

801.10 (c)(1)(ii)

[REDACTED]

August 9, 1991

[REDACTED]

Richard D. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
Room 312
Sixth Street and Pennsylvania Ave., N.W.
Washington, D.C. 20580

VIA TELECOPIER

Dear Dick:

This letter serves to confirm our telephone conversation of August 7, 1991, in which [REDACTED] and [REDACTED] also participated. [REDACTED] has written you a confirming letter on the main point of the conversation, which involved the applicability of the "ordinary course" exemption to a putative acquisition of an interest in undeveloped real property. I am writing separately to verify your concurrence with my interpretation of 16 C.F.R. § 801.10(c)(1)(ii) (the "rule"), as it applies to the following facts:

Corporations X and Y are entering into an option agreement that contemplates the formation of a non-corporate joint venture between them. X will initially pay \$500,000 for an option to acquire a 50% interest in the joint venture, which may be exercised within a 60-day option period. If the option is exercised, there will be a closing within 10 business days thereafter, at which time X will pay further consideration to Y and X and Y will execute the joint venture agreement. X is a publicly held company, and part of the further consideration is a specified number of shares of X's common stock that, at the date of the option agreement, had a market value of \$10 million. The shares represent about 3% of X's voting securities. Between the date of the option agreement and the closing date, the market value of the shares may increase, possibly to more than \$15 million.

The option agreement obligates X and Y to negotiate the terms of the joint venture agreement diligently and in good faith during the option period, so that the joint venture agreement will be available for execution at the

Richard D. Smith, Esq.
August 9, 1991
Page 2

[Redacted]

but cannot be earlier than 10 days before closing

closing. In a section of the option agreement captioned "Principal Terms," X and Y agree that the joint venture agreement will include certain terms and conditions delineated on the ensuing eight pages.

As you know, the rule defines "market price" as the lowest closing quotation or lowest closing bid price, as applicable, "within the 45 or fewer calendar days which are prior to the consummation of the acquisition but not earlier than the day prior to the execution of the contract, agreement in principle or letter of intent to merge or acquire." On the basis of the above-recited facts, you concurred in my view that the option agreement is the functional equivalent of an agreement in principle or letter of intent for purposes of the rule. (In fact, with its detailed articulation of terms, creation of binding obligations, and payment of \$500,000, the option agreement has a greater degree of formality than many letters of intent.) The effect of this interpretation is to enable Y to compute the latest allowable closing date (i.e., 10 business days after conclusion of the option period), and then count back 45 calendar days. If on the 45th day prior to the latest possible closing date, the closing market price of X's common stock, multiplied by the number of shares which Y is to receive, is less than \$15 million, then Y can be confident that it need not file notification as an acquirer of X's voting securities under Section 7A of the Clayton Act.

I might add that this interpretation, in these circumstances, comports fully with the rationale for the rule, as explained in the Statement of Basis and Purpose, 43 Fed. Reg. at 33471: "[T]he 45-day period may not extend back to any days prior to the day before execution of the contract, agreement in principle or letter of intent to acquire, since the parties presumably entered into their agreement on the basis of market prices prevailing at that time." As noted above, the number of shares stated in the option agreement was, indeed, determined with reference to the current market price.

If this letter does not correctly reflect our conversation or misstates the views of the Premerger Notification Office, please contact me at your earliest convenience. Unless I hear from you to the contrary, I will advise my client, Y, to rely on your concurrence with the interpretation set forth above. Thank you for your consideration.

Sincerely yours,

[Redacted signature]

8/9/91 called [Redacted]

Advised that in no case can 45 day period be earlier than day before option signed. Would also suggest that 45 day calculation be used for each day of the 10 days within which transaction might be closed, rather than just the latest date, i.e., the tenth day. Also, if stock taken is valued at 15 MM or less, no reportable event has taken place. R. Smith

cc:

[Redacted cc list]