

801.1(c)
802.50(a)



April 23, 2002

BY FAX No. (202-326-2624)

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Federal Trade Commission
Pre-Merger Notification Office
Washington, D.C.

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FEDERAL TRADE
COMMISSION
PRE-MERGER NOTIFICATION
OFFICE
2002 APR 23 P 12:17


Request for Informal Interpretation Under Hart-Scott-Rodino Rule 803.30

Dear Mr. Verne:

This is the letter I said I would send you. Its purpose is to confirm the substance of our telephone conversation of Thursday, April 18th. In that conversation, I described a cruiseship acquisition and sought your concurrence that our firm's client should determine whether it must file and wait under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 at the beginning of the charter period for the cruiseship even though that precedes formal conveyance of legal title to the vessel.

As I explained when we spoke, our firm represents a cruise vacation company that plans to acquire two cruise vessels in asset transactions. The HSR "acquired person" for each vessel is different, but the two transactions are analogous. So, for ease of description, I will speak here about one vessel and one transaction. As I explained, our question is not whether our client and the acquired person must file and observe the waiting period requirements but, rather, when they should make the analysis regarding whether they should file and wait.





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Facts

The acquiring person, our client, is a non-U.S. person. The acquired person is also a non-U.S. person, a French "co-propriété maritime". The co-propriété maritime is owned, in turn, by French investors. You may assume, for purposes of this letter, that the size of the persons and the size of the transaction will exceed the applicable thresholds. Accordingly, the parties will file unless an exemption is available. If an exemption is available, we believe it would be new Rule 802.50 and, in particular, its paragraph (a).

As elaborated below, in order to enable the co-propriété maritime to comply with certain non-U.S. tax requirements, the acquisition of the vessel will involve two steps, first a charter and, later, a formal transfer of legal title. Both steps will be prescribed and committed to by contract before the beginning of the charter period. The first step (the charter) will be specifically conditioned on the parties' unconditional commitment to complete the transfer of legal title at the end of the charter period.

In the first step, expected to occur later this year, our client will charter the vessel from the co-propriété maritime. Our client will assume full control of, and responsibility for, the vessel at the beginning of the charter period. Thereafter, during the charter period, our client will sell cruises for the vessel, determine pricing and service, and operate the vessel, all for its own account with full commercial risk. Neither the French investors nor the co-propriété maritime will play any role or have any involvement in any of those functions. The only constraint imposed on our client's freedom to operate the vessel, during the charter period, will be that, under the charter agreement with the co-propriété maritime, our client will be required to operate the vessel in defined geographic areas designed to provide benefits to certain "underdeveloped" French territories. In the meantime, our client will pay charter fees to the co-propriété maritime.

At the end of the charter period (some time in 2004 or 2005), our client will make a final payment to the co-propriété maritime and receive full legal title to the vessel. This delay in formal passage of legal title is intended to accommodate requirements imposed by French authorities on the French investors under an agreement between those authorities and the investors. However, the agreement between our client and the co-propriété maritime regarding title will not be a call option of our client or a put option of the co-propriété maritime. Rather, it will be a mutual obligation, incurred at the inception of the entire transaction, requiring the co-propriété maritime to transfer legal title to our client and our client to accept that title. Consistent with these facts, when our client assumes possession of the vessel at the beginning of the charter period, it will reflect the vessel as an asset on its balance sheet in accordance with applicable accounting principles and begin depreciating the full cost of the vessel (the charter payments plus final payment, discounted to present value).

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Whether our client and the co-proprieté maritime need to file HSR notices and reports and observe the waiting period requirements depends, we believe, on the application of new Rule 802.50(a) and, in particular, on whether sales from the vessel "in or into" the United States exceeded or will exceed \$50 million during the relevant fiscal year preceding the vessel's acquisition. Although, to date, the vessel has operated exclusively outside United States waters, a majority of the revenues attributable to the vessel during calendar 2001 (that being the most recently-completed fiscal year of the last operator) were derived from passengers residing in the United States. And, although the vessel will operate outside United States waters for the foreseeable future, the client anticipates that a substantial portion of the revenues attributable to the vessel during the year that will precede the transfer of legal title will also derive from United States residents. We and the client are aware of your August 14, 1986 interpretive letter regarding cruiseships and, more generally, the need to allocate an appropriate portion of the revenues generated by the vessel to the United States irrespective of where the vessel sails.

As you know, the issue I raised during our conversation is: When do we make that sales analysis? Do we do that now, before the charter commences and our client assumes possession and control of the vessel, based on the revenues attributable to the vessel during 2001? Or do we do that in 2004 or 2005, before formal legal title to the vessel passes, based on the revenues attributable to the vessel during the then-trailing fiscal year (i.e., 2003 or 2004)?

Conclusion

We believe the situation presented here compels the conclusion that the Rule 802.50(a) sales test should be applied now, before the charter period begins, based on 2001 sales, before our client assumes irreversible dominion over the vessel.

Based on our conversation of April 18th, I understand that you concur with this conclusion. However, this letter gives us an opportunity to make sure I communicated clearly in that conversation. Accordingly, I will call you in a day or two to confirm that that is so.

In the meantime, I thank you again for your courteous assistance in this matter.

Very truly yours,

AGREE WITH THE WRITER'S
CONCLUSION. BENEFICIAL OWNERSHIP OF THE VESSEL
PASSES TO THE BUYER NOW.
Michael Verne
4/24/02