino Filing

DATED: April 5, 1994

As we discussed, certain shareholders (the "Shareholders") of our client propose to enter into a transaction (the "Transaction") pursuant to which the Shareholders will sell their voting shares to the acquirer (the "Acquirer") in exchange for registered voting shares of the Acquirer; irrespective of each Shareholder's ability to qualify for the "investment exemption," a number of questions arise with respect to which Shareholders must file.

It is our understanding that if the acquisition price is not fixed when the merger agreement is signed (the "Signing") (i.e., consideration is expressed as a stock-for-stock exchange ratio with certain adjustments), the "market price" of the shares acquired by the Shareholders is determinative.¹ It is also our understanding that in this type of transaction, "market price" is based on the lowest closing price of the Acquirer stock for the 45 days prior to consummation of the transaction (the "Closing"). In our Transaction the period between Signing and Closing will likely exceed 45 days.

Scenario 1. At Signing, the "market price" of the Acquirer securities that a particular Shareholder anticipates receiving at the Closing exceeds \$15 million. Such Shareholder makes a Hart-Scott filing at Signing.² Between Signing and Closing, the stock price of the Acquirer declines so that the value of the stock received by such Shareholder falls below \$15 million. A) We believe that if this decline occurs within 45 days prior to Closing, the Shareholder may consummate the Transaction

¹ Section 801(a)(ii).

² This scenario assumes that no "investment exemption" is available.

without regard to the waiting period.³ B) We believe that if the decline occurs within 45 days prior to the Closing but the price increases prior to Closing, thus pushing the value back over \$15 million, the Shareholder may consummate the Transaction without regard to the waiting period.⁴ C) In the event that either of the above situations results in the Shareholder's ability to consummate the Transaction without regard to the waiting period (because of a failure to meet the Size-of-the-Transaction Test), will the FTC refund the filing fee?

Scenario 2. At Signing, the "market price" of the Acquirer securities that a particular Shareholder anticipates receiving at the closing of the Transaction is below \$15 million. As a result, the Shareholder does not make a Hart-Scott filing. Between Signing and Closing, the Acquirer's stock price increases so that the value of the stock received by such Shareholder would exceed \$15 million. A) We believe that if this increase occurs on the 46th day prior to the Closing and continues until Closing, the Shareholder must make a Hart-Scott filing.⁵ B) If this is the case, is there a mechanism that an individual Shareholder making a "last-minute" filing can use so as not to delay the entire Transaction (i.e., placing the Acquirer shares in trust until expiration of that Shareholder's waiting period)? C) We believe that if the increase in the Acquirer's stock price occurs on the 46th day prior to the Closing, but dips sufficiently in that period so as to cause the "market price" to fall below \$15 million for only one day, the Shareholder may consummate

³ See Interpretation 117 of the Premerger Notification Practice Manual; Section 801.10(c)(1)(ii); pp. 5-35 through 5-37 of Axinn, Fogg.

⁴ See Interpretation 117 of the Premerger Notification Practice Manual; Section 801.10(c)(1)(ii); pp. 5-35 through 5-37 of Axinn, Fogg.

⁵ See Interpretation 117 of the Premerger Notification Practice Manual; Section 801.10(c)(1)(ii); pp. 5-35 through 5-37 of Axinn, Fogg.

the Transaction without regard the waiting period.⁶

Scenario 3. "Solely for the Purpose of Investment" Exemption. At Signing, a Shareholder who would otherwise have to make a Hart-Scott filing qualifies for an "investment exemption" and therefore does not file. Between Signing and Closing, the Shareholder develops the intention to participate in the management of a wholly-owned subsidiary of the Acquirer, which subsidiary constitutes less than 10% of the total assets of the Acquirer; the Shareholder will not be a Board member of either the Acquirer or the subsidiary. The Acquirer, not the wholly owned subsidiary, is the issuer of the stock received by the Shareholder in the Transaction. A) We believe the Shareholder still qualifies for the "investment exemption."⁷ B) If not and a filing must be made, is there a mechanism that an individual Shareholder making a "last-minute" filing can use so as not to delay the entire Transaction (i.e., placing the Acquirer shares in trust until expiration of the Shareholder's waiting period)?

If any of the above is not clear to you, or you would like additional facts, please do not hesitate to contact me at [REDACTED]

[REDACTED]

⁶ See Interpretation 117 of the Premerger Notification Practice Manual; Section 801.10(c)(1)(ii); pp. 5-35 through 5-37 of Axinn, Fogg.

⁷ See Interpretation 37 of the Premerger Notification Practice Manual, where the FTC measures the intention of the individual to participate in the management of the issuer, not a subsidiary of the issuer that constitutes less than 10% of the assets of the issuer.