

801.11 ; 802.20 (b)

January 11, 1995

VIA FACSIMILE

Richard B. Smith, Esq.  
Premerger Notification Office  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Determining Whether a New Balance Sheet is Regularly Prepared for Purposes of Rule 802.20(b)

Dear Richard:

I am writing to confirm our telephone conversation on Monday, January 9, 1995, in which you advised me that the transaction described below would not be subject to the notification and reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a.

Corporation A has proposed acquiring 100 percent of the voting securities of Corporation B for less than \$15 million. B currently has a minority interest in Partnership P. Prior to the sale of its stock, B, in a non-reportable transaction, will acquire an additional partnership interest in P that will increase its interest to slightly more than 50 percent; the additional partnership interest is being acquired in partial satisfaction of a loan made by B's parent to the partnership.

Under Rule 802.20(b) of the premerger rules, an acquisition of voting securities for \$15 million or less is exempt from HSR filing requirements if it will not confer control of an issuer that, together with any other entities it controls, has annual net sales or total assets of \$25 million or more. 16 C.F.R. § 802.20(b). We understand that, because B will be acquiring a controlling interest in P before the sale of B's voting securities has been consummated, B must aggregate P's total assets and annual net sales with its own total assets and annual net sales for purposes of determining whether the \$25 million threshold in Rule 802.20(b) has been met or exceeded. See 16 C.F.R. § 801.11(b)(1); ABA Premerger Notification Practice Manual (1991 ed.), Interpretation No. 147 (commentary).

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Based on their existing, most recent regularly prepared balance sheets, B and P would have annual net sales of well under \$25 million, but would have total assets of more than \$30 million. However, prior to consummation of the sale of B's voting securities to A, B intends to prepare a new consolidated balance sheet and other financial statements that will reflect its acquisition of a controlling interest in P. On these new financial statements, the value of P's assets will be written down considerably, so that the total assets and annual net sales shown each will be less than \$25 million.

The new balance sheet will be as of December 31, 1994, which is the end of B's normal fiscal year. Although B usually would not prepare its annual financial statements until at least February, it is preparing them in January this year because of the impending sale of its voting securities to A. As part of the sale, B's parent will be required to warrant to A as to the accuracy of B's financial statements. The total asset value listed on P's existing balance sheet significantly overstates the value of P's assets because of overly optimistic projections that were made a few years ago concerning P's business prospects. B already had adjusted for this overstatement in its existing financial statements by writing down the value of its minority interest in P, but P has continued to carry the assets on its books at the inflated level. Now, B wishes to create new consolidated financials that will reflect its acquisition of a controlling interest in P, and that will more accurately reflect the value of P's assets. A/C

On Monday, January 9, 1995, I called you and asked whether, for purposes of determining whether B is entitled to the exemption in Rule 802.20(b), B could rely on its new balance sheet, or would be required to rely on the existing balance sheets of B and P. Under the HSR Rules, the total assets of a person are as stated on that person's most recent, regularly prepared balance sheet. 16 C.F.R. § 801.11(c)(2). You stated that the new balance sheet would qualify as B's most recent regularly prepared balance sheet for HSR purposes because it was being prepared with respect to B's normal fiscal year, and because it was reasonable for B to create a new consolidated balance sheet to reflect its acquisition of a controlling interest in P. You further stated that the fact that B was preparing its balance sheet somewhat earlier this year than usual because of the impending sale of its voting securities did not change this conclusion, because B was not altering the time period covered by its annual financials.

Based on B's new most recent regularly prepared balance sheet, its total assets and annual net sales each will be less than \$25 million. Thus, under Rule 802.20(b), A's acquisition of B's voting securities will be exempt from HSR filing requirements.

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Please call me at the number above to confirm that you agree with the advice reflected in this letter.

Sincerely,

[REDACTED]

1/20/95 Called writer and advised that a bona fide reduction in value of partnership's assets to reflect their value on 12/31/94, as part of the "consolidation" of a now controlled entity, is not ~~inappropriate~~ inappropriate as long as not done for avoidance purposes. Also, the A/P preparation of financials in January rather than February (a reasonably close proximity in time) does not, for this case, result in our concluding that the financials are not regularly prepared. However, I greater time ago between what is usual and what is now being done could lead to a different conclusion.

R.B. Smith