

7A(c)(10)  
801.1(b)(2)  
802.30

DATE OF ORIGINAL NOTIFICATION  
[REDACTED]

FACTS [REDACTED]

BY FACSIMILE

October 28, 1999

Re: Hart-Scott-Rodino Act Requirements

Michael Verne  
Premerger Notification Office  
Federal Trade Commission  
6<sup>th</sup> Street and Pennsylvania Avenue, N.W.  
Room 301  
Washington, D.C. 20580

Dear Mr. Verne:

This letter is meant to summarize the discussion we had on September 2, 1999 relating to the issues of (i) whether an individual "controls" a corporation through a combination of holding 46.4% of the voting securities and an irrevocable proxy to vote an additional 35.7% of the voting securities of the corporation and, if so, (ii) whether a filing ("HSR filing") under Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"), and the rules promulgated thereunder (the "HSR Rules") would have to be made by such individual who will acquire all of the issued and outstanding voting securities of four separate issuers indirectly held by such corporation. It is my understanding that we concluded that the individual "controlled" the corporation, and, as such, would be exempt under section 7A(c)(10) of the HSR Act from making an HSR filing for his acquisition of the voting securities of the four issuers controlled by the corporation because the individual would not increase his per centum share of the issuers.

As I generally described in the our telephone conversation, an individual ("A"), through a newly-formed, wholly-owned subsidiary ("Newco"), will acquire all of the issued and outstanding voting securities of four separate issuers (the "Targets"). Presently, A personally holds 46.4% of the voting securities of a holding corporation ("Holdings") and is party to a voting trust agreement with certain shareholders of Holdings which grants A, the trustee, the irrevocable right to vote the shareholders' voting securities, representing approximately 35.7% of the voting securities of Holdings. Holdings currently holds

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approximately 72.7% of the voting securities of its corporate subsidiary ("B"). B, in turn, holds 100% of the voting securities of each of the Targets.

The control definition in section 801.1(b)(2) does not specifically refer to the power to vote 50% or more of the outstanding voting securities; rather, it provides that the power presently to designate 50% or more of the board of directors constitutes control. As we discussed, however, Interpretation 62 of the ABA Premerger Notification Practice Manual indicates that the Federal Trade Commission staff (the "FTC staff") has concluded that the contractual power to vote shares will constitute "control" if "the proxy or other voting right is irrevocable" and "the voting rights...give the ability to elect half or more of the board...." Under the current circumstances, A "controls" Holdings because the combination of his personal holdings of 46.7% of the voting securities of Holdings combined with the irrevocable proxy to vote an additional 35.7% of the voting securities of Holdings gives A the ability to vote approximately 82.1% of the outstanding voting securities toward the election of Holdings' directors.

Since Holdings holds approximately 72.7% of the voting securities of B and B, in turn, holds 100% of the voting securities of each of the Targets, A indirectly holds 100% of the voting securities of the Targets. In connection with A's intention to acquire directly 100% of the voting securities of each of the Targets, A cannot avail himself of the "intraperson" exemption from making an HSR filing under section 802.30 of the HSR Rules because he does not control the Targets by reason of holdings of voting securities (i.e., A's control of Holdings pursuant to the voting trust agreement). As we discussed, however, A will be exempt from making an HSR filing for his intended acquisition of the Targets under section 7A(c)(10) of the HSR Act because he already indirectly holds 100% of the voting securities of each of the Targets and, as such, will not increase his per centum of outstanding voting securities of the Targets as a result of his intended acquisition.

I would appreciate your confirming our conclusion that the facts and circumstances described above do not require a filing under the HSR Act and HSR Rules.

If you have any questions, please do not hesitate to call me at the above telephone number.

Very truly yours,

AGREE THAT 7A(c)(10) EXEMPTS THIS TRANSACTION.  
R. SMITH & M. BRUNO CONCUR.  
B. Michael Verne 10/28/99