

301.10



December 7, 2000

BY FACSIMILE

Patrick Sharpe, Esquire
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Sharpe:

Thank you for speaking with [redacted] and me on November 29, 2000, concerning possible Hart-Scott-Rodino issues in a transaction that one of our clients is considering. I am writing to summarize the facts we presented to you and the comments you made to us.

Our client, Company A, is a petroleum company engaged in the distribution of refined petroleum products such as gasoline, diesel fuel, heating oil, residual fuel oil and jet fuel. Company A is considering the acquisition of assets from Company B, which holds long-term contracts to operate storage tanks and related equipment at several petroleum terminals for refined petroleum products. The purchase price Company A would pay for these long-term contracts is \$14 million.

The issue that led to our conversation was how to treat refined petroleum products that are in the petroleum terminals. Those products are owned by Company C, a financial institution that does business with Company B. Company B has a contract with Company C that requires Company B to buy the products in the petroleum terminals if Company B's contractual relationship with Company C ends. If Company B sells its long-term contracts to Company A, Company B's contract with Company C will terminate. In that event, Company B will have to acquire the products in the petroleum terminals. Because Company A is already in the petroleum business, it has its own products and does not need the products that are in the petroleum terminals, but it will have to acquire those products if Company B purchases them.



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Company A's acquisition of the long-term contracts alone would not be reportable because the selling price of the assets is less than \$15 million. The products in the petroleum terminals are not now part of the assets of Company B, but if the contract between Company B and Company C terminates, Company B would acquire the products for a moment in time and then pass title to Company A. Company A has no way to determine now what the value of the products in the petroleum terminals would be at the time of closing, but we assume the value would be enough to make the entire transaction more than \$15 million, if the products in the petroleum terminals must be added to the payments for the long-term contracts.

It was your position that if Company A acquires the products in the petroleum terminals from Company B, even if Company B only owns them for an instant, the value of those products must be added to the value of the long-term contracts to determine the size of transaction.

You said it would be better if Company A could acquire those products directly from Company C. It is our understanding that in that case the transaction between Company A and Company B would be below the level required to meet the size of transaction test and would not be reportable. Company A now is trying to determine if that can be done.

Please telephone me if I have misunderstood your position. Again, we appreciate your comments.

Sincerely,



I concur with this letter.
called [redacted] (PS)
12/19/00.



SUMMARY OF HSR ANALYSIS

Facts

1. Buyer has total assets or net sales in excess of \$100 million.
2. Target has total assets or net sales in excess of \$10 million.

This is a transaction that will result in the following:

3. Target, currently a corporation with community members, will be restructured to have two corporate members, Parent (a new corporation) and Buyer. The community members of Target will become the members of Parent.
4. Buyer will contribute assets and cash (\$7,000,000) to Target.
5. Target will distribute cash (\$4,000,000) to Parent.
6. Through the rights granted in Target's Corporate Bylaws, Buyer will appoint 4 Board members; Parent will appoint 4 Board members; local physicians will appoint 3 Board members; and one physician will serve *ex officio* with voting rights.
7. Target's Articles of Incorporation state that upon dissolution, Parent and Buyer will equally share in the distribution of assets.

Analysis

1. This is a restructuring of membership in a non-profit, non-stock corporation that has the effect of combining two businesses and is treated as a merger or consolidation. Therefore, this is an acquisition of voting securities, but is treated as an asset acquisition for valuation purposes (Interpretations 99, 109, 115; §801.2(d)).
2. As a result of director voting rights, Buyer and Parent will each hold 33% of the voting securities of Target (§801.12(b)). → N/A
3. Buyer and Parent may be viewed as having the contractual right to appoint 33% of the directors (Interpretation 64). YES
4. Buyer does not control Target because §801.1(b)(1)(ii) does not apply. AGREE - BUT UNDER RULE.
5. Buyer is the acquiring person; Target is the acquired person. YES
6. The value of the voting securities is determined by the value of the assets (Interpretations 99 and 115). - ASSET VALUE ONLY - NO VLS
7. The value of the assets is based on fair market value or the acquisition price, whichever is greater. Acquisition price is the sum of the property and cash that Buyer is contributing (§801.10(b)). AGREE

NO -
NEAR AND
NO VOTING
SECURITIES

Conclusion

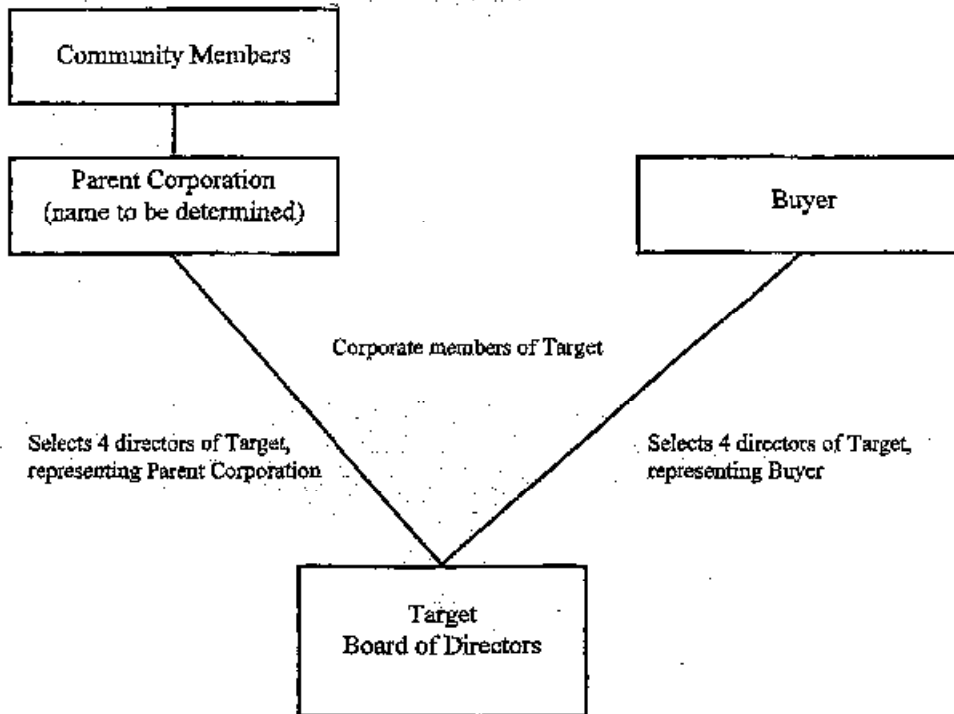
8. The transaction satisfies 7A(a)(3)(A) [15%], but not 7A(a)(3)(B) [\$15 million] (§801.1(b), §801.1(c), Interpretation 242). The transaction is exempt under §802.20 because:
- a. Buyer will not hold more than \$15 million of the assets of Target (33% of \$22,000,000) under §802.20(a); and/or
 - b. Buyer will not control Target under §802.20(b).

DONT NEED THIS ANALYSIS -
THERE IS NO ACQUISITION BECAUSE
THERE IS NO CHANGE IN CONTROL.

B. Michael
12/7/00

Exhibit 1

**Relationship of Corporate Members to the
Restructured Target, a non-stock, non-profit corporation**



12 Target Board Members

- Four (4) appointed by Parent Corporation
- Four (4) appointed by Buyer
- Four Physicians*

* Two employed physicians; Chief of Staff (*ex officio* with vote); one physician elected at-large by the Medical Staff.