

**Verne, Michael**

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**From:** Moss, Betty W.  
**Sent:** Monday, August 25, 2003 10:38 AM  
**To:** Verne, Michael  
**Subject:** FW: H-S-R Interpretive Advice regarding To File or Not To File in Connection with Corporate Repurchase of Stock

[REDACTED]

Mike, would you please look at this and handle as you see fit. Thanks.

-----Original Message-----

**From:** [REDACTED]  
**Sent:** Friday, August 22, 2003 3:13 PM  
**To:** Moss, Betty W.  
**Subject:** H-S-R Interpretive Advice regarding To File or Not To File in Connection with Corporate Repurchase of Stock

Ms. Moss:

I am struggling with the question described in more detail below regarding whether a filing under the Hart-Scott-Rodino Act is required in connection with a corporate repurchase of stock. I would appreciate it if you could forward this inquiry to a member of the Staff of the FTC Premerger Notification Office who might be able to help me.

I will describe the fact pattern, and then my attempt to analyze it under the H-S-R Act and rules. A corporation (the "Issuer") will make an offer to buy stock from its own stockholders. Some stockholders may sell stock back to the Issuer in response to the offer while other stockholders do not. As a result of the decrease in the total number of shares outstanding, an entity (the "Stockholder") which owns around 30% of the Issuer's voting common stock before the tender offer, and does not sell any of its stock, will own over 50% of the voting common stock after the tender offer. Is the Stockholder's crossing of the 50% threshold subject to a filing requirement under H-S-R or exempt?

The first question is whether the Stockholder is an "acquiring person." Obviously, the Stockholder is not acquiring anything directly within the ordinary meaning of the word "acquire." The Issuer is acquiring its own stock. However, Rule 801.2(a) states that any person which, as a result of an acquisition, will hold voting securities, either directly or indirectly, is an acquiring person. The example under Rule 801.2(a) establishes that an entity can be an acquiring entity even though it does not directly purchase shares. Will the Stockholder hold voting securities "as a result of an acquisition?" Rule 801.1(c)(8) states that a person holds all voting securities held by the entities included within it. The tender offer will result in the Issuer being included within the Stockholder, because the Stockholder will own over 50% of the Issuer after the tender offer whereas it did not before the tender offer. So the Stockholder will be considered to hold the securities bought back by the Issuer from other stockholders in response to the self-tender. But as soon as the Issuer buys back its shares of stock, those shares become non-voting under state corporate law. So the

Stockholder will not own those securities as voting securities as a result of the acquisition. Therefore, Rule 801.2(a)'s reference to owning voting securities as a result of an acquisition does not apply, at least as to the shares purchased in the self-tender. The Stockholder will continue to own the voting securities of the Issuer that the Stockholder owned before the tender offer. Could those be voting securities held "as a result of an acquisition?" Rule 801.13(a) states that all voting securities of the issuer which will be held by the acquiring person after the consummation of an acquisition shall be deemed voting securities held as a result of the acquisition. But that rule does not apply unless the Stockholder is an "acquiring person," which is what is at issue. It appears to me that the Stockholder is not an "acquiring person." If that is correct, then the analysis is done, and an H-S-R filing is not required. That strikes me as possibly an odd result, where control is being created over an entity that was not previously controlled by the Stockholder.

If the above analysis is incorrect, and the Stockholder is an "acquiring person," there would then be a question as to whether an exemption from filing under Rule 802.30 applies. Rule 802.30 provides: "Intraperson transactions. An acquisition . . . in which, by reason of holdings of voting securities, the acquiring and acquired persons are . . . the same person, shall be exempt from the requirements of the act. Examples: . . . 4. Corporation A repurchases a portion of its voting securities in a series of transactions involving numerous sellers. All of these acquisitions are exempt under this section. The redemption or retirement of securities would likewise be exempt under this section." The quoted example suggests that the transaction described above may be exempt, as it consists of a redemption. However, the wording of Rule 802.30 itself does not apply. The rule only applies if the acquiring and acquired person are the same person. Here I'm assuming that the Stockholder is an acquiring person. Is the Stockholder also the acquired person? Before the transaction, the Stockholder does not control the Issuer, so the Stockholder is not the acquired person. So the 802.30 exemption does not apply.

Please assume that all dollar thresholds relevant to application of the filing requirement are met.

Thank you.

[REDACTED] Esq.  
[REDACTED]  
[REDACTED]  
[REDACTED]

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ADVISED THAT UNLESS THE  
SHAREHOLDER WAS INSTRUMENTAL  
IN CAUSING THE REPURCHASE TO  
OCCUR, THERE IS NOT AN  
ACQUISITION, SO THE TRANSACTION  
IS NOT SUBJECT TO THE HSA ACT.

B. Michael [Signature]

8/25/03