

802.1

[REDACTED]

June 7, 2004

Via Federal Express

B. Michael Verne, Esq.
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue
Washington, DC 20580

FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE
2004 JUN -8 AM 11:32

Re: Confirmation of Telephone Conversation

Dear Mr. Verne:

This will summarize the conversation we had on June 2, 2004.

Facts

1. X is a general partnership with two partners, A and B. The business of X is to market the products of A and B. The respective interests of A and B in X vary from time to time depending on the sales of their respective products, but each of A and B owns roughly half of the assets and profits of X.
2. A and B have agreed to end the distribution of their products through X and to carry on their respective businesses independently.
3. Pursuant to this agreement, the assets of X related to the distribution of A's products will be distributed to A and the assets of X related to the distribution of B's products will be distributed to B. X's assets that are not specifically related to either A's or B's products will be distributed among A and B as they agree.
4. After these distributions occur, X will remain in existence, with A and B as its sole partners, to continue to fund and administer a pension plan for X's employees and to deal with any continuing liabilities of X relating to its distribution of A's and B's products.
5. These distributions by X to A and B and the continuation of X will be reflected in an implementation agreement (the "Implementation Agreement") that will be signed prior to the time that either A or B acquire assets from X as described below.

[REDACTED]

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6. The Implementation Agreement will provide that X will distribute to A all of X's inventory of A products and all of X's accounts receivable from sales of A products. The Implementation Agreement will also provide that X will distribute to B all of X's inventory of B products and all of X's accounts receivable from sales of B products. It is estimated that the value of the inventory and receivables to be received by each of A and B from X will exceed \$50 million.

7. The remaining assets of X that will be distributed to A and B pursuant to the Implementation Agreement will consist solely of (i) cash and (ii) other assets valued at less than \$50 million.

8. Both A and B need licenses to sell their products in all 50 states. A already has the necessary licenses in place and plans to end distribution of its products through X when the Implementation Agreement becomes effective, which will occur on or about July 1, 2004.

9. While B would prefer to end distribution of its products through X on the effective date of the Implementation Agreement, it cannot do so because it does not have all of the necessary licenses to distribute its products in all 50 states.

10. Accordingly, B will be required to continue distributing its products through X until B obtains the necessary licenses. It is estimated that the licensing process will take between 4 and 7 months to accomplish.

Conclusions

If both A and B were to receive their respective inventory and receivables on the effective date of the Implementation Agreement, their acquisitions would appear to be exempt under 802.1(c) as acquisitions of current supplies in the ordinary course of business. See also ABA Section of Antitrust Law Premerger Notification Practice Manual (3d Ed. 2003) Interpretations 7 and 162. It seems clear in this case that neither A nor B would be receiving all or substantially all of the assets of an operating unit which would otherwise render the current supplies exemption unavailable under 802.1(a).

I believe that the distribution of inventory and receivables to A on the effective date of the Implementation Agreement followed by the distribution of inventory and receivables to B promptly after it has obtained its state licenses should also be exempt under 802.1(c) if done pursuant to a single plan of integrated steps contained in the Implementation Agreement. In our conversation on June 2, 2004, you indicated that you would view the transfer of inventory and receivables to A and B in this circumstance as part of a single transaction and that

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the acquisition by A and B of their respective inventory and receivables would therefore be exempt under 802.1.

Excluding inventory, receivables and cash, the assets of X that will be acquired by A and B as part of this transaction have an aggregate value of less than \$50 million. As a result I believe that the transaction should not be reportable under HSR by either A or B.

After reviewing this letter, I would greatly appreciate it if you would confirm that, as stated in our telephone conversation on June 2, 2004, you agree with the above analysis. My direct number is [REDACTED] Thank you.

Sincerely,

[REDACTED]

AGREE.
B Michael Verne
6/16/04