

30000, the most regularly prepared balance sheet may be used to determine size of person & balance sheet may reflect in a footnote the proposed sale of [redacted] subsidiary to [redacted] of prior to acquisition of parent.

March 26, 1991

FEDERAL EXPRESS

Victor Cohen, Esquire  
Federal Trade Commission  
Premerger Notification Office  
Bureau of Competition  
Room 301  
Washington, D.C. 20580

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FEDERAL TRADE COMMISSION  
BUREAU OF COMPETITION  
WASHINGTON, D.C. 20580

Dear Victor:

This letter will confirm the telephone conversation you, [redacted] had on March 18, 1991 and follow-up telephone conversations I had with you on March 21, 1991 and March 25, 1991 concerning the facts set forth in this letter, our analysis of the applicability of the minimum dollar value exemption to such facts, and your conclusion relating thereto.

I. FACTS

The acquiring entity is a \$100 million person and the acquired entity is a \$10 million person. The acquiring entity will be purchasing the acquired entity in a statutory merger (the "Statutory Merger") which will result in the acquiring entity owning 100% of the acquired entity's capital stock and the shareholders of the acquired entity owning convertible preferred stock of the acquiring entity ("Convertible Preferred Stock"). Both parties to the transaction are privately held corporations.

The acquiring entity's Board of Directors has determined in good faith that the fair market value of the acquired entity's capital stock is less than \$15 million. Such determination was based upon recent offers of venture capitalists to purchase equity in the acquiring entity and certain other factors deemed appropriate.

The acquired entity's last regularly prepared income statement for 12 months reflects net sales of less than \$25 million but the most recently regularly prepared balance sheet reflects assets of approximately [redacted]

[REDACTED]

The acquired entity is disposing of a wholly-owned subsidiary ("Subsidiary") because for business reasons the acquiring entity does not desire ownership thereof. Consequently, the acquired entity will spin-off the Subsidiary to its shareholders or a trustee for such shareholders or otherwise transfer the Subsidiary to an Unrelated Third Party (as defined in the following sentence) prior to the Statutory Merger. Thereafter, the shareholders will sell the Subsidiary or its assets to a third party unrelated to either the acquiring entity or the acquired entity ("Unrelated Third Party"). The acquiring entity will enter into a management contract to manage the Subsidiary's operations, which management contract is likely to continue after the ultimate sale of the Subsidiary or its assets to the Unrelated Third Party. The acquiring entity will not have any ownership interest whatsoever in the Subsidiary or its assets.

As a result of the disposal of the Subsidiary, the assets of the acquired entity will be less than \$25 million. The contemplated disposal of the Subsidiary will be reflected in a footnote to the acquired entity's regularly prepared monthly financial statement dated as of February 28, 1991.

## II. ANALYSIS

Based on the foregoing fact pattern ("Fact Scenario"), we asked whether the acquired entity could prepare, and rely upon, a monthly financial statement dated as of February 28, 1991, reflecting in a footnote thereto the contemplated March disposal of the Subsidiary. I told you that the monthly preparation by management of a financial statement is consistent with the acquired entity's prior accounting practices as it regularly prepares financial statements on a monthly basis in the same manner and same time.

If the response to the prior question was affirmative, we inquired further whether the minimum dollar value exemption would be available based on the Fact Scenario.

Assuming the preparation of a February 28 financial statement, as provided above, would be permitted, we discussed the applicability of 16 CFR §802.20 to the Fact Scenario. 16 CFR §802.20 provides in pertinent part as follows:

An acquisition which would be subject to the requirements of the act and which satisfies section 7A(a)(3)(A), but which does not satisfy section 7A(a)(3)(B), shall be exempt from the requirements of the act if as a result of the acquisition the acquiring person would not hold:

(b) Voting securities which confer control of an issuer which, together with all entities which it controls, has annual net sales or total assets of \$25 million or more.

[REDACTED]

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Since the Board of Directors of the acquiring entity has determined the fair market value of the Convertible Preferred Stock to be less than \$15 million and the voting securities acquired would not confer control of an issuer with net sales or total assets of \$25 million or more, we were of the opinion that the acquiring and acquired entities could rely on the minimum dollar value exemption.

**III. CONCLUSIONS**

You told me that a regularly prepared monthly management financial statement, which footnoted an intended disposition of a subsidiary, could be utilized in determining the applicability of the minimum dollar value exemption.

Furthermore, based on the Fact Scenario, you stated the minimum dollar value exemption would be available and that HSR would not apply to the Statutory Merger.

If you disagree in any respect with this letter, please call me IMMEDIATELY.

As always, your assistance is greatly appreciated.

Very truly yours,  
[REDACTED]

[REDACTED]