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VIA HAND DELIVERY

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Premerger Notification Office
Federal Trade Commission
Room 323
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Washington, D.C. 20580

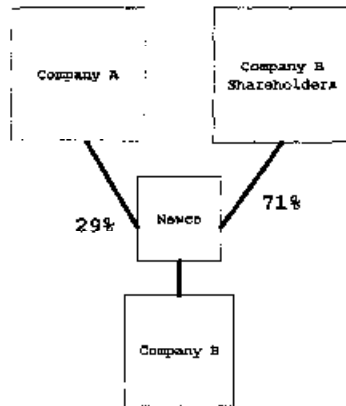
**HSR Reportability Issues Involving
Various Facets of a Simultaneous Transaction**

Dear Dick:

Thank you for taking the time to speak with [REDACTED] and me last week concerning the HSR reportability issues faced by one of our clients. To follow up on that discussion, as you requested, we are providing herewith a general description of the transactions and the HSR issues we reviewed with you by telephone. As you will see, the transaction will be reported, but the number of separate filings (and fees) could theoretically vary significantly depending on how one characterizes the sequence in which the several steps of the transaction occur. The transactional documents provide that the various steps are to occur simultaneously.

At the outset, I should emphasize that, viewed as a whole, this is a simple transaction. Company A will, in exchange for assets and cash, receive stock in Newco, which is the successor to Company B. As a result, Company A and the shareholders of Company B will share ownership of the successor company (Newco). Thus, the result will be:

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We hope the following description - which parses the components of the transaction - will enable you and your colleagues to consider the HSR reportability issues we discussed.

We describe below certain preliminary transactions and the "simultaneous transactions" for which they set the stage. For purposes of the analysis, you should assume that both Company A and Company B are \$100 million persons.

Preliminary Transactions

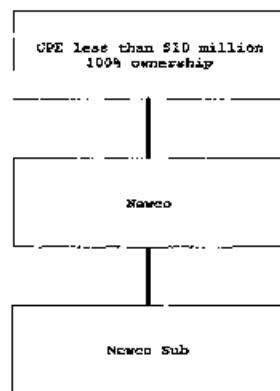
A. The Tender Offer

Company A will make a tender offer for 11% of the outstanding voting stock of Company B. The stock is valued at over \$15 million. This transaction is HSR reportable. Company A will file as the acquiring person, and Company B as the acquired person. 16 C.F.R. § 801.30.

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B. The Formation of Newco and its Subsidiary

Newco is to be formed when the sole Newco shareholder contributes \$1 and gets 100% of the common stock issued at formation. The Newco shareholder is not a \$10 million person, and at formation Newco has only \$1 in assets. Next, Newco forms a wholly owned subsidiary, Newco Sub. These transactions are not HSR reportable, given the size of person and intra-person transfer rules. See, 16 C.F.R. § 802.30.



The Simultaneous Transaction - Proposed Scenario

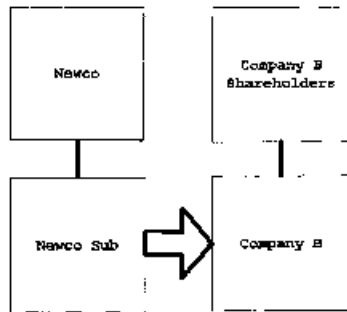
A. Corporate Reorganization of Company B

After the tender offer by Company A and the formation of Newco and Newco Sub, the contract requires that a reorganization of Company B, and an assets for stock exchange between Company A and Newco, take place simultaneously. We understand that the simultaneity requirement results from tax considerations.

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First, Company B will reorganize in order to facilitate the formation of a holding company structure. This will be accomplished pursuant to a reverse triangular merger, of Newco Sub into Company B (the "Merger"). In the Merger, each share of Common Stock of Company B will be converted into one share of Common Stock of Newco, and accordingly Company B's shareholders will receive newly-issued Newco common stock (thereby diluting the ownership interest of Newco's initial shareholder with the result that Newco will be its own ultimate parent entity). Company B will become a wholly-owned subsidiary of Newco.

This transaction is not HSR reportable: Newco (which includes wholly-owned Newco Sub) fails the size of persons test because it has assets (the \$1 contributed by its sole shareholder) of less than \$10 million at the time of the Merger. 15 U.S.C. § 18a(a)(2).



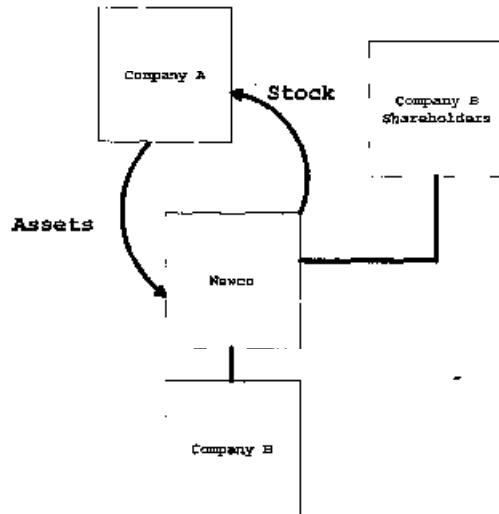
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B. The Contribution of Assets by Company A in Exchange For
Stock in Newco

In the "next" step, Company A exchanges \$23 million in cash and \$60 million in assets for convertible preferred stock of Newco (which constitutes voting securities as defined in 16 C.F.R. 801.1(f)(1)) representing a 20% voting interest in Newco.

This transaction is HSR reportable because both Company A and Newco are making acquisitions over \$15 million and both meet the size of persons test. Company A meets the test because it is a \$100 million company. Newco also meets the test because, via the merger of Newco Sub into Company B, Newco owns Company B and - as ultimate parent - is now a \$100 million company.

Thus, Company A will file as an acquiring person with respect to its acquisition of Newco stock; and Newco will file as acquiring person with respect to its acquisition of assets from Company A.



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In conclusion, characterized as set forth above, the transaction(s) will necessitate three HSR filings for acquiring persons, and the concomitant payment of three \$45,000 filing fees:

- (1) Company A will file as an acquiring person with respect to stock purchased in the tender offer;
- (2) Company A will file as an acquiring person with respect to stock acquired from Newco; and
- (3) Newco will file as an acquiring person with respect to assets acquired from Company A.

Reverse Scenario

Although we conclude that (at most) three filings are necessary, we are mindful that the FTC has required that simultaneous transactions be viewed differently, at least when - by characterizing the sequence of events - parties have sought to avoid any filing requirement. See Axinn, Fogg Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act (hereinafter "Axinn Fogg," at § 4.03[2], footnote 14.

Given the absence of guidance in the HSR statute and regulations, we are concerned that a different characterization of these simultaneous transactions - one in which the "order" of events is also reversed - could require as many as eleven acquiring person filings, and possibly more depending on the number of Company B shareholders required to file. Because of the theoretical possibility of such a severe set of HSR reporting requirements, we hope that you and your colleagues can provide confirmation of our initial, "three report" analysis.

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We believe that the "reverse" characterization is a possibility only if the law requires that, where multiple acquisitions occur simultaneously, each transaction must be deemed to have occurred first. This would mean, in effect, that filing requirements would be determined by characterizing the transactions as having occurred in both the initial "three filing" sequence described above, and in the "reverse" sequence set forth below.

A. Contribution of Assets in Exchange for Stock

In the "reverse" scenario, we return to the point following the tender offer and the formation of Newco and Newco Sub. "First," before the Merger, Company A exchanges \$23 million in cash and \$60 million in assets for Newco voting stock. This transaction is HSR reportable because Newco would be deemed to meet the size of persons test since the Merger would be deemed to have occurred first under the FTC interpretation set forth above, as cited in Axinn Pogg.

B. Corporate Reorganization of Company B

"Next," in this "reverse" characterization, is the Merger pursuant to which Company B is acquired by Newco, see 16 C.F.R. 801.2(d)(1)(ii), and Company B shareholders receive Newco stock in exchange for their stock in Company B. At this point, Newco has assets of at least \$60 million from the earlier assets for stock exchange.

Viewed in this sequence, this transaction is HSR reportable because both Newco and Company B meet the size of persons tests. Newco must file as an acquiring person, because it is acquiring 100% of the voting stock of Company B.

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In addition, each and every Company B shareholder acquiring over \$15 million or 15% of Newco stock, and meeting the size of persons test, must file as acquiring person. 16 C.F.R. § 801.2(a). See Axinn Fogg at § 3.03 at pages 3-22 to 3-24. Six shareholders of Company B will acquire more than \$15 million of Newco stock. One or two may fail the size of persons test, and one might qualify for the "investment only" exemption of 16 C.F.R. § 802.9. In short, the Company B shareholders will make no fewer than three and perhaps as many as six "acquiring person" filings.

Also, Company A, as a Company B Shareholder (having acquired Company B stock in the tender offer), must file as an acquiring person with respect to its acquisition of Newco stock.

Conclusion

To summarize, if each part of the transaction were deemed to have occurred first, then the parties would have to make no fewer than eight and possibly as many as eleven acquiring person HSR filings. In our view, this would impose an extraordinary and unnecessary cost on the parties, inasmuch as the three filings envisioned under the first scenario we described will provide the agencies ample notification of the transactions (and, in our view, will fulfill the parties' obligations under the HSR statute and regulation).

Thus, we request that the FTC confirm our view that the transaction is one requiring no more than three filings as described in the Proposed Scenario set forth above. The policy behind the HSR Act, that the agencies be given advance notice of transactions meeting certain size thresholds, supports this view. The Act requires three filings relating to the transaction, and these filings will supply a full account of the information

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required for the agencies to make a determination whether the transaction has any antitrust significance.

We thank you in advance for your consideration of this matter and look forward to your response. We very much hope we can reach agreement on what the HSR statute and regulations require in this matter.

Please do not hesitate to contact me [REDACTED] if you have any further questions.

Sincerely yours,
[REDACTED]
[REDACTED]

cc: [REDACTED]

3/6/98 Advised writer that shareholders of B do not have to report for the taking of the same % (or 51%) share in Navco since Navco is the successor to B and only holds B as a sub. Also, on p. 6 filings (1) and (2) could be combined to cover the CTO for 51% of B (one threshold) and 15% w/p and the acquisition of all shares of Navco (higher threshold and 30 day w/p). B/Navco should file as acquired company. We would assign two transactions #5, but only one fee would need to be paid. However, both A and B/Navco must file on same day. Writer said he would look into possible use of this procedure. In any case, filing (3) must also be made. (P.S. NO and HV agree with the conclusions.)

RBSmith