

TO: M. VERNE

801.1 (b)
801.11 (b)
801.12 (b)

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

The acquiring person in the proposed transaction ("Party A") is a limited partnership with

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 shares of Party C means that Party A

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 include in its financial statements the net sales of Party C.

801.11 (b)
801.12 (b)

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

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.

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

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, & 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

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