

July 20, 1984

Dana Abrahamsen, Esq.
Premier Notification Office
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 22580

Re: July 20, 1984 Telephone Conversation

Dear Dana:

In a telephone conversation today, I requested an informal opinion with respect to the following hypothetical:

Individual A, a person with \$10 million in assets, holds 40% of Company X, a company with \$100 million in sales and assets. Several other individuals and entities (B, C, and D) hold an aggregate of 14% of Company X. Assume that 1% of Company X's securities is valued, under Rule 801.10., at \$1 million. A, B, C and D form Newco and agree to contribute their collective holdings of company X's voting securities (i.e. 54% of Company X) to Newco. A will receive approximately 80% of the stock of Newco. As one values the Newco stock by assessing the value of the Company X stock to be contributed to Newco, (i.e. the acquisition price for the Newco stock and, presumably, also the fair market value of such stock) only Individual A is contributing, and thus, receiving, stock valued in excess of \$15 million.

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Under Rule 801.40, if the contributor who is acquiring Newco stock valued in excess of \$15 million has annual sales or total assets below \$100 million, his acquisition is subject to the requirements of the Hart-Scott Act only if the new joint venture or other corporation has total assets of \$100 million or more.

Here, where Newco will receive 54%, or control, of Company X, the question arises of how one should assess the total assets of Newco. Under 801.40(c), the assets of Newco must include all assets which any person contributing to the formation of the corporation has agreed to transfer.

Question

In calculating the total assets of Newco, pursuant to Rule 801.40, does one assess the value of the 54% control block being contributed to Newco pursuant to 801.10 or does one attribute to Newco all of the assets of Company X since, by virtue of Newco's receipt of control of Company X, Newco will "hold" all of the assets of Company X?

Discussion

You stated that, in light of the fact that Newco will be obtaining control of Company X, all of the assets of X should be attributed to Newco. You stated that this view was not affected by the fact that Newco would have to pay substantial sums to the remaining 46% shareholders of X, if it were to seek to purchase their shares.

You also noted that the question presented was a novel one, and suggested that you would discuss it with other persons at the Premerger Notification Office and advise me of your views. In order to facilitate this discussion, I agreed to send you this letter.

In an earlier telephone conversation I requested an informal opinion with respect to the following hypothetical:

1. Individual A and his wife own 52% of Company X, a \$100 million company. A sells 8% of his holdings to a group of investors for a total of \$8 million. A and the investor group form Newco and agree to contribute their holdings of X to Newco. A will receive approximately 88% of Newco.

[REDACTED]

Dana Abrahamsen, Esq.

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[REDACTED]

Under this hypothetical, you stated that the sale by A of 8% of X to a group of investors for \$8 million would not be reportable under 802.20. Under 801.40, assuming that the relevant size of person test is satisfied, only an acquiring person who was to acquire shares of Newco valued in excess of \$15 million would be subject to the Hart-Scott Act. Thus, in this hypothetical, Individual A might have to file for his acquisition of shares of Newco valued in excess of \$15 million. Newco would not have to file for its receipt of 5% of Company X as these shares would be contributed to Newco in connection with the formation of Newco and, under Rule 802.41 a new corporation does not have to file notification with respect to a transaction in connection with its own formation.

I believe this accurately describes our conversation and the informal opinions which you rendered today. If it does not, please contact me as soon as possible.

Sincerely,

[REDACTED]

~~At no filing of form~~ 7/23/84

[REDACTED]

2 transactions believed to
be separate
- one repairable
is assets acq.

also believed to be non repairable

~~A sub~~

B sells assets to A

B also intends to sell stock of
Sub to A - would be
under 15MM + sales assets
less than \$25 MM.

801.13, + ~~801~~ 801.14 -

- asset sale will not be
deemed to be asset of
A for purpose of
stock acq.

assuming separate
is a claim that
example in 801.14
controls

I said 1: rule it upon
file it