

B02.30

June 11, 2010

CONFIDENTIAL

VIA ELECTRONIC MAIL

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
7th & Pennsylvania Avenue, NW
Washington, DC 20580

Re: Basis of HSR Non-Reportability for a Repurchase of Voting Securities and Other Transactions

Dear Mike:

I am writing to confirm our discussions of March 31, 2010, May 14, 2010 and June 7, 2010 regarding the non-reportability under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"), of the proposed transactions described below.

Proposed Transactions

A privately held company (the "Company") intends to repurchase some of its issued and outstanding voting securities as a part of several transactions being undertaken pursuant to a purchase agreement entered into by the Company, its shareholders and other involved parties. The Company has one controlling shareholder for HSR purposes, an irrevocable trust ("Trust A"), and a number of shareholders who hold a minority voting position in the Company ("Minority Shareholders"). Trust A currently holds all of the shares of a class of preferred voting securities ("Class A Preferred Stock"), and these shares constitute appropriately 90% of the overall voting rights with regard to the election of the Company's directors. While there are significant economic rights in the common stock, the common stock collectively has less than 10% of the voting rights. The repurchase transactions have been initiated in an effort to resolve active litigation about to go to trial that has been brought against Trust A by several beneficiaries of Trust A who are also among the Minority Shareholders in the Company and who will have their interests acquired.

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Mr. B. Michael Verne
June 11, 2010
Page 2


The repurchase and other transactions will involve the following:

- (1) All of the common stock held in the Company by the Minority Shareholders who have brought the litigation and trusts for the benefit of themselves and their issue will be repurchased by the Company;
- (2) All of the preferred stock in the Company will be repurchased except for a portion of the Class A Preferred Stock held by Trust A;
- (3) Part of the common stock of the Company is held by a corporation ("Holding Corporation") that holds nothing other than a minority amount of the common stock of the Company, other than perhaps cash, cash equivalents and small holdings of minority interests in third party securities. The Company will purchase a majority of the voting securities of the Holding Corporation such that Holding Corporation will become a subsidiary of the Company. The only other remaining shareholders in the Holding Corporation will be trusts (collectively, "Trust B") for the benefit of the children of Person A, an individual identified below; and
- (4) Trust A will sell all of the remaining outstanding Class A Preferred Stock to a newly formed trust ("Trust C") for \$100,000 or less. Upon closing, these shares of Class A Preferred Stock will constitute in excess of 85% of the overall voting rights with regard to the election of directors to the Company's board of directors.

Upon the repurchase and other transactions, the Company will only have three shareholders. One shareholder is an individual ("Person A"). He is the Chairman of the Board of Directors of the Company. While Person A is not acquiring additional shares in the Company, as a result of the transactions, his percentage interest in the Company common stock will increase. However, the shares he holds will still constitute less than 10% of the overall voting rights with regard to the election of directors to the Company's board of directors. He is one of three trustees of Trust A, the current controlling shareholder of the Company. Neither Person A nor anyone else has the power to remove or replace 50% or more of the trustees of Trust A, and there is no settlor with a reversionary interest as the settlor of Trust A is deceased. Person A is only a remote, contingent beneficiary of Trust A. Person A also has trustee roles in other trusts as described below. Person A supports the proposed transactions. You can assume for purposes of this hypothetical that Person A anticipates that the transactions will be beneficial to him and that as a practical matter the Company would not go forward with the proposed repurchases if he was opposed. However, he does not have the power to compel the transactions to occur. For example, Trust A must approve the proposed transactions and Person A is just one of three trustees of Trust A.

The second shareholder upon closing is Trust C, identified above, the newly formed trust that at closing is acquiring from Trust A the outstanding Class A Preferred Stock. While I discussed several alternatives with you regarding the set up of Trust C, you should assume that

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Mr. B. Michael Verne
June 11, 2010
Page 3

Trust C will be set up as follows: Trust C is being set up for the benefit of Person A and family members of Person A, and Person A will be one of three trustees of Trust C. Trust C is an irrevocable trust. The settlor of Trust C, the spouse of Person A, will not retain a reversionary interest in Trust C. Person A will have the power to remove any of the other trustees (although he will not be able to remove both of the two other trustees at the same time). If Person A removes a trustee, he cannot personally and solely replace the removed trustee. The remaining trustees (of which there would then be two with him as one) would have the power to appoint a replacement based on a unanimous vote of the two trustees. Accordingly, Person A will have the power to block or veto a replacement choice being made by the two trustees. While not a fact we discussed, Trust C also may be set up such that if Person A and the other remaining trustee cannot agree on a replacement, the replacement trustee will be selected by a majority decision of Person A and his adult issue who also are beneficiaries of Trust C. If Person A resigns as a trustee, he can designate a successor for himself. You should assume that Trust C has a provision whereby a majority vote of the trustees can cause Trust C to distribute out the Class A Preferred Stock to Person A (or someone else), and change the mechanism for designating trustees, such that, for example, Person A could be given the power to remove and replace all of the trustees.


The third shareholder is Holding Corporation, an entity that as described above will upon closing be a majority owned subsidiary of the Company. Trust B, as mentioned above, will continue to hold a minority interest in Holding Corporation. Person A is one of the three trustees of Trust B. The settlor of Trust B, the mother of Person A, does not retain a reversionary interest in Trust B. There is no person or entity with the power to remove or replace 50% or more of the trustees of Trust B. Person A is only a remote, contingent beneficiary of Trust B.


You should assume that if Person A controlled Trust C for HSR Act purposes that the sale by Trust A to Trust C of its remaining Class A Preferred Stock would be reportable under the HSR Act as you should assume that combining the acquisition price for these shares in the Company (\$100,000 or less) with the fair market value of the common stock in the Company that Person A already holds and will continue to hold upon closing would exceed \$63.4 million.

Conclusions

You confirmed that the proposed transactions described above would not trigger any reporting obligation under the HSR Act. Specifically you confirmed:

(1) The Company repurchasing its own voting securities cannot be an HSR reportable event unless there is a person that is instrumental in the repurchase and that person crosses an HSR notification threshold as a result of the repurchase.





Mr. B. Michael Verne
June 11, 2010
Page 4

(2) Under the proposed transactions described above, there would be no person that would be both instrumental in the repurchase and cross an HSR notification threshold as a result of the proposed transactions.


(3) To the extent that Trust A's percentage interest in the voting securities of the Company would increase at closing from its current approximately 90% level (immediately before it sells those interests to Trust C) by virtue of the transactions, the transactions would not trigger any HSR reporting event (even assuming Trust A is instrumental in the repurchase). Any increase in holdings by this shareholder in the Company would be exempt as an intraperson transaction under 16 C.F.R. § 802.30(a).

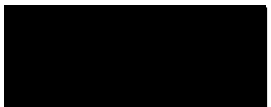
(4) Trust A's sale in conjunction with the closing of all of its interests in the Company, the outstanding Class A Preferred Stock, to Trust C would not be HSR reportable. There is a determined acquisition price (\$100,000 or less) for these voting securities, an amount well below the HSR \$63.4 million size of the transaction test. *See* 16 C.F.R. § 801.10. You agreed that the determined acquisition price controls for HSR valuation purposes even if one were to argue that the fair market valuation of the voting securities may be substantially higher and above \$63.4 million.

(5) The Company's acquisition of voting securities in Holding Corporation is not reportable under the HSR Act, regardless of the dollar value, as Holding Corporation only holds voting securities in the Company, and perhaps cash, cash equivalents and small, non-HSR reportable holdings of minority interests in third party securities.

(6) Person A would not be instrumental in the repurchase of the Company's voting securities for HSR purposes or otherwise be subject to any HSR obligation from the transactions regardless of the dollar value of the voting securities he will hold in the Company. You agreed that he would not be subject to any HSR reporting obligation even though his percentage interest in the voting securities of the Company will increase somewhat from the repurchase transaction and even if the fair market value of his shares increases as a result of the proposed transactions and would be worth more than the \$63.4 million size of the transaction test under the HSR Act. You confirmed that although Person A is important to the transaction process that he would not be instrumental for HSR purposes given his lack of power to compel the transactions to occur and that the repurchase transaction was not undertaken to avoid a need to file under the HSR Act.

(7) A possibility of inheritance is not a reversionary interest for HSR purposes, a settlor of a trust would not be deemed to hold the corpus of a trust or otherwise control a trust for HSR purposes based on being a remote and contingent beneficiary of a trust, and a person (other than a settlor of trust) would not control a trust based on being a beneficiary of the trust, even if that person is a present beneficiary of the trust. Person A's wife, the settlor of Trust C, would not be deemed to have a reversionary interest in Trust C based on Person A being a beneficiary of Trust C.





Mr. B. Michael Verne
June 11, 2010
Page 5

(8) Person A would not control Trust C for HSR purposes. The power to remove trustees does not confer control over a trust in the absence of the ability to replace 50% or more of the trustees of a trust. The fact that Person A can designate his own successor as trustee, and the fact that he has veto power over the replacement of any other trustees does not count as the ability to replace trustees for HSR purposes and would not result in him controlling Trust C. The fact that Person A's wife is the settlor of Trust C also does not change the conclusion that neither Person A nor his wife controls Trust C for HSR purposes. You confirmed that, even assuming arguendo that Trust C was structured in such a way as to avoid triggering an HSR filing obligation, this would not be a transaction or device for avoidance under 16 C.F.R. § 801.90. Parties are not under an obligation to structure a transaction in a manner that necessarily triggers notification obligations.

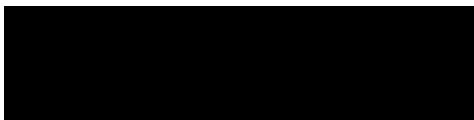
(9) The conclusion that no HSR filing is required to consummate the proposed transactions is not impacted by the fact that Trust C has a provision whereby a majority vote of the trustees can cause Trust C to distribute out the Class A Preferred Stock to Person A (or someone else), and change the mechanism for designating trustees, such that, for example, Person A could be given the power to remove and replace all of the trustees. Such a provision would only be relevant to an HSR analysis at the point, if any, it is used to authorize a proposed distribution by Trust C of Class A Preferred Stock or a change in control of Trust C.

As I noted above, Trust C may be set up such that if Person A and the other remaining trustee of Trust C cannot agree on a replacement trustee to fill an open trustee position, the replacement trustee will be selected by a majority decision of Person A and his adult issue who also are beneficiaries of Trust C. While we did not discuss this specific scenario, my understanding is that this would not change the conclusion that neither Person A nor any other person or entity controls Trust C for HSR purposes, and that no HSR filing obligation is triggered.

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Please let me know as soon as possible if you disagree with any of the conclusions discussed above, or if I have misunderstood any aspect of your advice. Thank you for your assistance in this matter.

Sincerely,



AGREE
B
6/15/10

