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FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

By Fax

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Premerger Notification Office
Bureau of Competition
Room 303
Washington, DC 20580

This material may be subject to confidentiality provisions of Section 6A(h) of the Clayton Act which restricts release under the Freedom of Information Act.

Re: Hart-Scott-Rodino Act Notification

Dear Melea:

Thank you for taking the time yesterday to discuss this matter with me. I am writing to confirm the conclusion of our discussion which was that no new Hart-Scott filing would be necessary in the situation outlined below.

Introduction

As we discussed, a Hart-Scott filing was made nearly a year ago for a transaction and the 30 day waiting period expired without a second request. At the time of the filing, it was anticipated that the transaction would occur all in one step. After the filing, however, it became necessary to divide the transaction into two phases. The first phase of the transaction is complete, but the second phase has not yet occurred and is not expected to occur within a year of the expiration of the waiting period. The question is whether the acquisition for which the filing was made has already occurred as part of Phase One, thus making a second filing unnecessary.

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The Parties

The transaction involves the affiliation of two separate entities. One of the entities is a non-profit, non-stock corporation with a number of subsidiaries. The other entity is an incorporated entity that is a non-profit, non stock corporation and that owns a number of and also engages in and other activities. The principal is not a subsidiary, but rather a division within the corporation. (The through a subsidiary.) Please note that these are fictional names and that the actual identities of the entities are given at the end of this letter.

The Planned Transaction

The original plan was for to form a new parent ("Parent"), which would be a non-profit, non-stock corporation. Under this plan, Parent would become the sole member of . It would also become the sole member of a new corporation, "Newco," which would be formed to own the business of and to operate that were formerly owned and operated by . Newco would either own or have a long term lease on the real property. As will be discussed in more detail below, this is still the way in which the parties ultimately intend to accomplish the transaction, but they have now decided to divide the transaction into two phases.

The Hart-Scott Filing

The formation of Parent was not reportable because took back any voting securities in parent, making § 801.40 inapplicable. Parent's becoming the sole member of was also not reportable because Parent did not meet the size of the person test prior to becoming the sole member of . Thus, the Hart-Scott filing dealt only with the acquisition of the by Parent, through the creation of Newco, in which Parent would be the sole member. In that filing, Parent was the "acquiring person" and is the "acquired person."

Phase One

After the Hart-Scott filing was made, it became apparent that, due to the need to meet certain bond requirements and obtain certain regulatory approvals, it was not possible to complete the entire transaction as quickly as had been anticipated. Thus, it was decided that the transaction would be completed in two phases. To date, only Phase One has been completed.

Under Phase One, Parent was made the sole member of . In addition, created an "Operating Committee" and transferred control of the business and

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operations of the [REDACTED] Operating Committee. The [REDACTED] Operating Committee was created as an "Other Body" under [REDACTED] law. The state statute defines an "Other Body" as a person or group, other than the board of Trustees or a committee of the board of Trustees, who may be given, by the bylaws of the corporation, powers that, if not vested in the Other Body, could be exercised only by the membership of the corporation as a whole, by the delegates of the members, or by the board of directors.

The [REDACTED] Operating Committee is presently controlled by the Parent by virtue of the Parent's right to elect or appoint seven out of the twelve members of the [REDACTED] Operating Committee. Of the twelve members of the [REDACTED] Operating Committee, six are nominated by the Chairman of the Parent and elected by the Board of Trustees of the Parent. One is the President and CEO of the Parent, *ex officio*. The other five are officers of the [REDACTED], *ex officio*. During Phase One, Parent also has the right to remove the non-*ex officio* members of the [REDACTED] operating committee for cause, as defined in the affiliation agreement among the parties.

Phase Two

Phase Two of the transaction has not yet been completed. Newco has been created but the [REDACTED] assets have not yet been transferred to it. In large part, this delay is due to the fact that a necessary pending filing with the Internal Revenue Service has been delayed due to the government employee furlough in November of this year. In Phase Two, the members of the [REDACTED] Operating Committee will serve as Newco's initial board of directors. As stated above, Parent will be the sole member of Newco and the business and operations of the [REDACTED] previously owned by the [REDACTED] will be transferred to Newco, but that will be an intraperson transaction and thus not reportable. Thereafter, all of the members of the Board of Newco will be nominated by Newco and be elected by the Parent.

(no; transaction)
would not be reportable
because
Newco
would
not
meet
size-of-person test

Issue

Does the fact that the Parent presently has the right to elect or appoint over 50 percent of the members of the [REDACTED] Operating Committee (to which the [REDACTED] has already transferred control of the business of the [REDACTED]) mean that Parent has already acquired the business of the [REDACTED] so that no additional Hart-Scott filing will be required at the time the business and operations of those [REDACTED] are transferred to Newco and the Parent is made the sole member of Newco?

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Identities of the Parties

When I initially spoke with you and prepared a draft of this letter, we did not yet have permission from our client to reveal the identities of the parties. We now have that authority and would like to do so.

The "Parent" is identified in the filing as [redacted] and is now operating as the [redacted]. The filing was dated December 14, 1994 and was actually filed on [redacted]. For your information, the filing indicates that Dick Smith was consulted on certain matters related to the filing.

Conclusion

It appears that, for purposes of the Hart-Scott-Rodino Act, the transaction described in the filing has already occurred because control of the business of the [redacted] was already passed to Parent by virtue of Parent's right to appoint a majority of the members of the [redacted] Operating Committee. Please call me after you have had an opportunity to review this letter to confirm that your conclusions remain the same.

Thank you very much for taking the time to discuss this issue with me. You can reach me at [redacted]

Sincerely,

[Redacted signature]

Enclosures

I spoke with [redacted] on 12/14 after consulting with RS, VC and TH. We agree that Parent has sufficient control and ownership of [redacted] to make a new filing unnecessary. Since the previous filing already covered the substantive transaction, we have concluded that the parties do not need to refile. This conclusion is for this specific fact pattern only.