

FMN Rules: ~~801.10~~ ~~802.20~~ ~~802.9~~
801.10(c); 802.10(f); 802.9; Filing Fee

MEMORANDUM

TO: Alice Villavicencio, Esq.
Federal Trade Commission

RE: Hart-Scott-Rodino Filing

DATED: April 5, 1994

As we discussed, certain shareholders (the "shareholders") of our client propose to enter into a

qualify for the "investment exemption," a number of questions
price with respect to which shareholders must file

price is not fixed when the merger agreement is signed (the

determinative.¹ It is also our understanding that in this
type of transaction, "market price" is based on the lowest

Transaction the period between Signing and Closing will
likely exceed 45 days.

Scenario 1. At Signing, the "market price"
of the Acquirer securities that a particular
Shareholder anticipates receiving at the

Signing and Closing, the stock price of the
Acquirer declines so that the value of the

decline occurs within 45 days prior to Closing,
the Shareholder may consummate the Transaction

¹ Section 801(a)(ii).

² This scenario assumes that no "investment exemption" is

without regard to the waiting period.³ B) We

days prior to the closing but the price increases prior to Closing, thus pushing the value back over \$15 million, the Shareholder may consummate the Transaction without regard to the waiting period.⁴ C) In the event that either of the above situations results in the Shareholder's ability to consummate the Transaction without regard to the waiting period (because of a failure to meet the size of the Transaction),

of the Acquirer securities that a particular

make a Hart-Scott filing. Between Signing and Closing, the Acquirer's stock price increases so that the value of the stock received by such Shareholder would exceed \$15 million. A) We believe that if this increase occurs on the 46th day prior to the Closing and continues until Closing, the Shareholder must make a Hart-Scott filing. B) If this is the case, is there a mechanism that an individual Shareholder making a "last-minute" filing can

sufficiently in that period so as to cause the "market price" to fall below \$15 million for only one day, the Shareholder may consummate

³ See Interpretation 117 of the Premerger Notification Practice Manual; Section 801.10(c)(1)(ii); pp. 5-35 through 5-37 of Axinn, Fogg.

⁴ See Interpretation 117 of the Premerger Notification Practice

⁵ See Interpretation 117 of the Premerger Notification Practice Manual; Section 801.10(c)(1)(ii); pp. 5-35 through 5-37 of Axinn, Fogg.

the Transaction without regard the waiting period.⁶

Scenario 3. "Solely for the Purpose of Investment" Exemption. At Signing, a Shareholder who would otherwise have to make a Hart-Scott filing qualifies for an "investment exemption" and therefore does not file

Acquirer, which subsidiary constitutes less than 10% of the total assets of the Acquirer; the Shareholder will not be a Board member of either the Acquirer or the subsidiary. The Acquirer, not the wholly owned subsidiary, is the issuer of the stock received by the Shareholder in the Transaction. A) We believe the Shareholder still qualifies for the "investment exemption."⁷ B) If not and a filing must be made, is there a mechanism that

entire Transaction (i.e., placing the Acquirer shares in trust until expiration of the Shareholder's waiting period)?

If any of the above is not clear to you, or you would like additional facts, please do not hesitate to contact me at [REDACTED]

⁶ See Interpretation 117 of the Premerger Notification Practice Manual; Section 801.10(c)(1)(ii); pp. 5-35 through 5-37 of Axinn, Fogg.

⁷ See Interpretation 37 of the Premerger Notification Practice Manual, where the FTC measures the intention of the individual to participate in the management of the issuer, not a subsidiary of the issuer that constitutes less than 10% of the