

In preparation for a transaction involving the acquisition of all of the issued and outstanding stock of a corporation by a wholly-owned subsidiary of a limited partnership, the parties to the proposed transaction wish to determine whether it is necessary to file a premerger notification and report form with the Federal Trade Commission and the Department of Justice. We have determined that the transaction, as currently structured, meets the size-of-transaction test under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") and the rules promulgated pursuant to the Act (the "Rules"). We are more uncertain of the proper analysis under the size-of-person test under Section 7A(a)(2) of the Act, and would like some guidance in this area. What follows is a brief summary of the entities involved, as well as our analysis of the size-of-person issue.

The acquiring person in the proposed transaction ("Party A") is a limited partnership with total assets of approximately \$19.5 million. It has no sales. The acquired person in the proposed transaction ("Party B") is a corporation with approximately \$30.2 million in total assets and \$58 million in annual net sales. Clearly, if Party A and Party B are considered individually, the size-of-person threshold under Section 7A(a)(2) of the Act is not met. However, Party A owns less than 49% of the voting common stock of another entity ("Party C") and additional convertible preferred stock in Party C, exercisable in the discretion of Party A, which would, upon conversion of the preferred shares into common shares, give Party A control of Party C. To date, Party A has not converted any of its Party C preferred shares, and has no plans to do so prior to the consummation of the proposed transaction with Party B. In its most recent financial statements, Party C had annual net sales in excess of \$100 million. The issue, therefore, is whether the ownership of the convertible shares of Party C by Party A requires Party A to include Party C's net sales information in its calculations under the Act for purposes of applying the size-of-person test. If Party A is required to include such net sales data, then the size-of-person threshold will be met and a premerger notification filing would most likely be necessary.

Our size-of-person analysis begins with the definition of "control" in Section 801.1(b) of the Rules. Under that definition, a person has control of an entity if it holds 50% or more of the outstanding voting securities of an issuer. The term "voting securities" is defined under Section 801.1(f) of the Rules to mean "any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, ..." (emphasis supplied). It would appear that based solely upon the definitions under Section 801.1 of the Rules, Party A's ownership of convertible preferred stock in Party C means that Party A "controls" Party C. Section 801.11(b) of the Rules provides that annual net sales and total assets of each entity "included within such person" must be consolidated on the financial statements of such person and, to the extent such information is not consolidated on the regularly prepared statements, the annual net sales and total assets must be recomputed to include the nonduplicative annual net sales and total assets of each such entity. Since, based on the Section 801.1(h) definition of "control" Party A controls Party C, Section 801.11(b) of the Rules would seem to require Party A to recalculate its financial statements to include Party C's annual net sales.

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In conducting our analysis, however, we have come across two Statements of Basis and Purpose ("S.B.P.s") which lead us to conclude that Party A need not include Party C's annual net sales for purpose of its size-of-person calculations. The first S.B.P. was published in 1978, and it describes the exemption of the acquisition of convertible securities and the exclusion of convertible securities for purposes of the size-of-transaction test. However, that same S.B.P. also states in relevant part, "The only time, in fact, that convertibles are 'counted' is as assets on a person's last regularly prepared balance sheet, for purposes of the size-of-person test of Section 7A(a)(2)." 43 Fed. Reg. 33,450, 33,462 (1978). This implies that the ownership of convertible securities does not affect the size-of-person test, except to the extent ownership of such securities may increase the size of that person's assets as shown on its last regularly prepared balance sheet.

The second S.B.P. describes certain modifications to Section 801.12(b) of the Rules made in 1987. Section 801.12(b) provides a formula for calculating the percentage of voting securities, and states that only those securities that give the holder of the securities the *present* right to vote those securities are to be included in the calculations. Section 801.12(b) of the Rules also states, however, that it is to be applied "Whenever the act or these rules require calculation of the percentage of voting securities of an issuer *to be held or acquired...*" (emphasis supplied), which seems to indicate that Section 801.12(b) does not apply to presently-held voting security calculations made for the size-of-person test. Nevertheless, the 1987 S.B.P. clearly states that, "Section 801.12(b) sets out a formula by which persons are to calculate the percentage of voting securities of an issuer *that they hold or will hold as a result of an acquisition.*" 52 Fed. Reg. 7066, 7070 (1987) (emphasis supplied). The S.B.P. goes on to state that, "it is important that determinations of the percentage of voting securities held reflect the actual power of the person holding the shares..." Id.

If Section 801.12(b) does apply to calculations of voting securities percentages for purposes of determining the size-of-person test, it would appear that Party A does not need to include its ownership of Party C's preferred securities because it does not presently have the right to vote such securities, and therefore Party A does not have "control" of Party C. Since Party A does not control Party C, it is not necessary under Section 801.11(b) of the Rules to recalculate Party A's most recent regularly prepared balance sheet to include Party C's net sales information, which in turn means that Party A and Party B fail to meet the size-of-person test and no premerger notification filing is required.

Please call either [redacted] or [redacted] with your comments to our analysis as soon as possible. Thank you in advance for your prompt attention to this matter.

ADVISE THE CASE THAT EXCEPT IN THE INSTANT CASE  
CONVERTIBLE VLS ARE HELD IN CONNECTION WITH A CONTRACTUAL  
RIGHT TO DESIGNATE DIRECTORS,  $\frac{1}{2}$  THE PERCENTAGE OF VLS THAT  
WOULD BE HELD UPON CONVERSION CORRELATES DIRECTLY WITH  
THE PERCENTAGE OF DIRECTORS THAT CAN BE DESIGNATED, CONVERTIBLE  
VLS ARE NOT INCLUDED IN THE CALCULATION OF VLS HELD.  
SINCE THIS IS NOT THE CASE A DOES NOT CONTROL C  
AND DOES NOT SUFFICE FOR SIZE OF PERSON TEST.

[redacted] Bruchelstein

8/19/99