September 29, 1972

Alden H. Mann, Dir., Securities Div. Banks and Banking

Craig H. Nelson, Assistant Attorney General

Applicability of exemption provided by 32 M.R.S.A. § 874, sub-§ 10 to a proposed exchange of securities as part of a plan and agreement of reorganiz tion among foreign business corporations.

You have inquired as to the applicability of the registration exemption provided by Title 32 M.R.S.A. § 874, sub-§ 10 to the exchange of securities that will occur pursuant to the proposed Plan and Agreement of Reorganization entered into by and among McCrory Corporation (McCrory), J. J. Newberry Co. (Newberry) and McCrory Subsidiary, Inc. (Subsidiary).

In connection with your inquiry you have also called to my attention the recent ruling of the United States District Court for the District of Maine in the case of Dyer vs. Eastern Trust & Banking Co. where the Court ruled that the Plan and Agreement of Reorganization entered into by and among Eastern Trust Financial Associates (Associates), Eastern Trust & Banking Co. (Eastern Trust) and Kenduskeag Banking Co. (Kenduskeag) was a two-step transaction involving a merger between Eastern Trust and Kenduskeag and an exchange of securities between Eastern Trust and Associates and that, therefore, the securities registration exemption provided by 32 M.R.S.A. § 874, sub-§ 10 did not apply to the second step of the reorganization, i.e. the exchange of securities between Associates and Eastern Trust, the survivor of the first step merger.

Under the Associates-Kenduskeag-Eastern Trust reorganization, Kenduskeag, which was organized as a wholly-owned subsidiary of Associates solely for the purposes of the reorganization plan, merged with Eastern Trust with Eastern Trust being the survivor of the merger. Once this first-step merger had taken place, the stockholders of Eastern Trust who had voted in favor of the Reorganization Agreement and Plan were obligated to exchange their shares of Eastern Trust stock for Associates stock at a ratio of four (4) Associates shares for every Eastern Trust share. The Eastern Trust stockholders who dissented to the Reorganization Plan and Agreement were entitled, under the terms of the Plan and Agreement, to receive cash payment for each share of Eastern Trust stock held by them. After this exchange took place, Associates became the sole stockholder of Eastern Trust and the former Eastern Trust stockholders became stockholders of Associates.

In comparison, the McCrory-Subsidiary-Newberry Reorganization Plan and Agreement provides for the organization of McCrory Subsidiary as a wholly-owned subsidiary of McCrory solely for the purposes of the Reorganization Plan and Agreement, which provides for the merger of Subsidiary and Newberry with Newberry being the survivor of the merger.

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Once the Subsidiary-Newberry merger has taken place, the stockholders of Newberry will exchange their shares of Newberry stock for McCrory stock at ratios and under procedures provided for in the Reorganization Plan and Agreement which will vary according to the class of stock held by each stockholder. After this stock exchange takes place, McCrory will become the owner of all the outstanding Common Stock of Newberry and the former Newberry stockholders will become stockholders of McCrory.

In the recent ruling, by way of Interlocutory Order, in the Dyer case referred to above, the Court, in denying Defendant Eastern Trust's Motion for Summary Judgment, ruled as follows:

> "Their (defendants') position is that the whole reorganization was 'a merger'. That simply is not the case. As the Maine court pointed out in Marcou, 'the Plan is a package containing a merger, and an exchange of stock. Marcou v. Federal Trust Co., supra, 268 A.2d at 635. . . Plaintiff's claim arises from the exchange of stock between herself and the Association, which was the second step of defendants' two-step plan of reorganization. . . The exemption for statutory mergers provided by Rule 133 and 32 M.R.S.A. § 874 can reach only so far as to exempt the initial merger transaction. It does not reach beyond the merger to exempt the later distribution of unregistered stock. . . ."

In comparing the facts made available to me concerning the McCrory-Subsidiary-Newberry Reorganization Plan and Agreement to those concerning the Associates-Kenduskeag-Eastern Trust Reorganization Plan and Agreement and, after giving due consideration to all arguments advanced by Rubin, Wachtel, Baum & Levin (by Seymour Casper), Attorneys for McCrory Corporation, in the attached letters to you of May 25 and June 19, 1972, it is my opinion that you are correct in taking the position that the subject McCrory-Subsidiary-Newberry Reorganization Plan and Agreement is no different, in pertinent part, from the Associates-Kenduskeag-Eastern Trust reorganization. It is also my opinion that the subject ruling of the Court in the Dyer case is applicable to all three-party corporate reorganizations, of the type which was carried out by Eastern Trust, and that, therefore, pursuant to that ruling, the second step in the McCrory-Subsidiary-Newberry reorganization, the exchange of Newberry and McCrory stock, will not be exempt under 32 M.R.S.A. § 874, sub-§ 10 from the security registration requirements of 32 M.R.S.A. § 871.

Craig H. Nelson
Assistant Attorney General

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