

§ 7A(c)(8)

[REDACTED]

[REDACTED]

[REDACTED]

June 14, 1996

BY HAND

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Federal Trade Commission
6th & Pennsylvania Avenue, N.W.
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JUN 14 6 05 PM '96
FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

Re: Application of 15 U.S.C. § 18A(c)(8)

Dear John:

This transaction (the "Transaction") involves the acquisition by a subsidiary of a bank holding company (the "Acquiror") of 100 percent of the voting stock of an [REDACTED] company incorporated in [REDACTED] but doing business solely from a place of business in [REDACTED] (the "Acquiree"). Although the purchase price for the stock is less than \$15 million, the assets of the acquiree exceed \$25 million, raising the question whether a filing is necessary under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ("HSR Act"). The Transaction is scheduled to close on July 1, 1996 or as soon thereafter as U.S. and [REDACTED] regulatory clearance can be obtained.

15 U.S.C. § 18A(c)(8) ("7A(c)(8)") exempts from HSR filing requirements "transactions which require agency approval under section 1843 of Title 12," i.e., section 4 of the Bank Holding Company Act (the "BHC Act"), which is codified at 12 U.S.C. § 1843. As explained below, the Transaction "require[s] agency approval under section 1843 of Title 12," namely the approval of the Federal Reserve Board ("FRB") under subsection (c)(13) of section 1843, and therefore qualifies for the 7A(c)(8) exemption from the filing requirements of the HSR Act.



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Discussion

Agency approval of the Transaction under which the Acquiror is acquiring the Acquiree is required by section 4(c)(13) of the BHC Act, which authorizes bank holding companies (and their nonbanking subsidiaries, such as the Acquiror) to acquire:

shares of, or activities conducted by, any company which does no business in the United States, except as an incident to its international or foreign business, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this chapter and would be in the public interest.

12 U.S.C. § 1843(c)(13) (emphasis added).

In other words, section 1843(c)(13) authorizes bank holding companies and their nonbank subsidiaries to acquire shares of companies that do no business (other than certain incidental business) in the U.S. (as in the present Transaction). This authorization is available only if the proposed transaction is approved by the FRB. The FRB approval may be granted "by regulation or order" which determines that, in the circumstances of the transaction, it is not substantially at variance with the purposes of the BHC Act and would be in the public interest.

One way of claiming an HSR filing exemption would be to rely on a specific order of the FRB authorizing the Acquiror to acquire the Acquiree in reliance on section 1843(c)(13). In such a case, the Transaction would have required and received "agency approval under section 1843 of the Title 12," and therefore would be entitled to the 7A(c)(8) exemption.

But, section 1843(c)(13) specifically provides for two methods for the Board to give its approval to individual transactions: "by regulation or order." In this case, the Transaction has been approved "by regulation" issued by the Federal Reserve under section 1843(c)(13) because it fits within quantitative limits which the FRB has established by regulation which permit the Transaction.

The FRB's Regulation K, 12 CFR § 211.5(c), gives "general consent" authority -- general agency approval for transactions to engage in specified approved investment activities, provided that the amount invested in the transaction does not exceed the lesser of \$25 million or 5 percent of the investor's regulatory capital. Thus, the Federal Reserve Board, itself, has made a general determination that a certain class of transactions within a fixed

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limit are not at variance with the purposes of the BHC Act and are in the public interest -- the statutory prerequisites for agency approval of the transactions. Accordingly, any transaction that falls within the scope of this regulation has agency approval as a matter of law.

In this case, the activity is one of those authorized for general consent and \$25 million is the relevant limit. The proposed Transaction, as noted above involves an investment of less than \$15 million. Therefore, "by regulation" the Transaction is approved by the Board and no filing with the FRB is required to proceed with the Transaction because the Board has made the necessary public interest finding "by regulation" as authorized by section 1843(c)(13).

We would emphasize that the general consent provision of Regulation K is an exercise by the FRB of the statutory authority granted to it under section 1843(c)(13) of the BHC Act to approve certain classes of transactions by regulation. This regulatory approval is subject to revocation, moreover, in which case a specific order of approval would have to be sought. The regulation specifically provides in pertinent part that:

The Board may at any time, upon notice, modify or suspend the general-consent and prior-notice procedures with respect to any investor or with respect to the acquisition of shares of organizations engaged in particular kinds of activities.

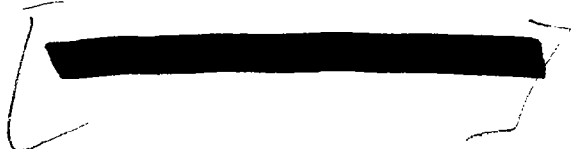
12 CFR § 211.5(c).

The fact that an agency approval process is taking place by operation of a regulation is further demonstrated by the FRB requirement that the Transaction must be specifically reported to the FRB within a maximum of 60 days, as well as in the annual report submitted to the FRB by all bank holding companies, and that the Acquiror itself is subject to FRB examination on a regular basis. Thus, the Transaction, even if the agency approval is granted under general consent authority established by regulation, is subject to regulatory reporting and review.

Hence, it is clear that the Transaction requires FRB approval under section 1843 for purposes of the 7A(c)(8) exemption. The fact that the FRB has elected to grant general approval to certain classes of transactions -- subject to withdrawal of such approval in certain individual circumstances or with respect to certain types of transactions -- is fully consistent with the availability of the exemption from the HSR Act provided by section 7A(c)(8).

It seems particularly appropriate to apply 7A(c)(8) to approvals by order and by regulation because section 1843(c)(13) transactions, involving companies whose business activities are

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almost exclusively conducted abroad, are extremely unlikely to raise competitive concerns in the United States. It is likely that most section 1843(c)(13) transactions avoid the HSR Act under the foreign issuer exemption afforded by 16 C.F.R. 802.51. However, the foreign issuer exemption does not apply to the Transaction because the Acquiree, although engaged in business exclusively outside the United States, is incorporated in the United States and owned by a U.S. company.

* * *

After you have had a chance to review this letter, would you please call me to discuss your views on this issue? We would very much appreciate a determination on this request by next Wednesday, June 19, at the latest.

Very truly yours,



Confirmed that ~~also~~ based on the facts presented that the acquisition in question has been approved by the Fed Reserve Board by regulation, the proposed transaction is exempt under § 7A(c)(8) of the Clayton Act.