

801.1(c)

WRITER'S DIRECT LINE

August 21, 1991

By Telecopier

Richard Smith, Esq.
Premerger Notification Office
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Smith:

This is to request that you reconsider your initial advice that a separate filing is required in the situation where, an instant prior to selling its assets to Company A, Company X acquires title to its share of assets previously indirectly held through a minority interest in a partnership with Company B and immediately transfers title to those assets (as well as its previously held assets) to Company A.

In this situation, it appears sufficient for Hart-Scott purposes that Company X file as acquired person with respect to its sale of assets to Company A. That is because Company X will not hold title to the former partnership assets (of which Company X acquires 49% upon the dissolution of the partnership an instant prior to the asset sale to Company A) for more than that instant. The guarantee that title to the assets will not reside in Company X for more than that instant is the "reconstitution" clause of the partnership termination and dissolution agreement which provides that if the sale to Company A does not occur at that time, the partnership shall be immediately reconstituted as if the dissolution had not occurred.

Substantively, the transaction being examined here by the Commission or the Justice Department is the acquisition of Company X's assets by Company A. As a voluntary submission,

[REDACTED]

Richard Smith, Esq.

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Company X's filing with respect to that acquisition separately breaks out the portion of Company X's revenues derived from its 49% interest in the partnership assets. Also being provided is a copy of the termination and dissolution agreement (which is Ex. 1.1(A) to Attachment A). Thus, Company X's filing as acquired person includes all of the information that would be contained in a second filing as acquiring person. What we are talking about here is the expense -- including the \$20,000 filing fee -- of preparing a second filing with respect to the technical passage of title to some of the partnership assets through Company X on their way to Company A in a situation where that filing would provide no additional information to the enforcement agencies.

It appears to be your position that you would reach a different result if Company X were selling its share of the partnership assets to Company A pursuant to a separate agreement from that which also includes its previously held assets. I respectfully suggest that that analysis should lead to the conclusion that no separate filing is required here. If in your hypothetical the transfer of partnership assets through Company X to Company A would be nonreportable by Company X (with the partnership or its controlling partner filing as acquired person), then the same result should obtain where the transfer of Company X's share of the partnership assets to Company A occurs simultaneously with the reportable sale of Company X's preexisting assets to Company A.

I believe that interpretations 70 and 79 in the draft revised ABA Premerger Notification Practice Manual, with their emphasis on there being adequate assurance that the holding of title by an intermediary be merely transitory, support my position. The fact that Company X will hold the partnership assets for only an instant is an absolute certainty on the present facts.

I would appreciate hearing from you as soon as possible so that we can comply with all of our Hart-Scott requirements. Please let me know if you need any additional information. Our filing with respect to the sale of assets by Company X to Company A will be made today.

Respectfully submitted,

[REDACTED]

[REDACTED]

[REDACTED]

On 8/21/91 I advised [redacted] that her 8/21 letter to me was troublesome to the PMN office. The continuum theory is based upon there being a contract between A and B and, for whatever reason, the transfer of the assets or voting stock will, for a moment, stop in C. In the present situation, A has no contract with B (the partnership) but the partners, in their dissolution agreement, have agreed with each other to pass the assets received from the partnership to A.

While this fact situation appears to be a stretching of the continuum theory, we will not require X to file for the purchase of assets from the partnership as long as the partnership certifies as to the sale of those assets from X to A and X agreed that it will not use the fact that it does not yet hold those assets as a reason for non-compliance with any record request. We also must be certain that the original holder of those assets, the UPE of the partnership, will supply the necessary data to X so that it can substantially comply with any record request. 7/6

Our view that X does not have to file for its purchase of assets from the partnership is limited to this fact situation only and cannot be used to exempt any future transactions of a similar nature.

PTB Smith