

801.90
F.I.15

[REDACTED]

[REDACTED]

January 5, 2000

BY FACSIMILE

[REDACTED]

Michael Verbe, Esq.
Pre-Merger Notification Office
Federal Trade Commission
6th Street and Pennsylvania, NW
3rd Floor, Room 323
Washington, DC 20580

Re: HSR Issue

Dear Mr. Verbe:

This letter will confirm yesterday's telephone conversation among yourself, [REDACTED] and myself, regarding the following situation.

Three investors have formed an LLC. One of the investors is our client ("Investor A"). The investors plan to cause the LLC to acquire all of the stock of an unrelated company ("Company X"). An issue has arisen as to whether the LLC has a parent for purposes of the size of the parties test in determining whether the acquisition of Company X is reportable.

At one time, Investor A had proposed to acquire a majority of the equity interest in the LLC. Currently, however, Investor A proposes to acquire a minority of the equity interest, and to take a debt instrument for the remainder of its investment. That debt instrument will be convertible into equity should Investor A choose to convert, which it can do at any time within twelve months of closing. Because of this change in the transaction, no investor holds 50% or more of the equity of the LLC, although Investor A would own a majority of the equity if it converted its debt instrument at a future time.

We discussed the position of the pre-merger office which has been taken in connection with similar transactions. In essence, we have been previously advised that so long as the subsequent transaction (in this case, the conversion of the debt for equity) is a transaction for which the party in control of the decision (in this case Investor A) has the opportunity to make a yes or no decision based upon circumstances existing at that future time, and the decision to exercise its conversion rights or not to exercise those conversion rights is one which has

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economic substance (in this case an exercise of the conversion rights would mean, *inter alia*, a loss of priority in the distribution of assets should the LLC be liquidated), then the transaction is not at risk of adverse characterization under Section 801.90.

As we discussed, it has been acknowledged in the past that business transactions such as this one are the result of joint decisions involving numerous people, and it would not be practical to face the Section 801.90 analysis based upon what is in the mind of any given person at a given time, particularly as attitudes may be influenced by changing circumstances prior to the time that the conversion decision is made. This more objective way of conducting the Section 801.90 analysis has been used as a way of giving some comfort that the transaction is not at risk based upon the perhaps temporary mindset of an individual, so long as the decision to convert may be made in the future based upon circumstances existing at that time and the decision, no matter which way it is made, will have economic substance at that time.

Thank you again for your assistance in this matter.

Sincerely,

[REDACTED]

cc: [REDACTED]

These appear to be ¹ BUSINESS REASONS
FOR STRUCTURING THE DEAL IN THIS
MANNER. I SEE NO 801.90 ISSUE.

Michael Verne
1/5/00