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May 22, 1994

I am not an attorney

BY TELECOPIER

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Interpretation of HSR Rule 802.52

Dear Mr. Sharpe:

We discussed on Monday the scope of Section 802.52 of the HSR Coverage Rules, "Acquisitions by or from Foreign Governmental Corporations". At that time, you suggested that I put my questions into a letter to you.

In particular, we discussed the following transaction: Company A and Company B are corporations organized under the laws of foreign country X. Company B is directly controlled by the government of foreign country X. Company B directly owns assets located in the United States and also owns all the outstanding voting securities of a U.S. issuer. Company A and Company B enter into an agreement pursuant to which Company A will acquire all the outstanding voting securities of Company B.

Our question is whether Section 802.52 exempts the acquisition by Company A of Company B's voting securities.

Section 802.52 provides:

An acquisition shall be exempt from the requirements of the Act if:

- (a) The ultimate parent entity of either the acquiring person or the acquired person is controlled by a foreign state, foreign government, or agency thereof; and
- (b) The acquisition is of assets located within that foreign state or of voting securities of an issuer organized under the laws of that state.

16 C.F.R. § 802.52.

Section 802.52 appears to exempt the above-described transaction. It is clear that the ultimate parent of Company B is controlled by a foreign government (since Company B is its own ultimate parent entity and it is controlled by its government). Second, the acquisition is of voting securities of an issuer (Company B) that is organized under the laws of that same foreign state.

Thus, the plain meaning of the rule seems to exempt the entire acquisition if it meets the conditions specified in subsections (a) and (b), and the Statement of Basis and Purpose, as discussed below, is consistent with this interpretation. In light of these facts, we would question the basis for any argument that the resulting indirect "acquisitions" of control of Company B's U.S. subsidiary and of Company B's U.S. assets are nevertheless not covered by the exemption. We would think that there is no basis in the HSR Rules for "looking through" the primary acquisition to reach such an indirect acquisition.* Although some HSR rules expressly look to the U.S. presence of the foreign person (unlike Section 802.52) to determine if the entire foreign transaction is reportable, see 16 C.F.R. § 802.50, § 802.51, we are aware of no rule which requires the break-up of the holdings of a single foreign issuer to be acquired into separate reportable and non-reportable parts.

* The only rule of which we are aware which provides for possible reportability of indirect acquisitions is Section 801.4 -- Secondary Acquisitions. That section, which addresses indirect acquisitions of voting securities of a third person, is not applicable to the instant transaction.

The following example demonstrates the preceding point. An acquisition of X Co., a foreign person with U.S. sub 1 and non-U.S. sub 2 may be reportable if U.S. sub 1 meets certain thresholds. However, that direct acquisition of X Co. is either reportable in its entirety or it is not; it would never be the case that the indirect acquisition of U.S. sub 1 is separately reportable while the indirect acquisition of non-U.S. sub 2 is not.

The conclusion that indirect holdings of assets or voting securities resulting from an acquisition of an issuer cannot be separately reportable events under Section 802.52 is also squarely supported by the Statement of Basis and Purpose issued in connection with the promulgation of that rule. In the "Background Information to § 802.52", 43 Fed. Reg. 33,499-500 (July 31, 1978), the commentary provides:

In the Federal Register notice accompanying the revised rules, the Commission stated that it would consider excluding from the exemption indirect acquisitions of assets located in the United States and indirect acquisitions of voting securities of United States issuers. 42 FR [sic] at 39045 (August 1, 1977). The Department of State in its comment (1072) opposed narrowing the exemption, citing the considerations supporting the exemption and the likelihood that the agencies would learn of any acquisition of interest to them from public sources. In view of this comment, the final rule did not adopt the change proposed in the Federal Register.

43 Fed. Reg. 33,500 (July 31, 1978) (emphasis added). Thus, it appears that the Commission considered and rejected excluding indirect acquisitions from the coverage of the Section 802.52 exemption.

If, however, you reach the conclusion that Section 802.52 does not exempt indirect acquisitions, then we would appreciate if you would comment on the the following assumptions. First, we would assume that the exempt part of the transaction would be non-reportable and that the filing parties would only have to report with respect to the non-exempt parts of the transaction. See 16 C.F.R. § 803.2(c)(2). Second, the acquisition price for the reportable transaction could exclude all consideration for the non-reportable elements of the transaction. See 16 C.F.R. § 801.15. Finally, we would question whether an indirect acquisition of voting securities would be treated the same as an indirect acquisition of assets (as it would

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seem to us that even if indirect acquisitions of voting securities may be separately reportable, a person cannot be deemed to make an indirect asset acquisition by simply by acquiring shares of an issuer).

We would very much appreciate receiving your thoughts and comments on the issues raised by the above-described transaction. As our client is contemplating its course of action, it would be very helpful to have your comments as soon as it is convenient. If I can be of assistance on this matter, please do not hesitate to call me.

Very truly yours,



I concur this is
an exempt transaction
under 802.52.

PMN staff agrees per staff
meeting 5-
under 802.52 you do not
Pierce through to U.S.
interests - see S.B.P.

A/C