

802.71

May 3, 2002

BY HAND

Ms. Marian R. Bruno
Assistant Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Marian:

I am writing to confirm our telephone conversation regarding whether the irrevocable transfer of certain voting securities from a borrower to a trustee in connection with a debt workout is exempt from pre-merger notification requirements. Given the facts as presented below, you stated that the transaction would not be reportable based upon the exemption in 17 C.F.R. 802.71.

We represent [REDACTED], which is acting for itself and a consortium of banks, in connection with the workout of a loan that was secured by almost all of the voting securities of [REDACTED]. In September 2001, [REDACTED] (the "Borrower"), an indirect subsidiary of the [REDACTED] used the loan proceeds to acquire the [REDACTED] shares, which constitute 94.5% of [REDACTED] outstanding voting securities. Five months later, in early 2002, approximately \$106 million of K [REDACTED] funds were reported missing. Published reports alleged that the money had been illegally diverted to [REDACTED] itself and a criminal investigation is underway. We understand that [REDACTED] as denied any wrongdoing. Copies of English language articles referring to these events are attached hereto as Exhibit A.

As a result of these reports, and the resulting insecurity on the part of the lenders, the banks and the Borrower have entered into a Restructuring Agreement whereby legal title to

[REDACTED]

Ms. Marian Bruno, Esq.

May 3, 2002

[REDACTED]

the voting securities of [REDACTED] is to be transferred without consideration from the Borrower to a Trustee in an irrevocable trust agreement that instructs the trustee to both manage the company and sell it. The Trustee is [REDACTED], a management consulting firm. Specifically, the agreement states that, in order to allow for the restructuring of the loan, "the Borrower shall transfer the [REDACTED] shares to the Trustee as trustee for both the Borrower and the Lenders and, inter alia, to manage and operate the [REDACTED] in accordance with commercially prudent business practices and to sell the [REDACTED] shares to a third party upon the terms and conditions set forth hereinafter." See Recital ¶ F.¹ The Trustee is paying nothing for the [REDACTED] shares, and the transfer is irrevocable. The Borrower is responsible for paying the Trustee a remuneration for its function as trustee. Although the Trustee is empowered to sell the [REDACTED] shares, there is no deadline by which the Trustee must dispose of them. As a practical matter, it is likely that [REDACTED] operations will be managed by the Trustee for the near future.

Actual transfer of the shares to the Trustee is subject to the condition precedent "that all applicable merger control or antitrust approvals to the extent compliance is required by mandatory law, have been obtained or the waiting periods thereunder have expired or been terminated." Agreement, Section 1.2(c). The agreement is entitled, "Restructuring Agreement and Amendment No. 1 to the Finance Documents and to the Investment and Shareholders Agreement." A copy of the agreement, as signed by the banks and the Borrower, is enclosed herewith.

Rule 802.71 exempts "[a]cquisitions resulting from . . . transfer by a settlor to an irrevocable trust . . ." The Statement of Basis and Purpose provides the explanation that "acquisitions exempted by the rule are typically involuntary accompanying this rule without consideration." Here, legal title to collateral is being irrevocably transferred from a borrower to a trustee appointed jointly by both the borrower and the lenders, pursuant to an agreement in which the trustee is being instructed to sell the collateral for the benefit of both the borrower and the lenders in order to pay off an outstanding loan. No consideration is being paid to the Borrower

¹ The trustee's obligations are set forth more fully in Section 1.1 of the Agreement. In particular, the trustee is required to "exercise all rights attached to the [REDACTED] Shares in its own name but for the account and at the risk of the Borrower, including but not limited to the exercise of the voting rights, and to take such actions in the ordinary course of business that may be required from time to time to maximize the value in connection with a sale or disposal of the [REDACTED] Shares," to "sell and to dispose of the [REDACTED] Shares in accordance with this Agreement," to "inform the Borrower and the Lenders about all material business affairs of [REDACTED] and to "disburse all amounts received in connection with a disposal of the [REDACTED] Shares" to pay the outstanding loan and to give to the Borrower any money left over.

[REDACTED]

[REDACTED]

Ms. Marian Bruno, Esq.

May 3, 2002

for the transfer of collateral to the trustee. We believe such an acquisition fits within the exemption under Rule 802.71.

I believe this letter accurately reflects our conversation regarding the facts and applicable exemptions. Please contact me if you disagree.

Sincerely,

[REDACTED]

Enclosures

[REDACTED]