

FEDERAL TRADE COMMISSION
ADMINISTRATIVE INFORMATION
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July 6, 1999

VIA HAND DELIVERY

Thomas Hancock, Esquire
Federal Trade Commission
Room 303
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Acquisitions of Non-Voting Securities and Board Seats

Dear Tom:

On June 24, 1999, [REDACTED] LLC, and I called you to discuss the situation in which certain investors will acquire non-voting securities from our client (the "Company") and also will obtain the right to designate a member of the Board of Directors of the Company. We would like to confirm your oral advice that the described acquisitions are exempt from the notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), and do not appear to violate the provisions of 16 C.F.R. §801.90. For purposes of our conversation and this letter, we have assumed that the size of the persons requirements of the Act have been met.

Background

The Company has eight classes of Common Stock, designated Series A Common Stock through Series H Common Stock. One share of each of the Series B Common Stock through Series H Common Stock is issued and outstanding. These shares have been designated as "Special Common Stock" and are presently entitled to elect an aggregate of thirteen of the fourteen directors of the Company. The fourteenth director is elected by vote of the thirteen directors elected by the Special Common Stock. Each holder of the Special Common Stock is restricted from transferring such stock for three years, and thereafter may only transfer such stock in connection with the transfer of seventy-five percent (75%) or more of all shares of the

[REDACTED]

Company held by such holder.

The Company also has one class of non-voting Common Stock, seven classes of voting convertible Preferred Stock ("Series A Preferred Stock" through "Series G Preferred Stock") and one class of non-voting convertible Preferred Stock. The Series A Common Stock and the Series A Preferred Stock through Series G Preferred Stock have voting rights, but do not have the present right to elect any of the Company's fourteen directors, and therefore, for the purposes of the Act are considered as non-voting stock. Such stock will be referred to in this letter as non-voting stock of the Company.

Structure of Acquisition

Two investors of the Company ("Investor A and Investor B") have acquired one or more series of non-voting stock of the Company for consideration of \$20 - \$30 million. Each of the investors has made such investment with the knowledge that the Company is anticipating making a initial public offering of Common Stock in late summer or early fall. It was also the intention of each of the investors to acquire the right to designate one member of the Board of Directors of the Company. There are two options under consideration in which each of the investors would acquire the right to designate a member of the Board of Directors. Option One is for the Company to issue each investor a single share of a new class of Special Common Stock, each class with the right to elect one director. Option Two is for one of the present holders of Special Common Stock which has the right to elect multiple directors to agree to elect one member designated by each of the investors.

Option One

It is understood that the acquisition of one share of a series of Special Common Stock, with the right to elect one director of the Company, is the acquisition of a voting security under the Act. The value of the voting security is determined in accordance with the provisions of 16 C.F.R. §801.13. Since the voting security is not traded on a national securities exchange, nor an interdealer quotation system, the value of the security is its fair market value.

The Subscription Agreements for prior acquisitions of Special Voting Stock stated that the acquisition of the Special Common Stock was made without the payment of additional consideration (in addition to the consideration for the non-voting securities acquired at the same time). In the present acquisition, no additional

consideration will be paid for the Special Common Stock. On two occasions the Special Common Stock was issued together with non-voting securities for aggregate consideration of \$8 million. In each transaction involving the acquisition of non-voting securities and Special Common Stock, the economic value of the non-voting securities was equal to the aggregate consideration for the non-voting securities and Special Common Stock taken together. Based on these facts, the fair market value of the share of Special Common Stock has been determined to be less than \$15 million.

The Board of Directors presently has fourteen members. To allow the two investors to have members on the Board, it will be expanded to sixteen members. If this option is chosen, each investor would hold voting securities that allow it to elect one member of the Board, which equals 6.25% of the outstanding voting securities (one director of sixteen = 6.25%). You agreed, based on the above facts, that if the fair market value of the Special Common Stock was less than \$15 million, notwithstanding the fact that the Special Common Stock was being issued in conjunction, and in consideration, of the acquisition of non-voting securities with a value of \$20 - \$30 million, the acquisition of the voting and non-voting securities would not be subject to the reporting and waiting period requirements of the Act.

Option Two

Option Two would allow each investor (who would hold only non-voting securities of the Company) to appoint a member of the Board. This would be accomplished by having the Company expand the number of seats elected by an existing holder of Special Common Stock by two and that stockholder agreeing to elect one member designated by each of the investors. Because this option would not result in the acquisition of any voting securities, the Act would not apply to the acquisition.

The investors were concerned that the acquisition of the right to designate a member of the Board of Directors, coupled with the acquisition of non-voting securities, would be considered an attempt to avoid the requirements of the Act and would violate the provisions of 16 C.F.R. §801.90. You stated that the staff of the Premerger Notification Office of the Federal Trade Commission does not usually advise on the provisions of 16 C.F.R. §801.90, but that you would consider our facts.

We discussed that Investor A was unable, due to bank regulatory restrictions, to hold 100% of the outstanding voting securities of a particular class and, therefore, was unable to hold the one share of a series of Special Common Stock (Option One).

As to Investor A you agreed that it appeared that Investor A had a valid business reason for choosing Option Two to acquire the right to appoint a member to the Board. As to Investor B, we discussed that the decision to choose Option One or Option Two was based on what would be easier for the parties, and not on regulatory restriction. You agreed that, although it was not as clear a case, the parties had independent reasons for choosing one option over the other and did not appear to be trying to avoid the requirements of the Act.

We would submit that having determined that the value of the Special Common Stock would be less than \$15 million, the acquisition of the voting stock, and thereby the ability to elect a member of the Board by Option One, would not be subject to the requirements of the Act. We would further submit that since Option One is not subject to the requirements of the Act, Option Two could not be an avoidance of the requirements of the Act since neither option would independently require notification under the Act. We therefore submit that, based on the above facts, gaining a member on the Board of Directors through either Option One or Option Two would not be subject to the requirements of the Act, and that the choice to use one option as apposed to the other does not appear to violate the provisions of 16 C.F.R. §801.90.

Acquisition of Voting Common Stock at time of Public Offering

As we discussed, the Company is anticipating making a public offering of its voting common stock in late summer or early fall. All of the Special Common Stock and non-voting securities will be converted, on the occasion of the public offering, into voting common stock, on a one-for-one basis. The conversion is automatic and does not require any active participation of any stockholder. The investors in the present transaction are aware of the possibility of the public offering. You informed me that an investor buying non-voting convertible securities in contemplation of a public offering that is reasonably certain to take place in a reasonably short time span would be required to observe the notification and reporting requirements of the Act prior to conversion (assuming no other exemptions). The acquisition of the convertible securities in such a transaction would be considered as active participation in the conversion. You agreed that any prior acquisition of convertible securities at a time when the public offering was not reasonably certain to take place in a reasonably short time span would be exempt from the requirements of the Act because the investor would have no active participation in the conversion.

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Thomas Hancock, Esquire
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I would appreciate it if you would contact me as soon as possible to confirm that the foregoing accurately reflects our conversations and the interpretations of the Premerger Notification Office staff of the Federal Trade Commission. My client intends to rely on such to consummate the transactions contemplated in this letter that are exempt from the notification and waiting period requirements of the Act. I have also requested by separate letter, pursuant to the authority of the Freedom of Information Act, that a copy of this letter, together with any notes you may make upon it, be returned to me, and indicated that this letter can be found in your office.

Sincerely yours,



cc:



7/14/99

I spoke with the writer of this letter and inform him that I agree with the representations and conclusions contained in it. Very so H.H.
acting as required.

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