

801.1(a)(2)

[REDACTED]

[REDACTED]

[REDACTED]

November 6, 1991

REFER TO FILE NUMBER

[REDACTED]

VIA FAX - (202) 326-2050
AND REGULAR MAIL

Dick Smith, Esq.
Staff Attorney
Federal Trade Commission
Premerger Notification, Room 303
Washington, D.C. 20580

Re: Applicability of Hart-Scott-Rodino Act to
Acquisition of Assets by State Employees'
Retirement System

Dear Mr. Smith:

This letter is to confirm our telephone conversation of October 31, 1991, concerning the applicability of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a (the "Act"), to the acquisition of certain assets by a state employees' retirement system with total assets exceeding \$100,000,000 (the "System"). The System intends to acquire assets worth more than \$15,000,000 from an entity which is not exempt from the Act.

Section (c)(4) of the Act exempts "transfers to or from a federal agency or a state or political subdivision thereof" The Commission's regulations provide that the Act does not apply to transfers to " . . . the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation engaged in commerce)." 16 C.F.R. § 801.1(a)(2). As I indicated to you, the facts surrounding the System's creation and existence show both that it is a state agency and that it is not a corporation.

The fact that the System is a state agency is shown by its placement within a state fiscal department for administrative and oversight purposes. The head of the fiscal department is the custodian of the System's funds; the state

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legislature is responsible for appropriating monies yearly as necessary for the System's operation; all rules and regulations adopted by the System are subject to approval by the state's governor; the employment of all officers and employees of the System is subject to approval by the head of the fiscal department; all purchases of supplies or equipment by the System are subject to approval by the head of the fiscal department; and the System uses the state seal on its letterhead. In short, the System both acts as, and is treated consistently with its being, a state agency.

The facts also show that the System is a trust rather than a corporation. The System was created by a trust indenture and is governed by a board of trustees rather than a board of directors. It is not incorporated, nor does it issue stock or have shareholders. The IRS has issued a letter ruling stating that the System is a "qualified trust" under 26 U.S.C. § 401. While the System's enabling legislation provides, *inter alia*, that the System shall have "the powers and privileges of a corporation," this language appears intended merely to give the System the privileges of a corporation rather than to establish that it is a corporation.

Based on the foregoing facts, you told me that it appeared the System was exempt from the Act under 16 C.F.R. § 801.1(a)(2). You also said that if I sent you a letter summarizing the facts set forth above, you would circulate it to other legal staff of the Federal Trade Commission in order to be certain that others agree with your interpretation.

If for any reason you should determine that the exemption set forth in 16 C.F.R. § 801.1(a)(2) may not be available to the System, please call me at your earliest convenience to advise me of this determination. Otherwise the System intends, in reliance on the availability of the exemption, to sign an agreement on or about November 12, 1991 obligating it to purchase the above-mentioned assets.

Thank you for your assistance in this matter.

Very yours,

[REDACTED SIGNATURE]

This conclusion is supported by the enabling legislation which grants the powers and privileges of a corporation. There is a separate document.

[REDACTED]

11/7/91 Called [REDACTED] and advised that the System is a state agency (non-corporate) and, as such, is not an entity under 6801.1(a)(2). No filing is required. [REDACTED]