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October 19, 1973

Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Attention: Mr. J. Roland Cook

Gentlemen:

This letter sets forth a problem which the undersigned has discussed with Mr. Roland Cook relating to the applicability of the exemption provided by Rule 145(a)(2) under the Securities Act of 1933 (the Act) to a statutory merger utilized to effect a reincorporation. The following is a brief statement of the facts of a typical situation which presents the problem.

A Delaware corporation (the acquiring company) has acquired for cash by public tender offer or private purchase in excess of 90% of the outstanding shares of a corporation registered under the Securities Exchange Act of 1934. The corporation whose shares have been so acquired (the target company) is incorporated in a state which does not have a "short form" merger statute, such as Section 253 of the Delaware General Corporation Law, which permits payment in cash to minority stockholders upon liquidation by merger of a 90% owned subsidiary into its parent. The acquiring company wishes to complete the purchase of all of the outstanding stock of the target company, and in order to do so, wishes to utilize the provisions of such a short form merger statute.

If the target company is not incorporated in a state such as Delaware which permits pay-out to minority stockholders in cash, it is necessary to reincorporate the target company in Delaware or some other jurisdiction permitting this procedure. To effect such reincorporation, the target company could be merged into a new Delaware corporation and securities of the new Delaware corporation could be issued to former stockholders of the target company in exchange for their securities in the target company. Upon completion of the reincorporation, the new Delaware target company would be a 90% subsidiary of the acquiring company. Therefore, the merger permitted by Section 253

be effected by action of the board of directors of the acquiring company without any further action by the board of directors or stockholders of the target company. The entire "step transaction" of the two mergers and resulting cash payment to minority stockholders would, of course, be disclosed at length to minority stockholders of the target company in proxy material prepared for the stockholders meeting to approve reincorporation.

The issuance of shares of the new Delaware target company would be the transaction which presumably would require registration of securities to be issued on Form S-14. In practice, the "issuance" of securities upon such a merger would be ephemeral. Once the reincorporation-merger had been approved by a vote of the stockholders of both the acquiring company and the target company, necessary steps would be taken immediately to effect the merger of the target company, now a Delaware corporation, into the acquiring company, also a Delaware corporation, and the resultant payment in cash to minority stockholders of the target company.

It should be noted that, in such a transaction, minority stockholders of the target company do not at any time actually receive securities of the new Delaware corporation issuable upon the reincorporation. This is so simply because the merger of the Delaware target company into the acquiring company would be timed to occur immediately after the reincorporation - merger had been effected. As a practical matter, minority stockholders of the target company would have only the right to receive cash, which right could be exercised in one of three ways: (i) through exercise of dissenter's rights upon reincorporation under the laws of the original state of incorporation of the target company, (ii) through exercise of dissenter's rights upon the short form merger under the laws of the State of Delaware, and (iii) upon receipt of cash offered by the parent upon liquidation by short form merger.

The foregoing fact situation has been set forth at length in this letter to indicate the immaterial nature of the securities offering involved in the reincorporation. On the basis of the factual situation as outlined, we are of the opinion that the issuance of securities upon the reincorporation does not require registration under the Act.

The provision which would ostensibly exempt this issuance from registration is the language of Rule 145(a)(2) excluding a statutory merger "... where the sole purpose of the transaction is to change an issuer's domicile..." In the instant transaction the only reason for the merger resulting in the securities offering is to change the state of incorporation of the target company to enable the laws of the new domiciliary state, Delaware, to govern.

It is understood that for purposes of applying paragraph (a)(2), the Staff considers whether or not other corporate structural changes effected upon the change of domicile could have been effected without reincorporation. For example, the Staff's letter available March 7, 1973 with respect to The Clorox Company, involving a change of corporate purposes and its letter available April 19, 1973 with respect to Motorola, Inc., involving elimination of pre-emptive rights suggest this analysis. Since both of these changes could have been effected by amendments to the existing charters of those corporations without reincorporation, the fact that these actions were effected as part of reincorporation did not cause them to be considered a purpose of reincorporation, and the "sole purpose" test of Rule 145(a)(2) was deemed satisfied.

It must be candidly recognized that, in the factual situation here presented, reincorporation permits something to be accomplished which could not otherwise have been: the elimination of minority stockholders of the target company by cash pay-out rather than their retention of equity securities in the target company. But this result should not deny application of the exemption provided by paragraph(a)(2). Because of differences in state corporation laws, some changes in governing statutes will inevitably result from any reincorporation. We respectfully submit that the exception to compliance with Rule 145 contained in paragraph (a)(2) should not be narrowly construed to exclude a reincorporation merely because the corporation is thereby able to effect actions not permitted in its former domicile.

Of most significance, the rationale on which Rule 145 is based indicates that its purpose is not avoided by permitting reincorporation on the facts presented to proceed without registration. Various commentaries on the Rule describe the transaction which the Rule is meant to cover as one in which security holders of a company are asked to make a new investment decision. See, for example, the comments of Chairman William J. Casey in a release dated May 2, 1972, where he stated:

> "When the security holders of one company are asked to surrender their securities in the company in exchange for the securities of another company, whether by merger, consolidation or otherwise, they should have the same information which they would need if securities of the other company were being offered to them for cash..."

See also the language of the first paragraph of the Preliminary Note to Rule 145, which states in part that:

> "The thrust of the Rule is that an "offer", "offer to sell", "offer for sale", or "sale" occurs when there is submitted to security holders a plan or agreement pursuant to which such holders are required to elect, on the basis of what is in substance a new investment decision, whether to accept a new or different security in exchange for their existing security."

The protection of a prospectus is needed in situations where the stockholder is to receive a participating interest in a corporate entity of which he may know little, with the prospectus informing him of the nature of the entity in which he is being asked to invest. In the factual situation described in this letter, the minority stockholder is not being asked to invest in a new entity. The very opposite is true; he participates in a procedure which is designed to pay him in legal tender, not securities of any corporation. Indeed, it is difficult to conceive what investment decision would be involved if securities of the new Delaware target company were actually issued and delivered upon reincorporation, since the recipients are merely receiving equity interests in the same operation, presumably without change other than domicile. Except for this change, the issuance is analogous to the exchange of securities exempted by Section 3(a)(9) of the Act.

For the foregoing reasons, we request advise that the Staff would not recommend any action to the Commission if a reincorporation in Delaware as described herein were effected without registration of the securities issuable upon the reincorporation, followed immediately by merger of that Delaware corporation into its parent in a manner which would provide cash payment to all minority stockholders of that Delaware corporation.

Because of the complexity of this matter, we would appreciate the opportunity to discuss this further with you by telephone, or in conference if you desire, before any formal reply is made to our request.

Very truly yours,

QUINN, JACOBS & BARRY

by:
G. Gale Roberson, Jr.

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