

Facts indicate that C is an (V/S) agent of A + therefore, A must file before acquisition by [redacted] agent C. Otherwise an 801.90 violation will occur re purpose is to make filings between A + B, and [redacted] both A + B are liable for civil penalties.

801.1(c)
801.90

October 17, 1991

This material may be subject to the confidentiality provision of the Freedom of Information Act.

Premerger Notification Office
Room 303
Federal Trade Commission
Washington, D.C. 20580

Dear Sir or Madam:

During discussions with your office yesterday concerning a hypothetical Hart-Scott-Rodino question, it was suggested that the issue was somewhat complex and could be analyzed more fully by your office if set forth in writing. This letter is for that purpose.

Company A proposes to acquire Company B in what would clearly be a reportable transaction, requiring Hart-Scott-Rodino filings by both A and B. B is a domestic company; however, its owners are foreign individuals who have little patience with governmental procedures. They have attempted to market B for some time with little success. They feel that the uncertainty inherent in that marketing process has been disruptive to both company management and employees and want no more of it. Their position, quite simply, that they will make a cash sale with no contingencies, or they will make no sale. Further, they will make no filings such as those required by Hart-Scott-Rodino.

Company A cannot acquire Company B under such terms, since, as noted, the transaction would be reportable, and A would be in violation. Thus, Company A proposes the following:

1. Individual C, who is currently unknown to A, but who will have no connection to it, will purchase B. Given C's status, the transaction would not be reportable, and no filings would be required from either C or B. The purchase by C would be with funds advanced by A pursuant to a non-recourse loan. C would also receive a fee for services.

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2. During the period of time that C owns B, both would remain fully independent from A, and A would have no input of any kind into the management or operations of B.

3. Company A would then acquire Company B from Individual C in a reportable transaction, complying with all applicable Hart-Scott-Rodino requirements. Filings would be made by both A and B.

Company A's concern, of course, is whether, should it pursue this course of action, it could be accused of failing to comply with Hart-Scott-Rodino and possibly be subjected to civil penalties. Clearly, an argument could be structured that C is merely A's agent and, therefore, the acquisition of B by C is, indeed, reportable. Yet, were that argument pursued there could be no acquisition, since B will make no filings under current ownership.

Clearly, A is not considering the proposed course of action to avoid Hart-Scott-Rodino filing requirements. To the contrary, its sole purpose is to effectuate compliance -- something which it presently cannot do by virtue of the position of B's owners. The purpose of Hart-Scott-Rodino is to give enforcement agencies sufficient time to analyze proposed acquisitions. Here, that will be accomplished prior to the time Company A acquires Company B from Individual C. From the perspective of such agencies, the situation is exactly the same under what is proposed as it would be were Company A acquiring Company B, and both made the requisite filings immediately.

There is some time sensitivity to this matter, and it would be appreciated if you would contact me as soon as possible.

Sincerely,

A large, solid black rectangular redaction covering the signature and name of the sender.