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**From:** [REDACTED]  
**To:** "Mike Verne (E-mail)" <mverne@ftc.gov>  
**Date:** 11/26/01 12:09PM  
**Subject:** FW: HSR Assistance Requested

Mike:

Several weeks ago I forwarded to you the e-mail attached below, indicating that a certain deal I had previously contacted you about had changed in form. I indicated that the trust that is the acquiring party in the tender offer might also be an acquiring party on the asset deal. However, the way the deal currently stands, the trust (or an entity related to it) will not acquire assets from the acquired party on the asset deal, but rather is considering making a small equity investment in the company that will be the acquired company on the asset deal. The investment would be approximately \$5 million. It not clear at this point whether the investment would occur before, after, or concurrent with the tender offer and asset deal. On its own, a \$5 million equity investment in a company would not trigger a filing requirement. Does this factor give rise to a duty on the part of the trust to make a filing in connection with the tender offer?

I left you a voice mail concerning this question as well.

Thanks very much for your assistance.

Best regards,

-----Original Message-----

**From:** [REDACTED]  
**Sent:** Sunday, November 11, 2001 6:21 PM  
**To:** Mike Verne (E-mail)  
**Subject:** HSR Assistance Requested

Mike:

Several months ago, a colleague and I contacted you regarding a transaction (I represent the Acquiring Company; my colleague represents Acquired Company). The deal has still not closed but has changed somewhat since then. I would like to run the modified deal by you.

The proposed transaction involves a tender offer and follow-on merger (the "Tender Offer") that will result in 100% of the voting securities of the acquired company being acquired by the Acquiring Company for aggregate

consideration of over \$200,000,000. It is a condition to the Tender Offer that, immediately following the completion of the Tender Offer, all of the remaining operating assets held by the Acquired Company are to be sold to Company X for cash consideration of approximately \$120,000,000 (the "Asset Sale"). Company X is an independent third party unrelated to the Acquired company or the Acquiring company. For practical purposes, the closing of the Tender Offer and the closing of the Asset Sale will occur simultaneously. For a number of business reasons, however, the parties have ordered the transactions such that the Tender Offer will be deemed to have been completed immediately prior to the Asset Sale.

The acquired company and Company X should will submit filings under the HSR Act with respect to the Asset Sale. My colleague and I sought your advice as to whether HSR filings would be required with respect to the tender offer in light of the fact that the ultimate parent entity of the acquired company will change as a result of the Tender Offer being completed immediately prior to the Asset Sale.

Based on these facts, you advised that the Staff would not require premerger notification filings under the HSR Act from Acquired Company and Acquiring Company with respect to the Tender Offer. You indicated that the Staff would apply a continuum theory to subsume the Tender Offer within the reportable Asset Sale in light of the fact that (i) the Tender Offer and the Asset Sale are each conditioned on the other, such that it is impossible for the Tender Offer to close without the Asset Sale immediately following, and (ii) following the transactions, Acquired Company's assets will consist exclusively of cash. You acknowledged that the HSR filings being submitted in connection with the Asset Sale are being filed only by Acquired Party and Company X not by Acquiring Company and indicated that the Staff would nevertheless subsume the Tender Offer within the Asset Sale and not require filings for the acquisition by Acquiring Company of the voting securities of Acquired Company.

The only aspect of the deal that has changed is that Company X will no longer be the acquiring party in the asset deal. Instead, a new company and a Trust have stepped in to acquire the remaining operating assets held by the Acquired Company following the tender offer. I assume the new company will need to make a filing. My question is whether the Trust will need to make a filing. The trust is related to the Acquiring Company in the Tender Offer, although the exact relationship is not yet clear. It is also not clear at this point how much of the purchase price for the asset sale will be contributed by the new company and how much will be contributed by the Trust. Will the Trust need to make a filing if its contribution to the asset purchase price is below \$50 million, which is likely to be the case?

I may be reached at [REDACTED] Thank you very much for your assistance.

[REDACTED] LP  
[REDACTED]  
[REDACTED]



ADVISED THE WRITER THAT IF A COMPANY HELD ANY ASSETS OTHER THAN CASH OR CASH EQUIVALENTS AFTER THE ASSET TRANSFER, THEN THE TENDER OFFER COULD NOT BE SUBSUMED IN THE REPORTABLE ACQUISITION OF ASSETS. A SEPARATE FILING WOULD BE REQUIRED FROM THE ACQUIRING COMPANY IN THE TENDER OFFER.

B. Michael Verne  
11/29/01