

7A (c)(4); 801.1(a)(2)

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December 2, 1991

BY FAX

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

Re: Informal Hart-Scott-Rodino Opinion Letter

Dear Mr. Smith:

As you suggested, I am writing to obtain the Staff's position on the applicability of the statutory (c)(4) exemption for transfers "to or from a State" under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act") as well as the definition of "entity" at Section 801.1(a)(2) of the Regulations under the facts outlined below.

FACTS

Company "A", a wholly-owned subsidiary of Company "B", is a State "X" corporation and engages in the business of insurance. Company A became insolvent so as to endanger the interests of its policyholders.

Under authority granted to him by a State X statute, the Commissioner of Insurance ("Commissioner"), an elected state official, filed an application to the Superior Court of State X, which issued an order (1) appointing the Commissioner Conservator of Company A; (2) vesting title to all of the Company A assets in the Commissioner (and his successors in office) in his official capacity as Conservator; (3) directing the Commissioner to take possession of all Company A's books, records, property, assets, and all other indicia of ownership and to conduct, as Conservator, any business of Company A; (4) enjoining Company A and any of its officers, directors, agents, servants, or employees from transacting any business or disposing of any property on behalf of Company A; and (5) assuming and exercising sole and exclusive jurisdiction over all property of Company A to

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the exclusion of any other court or tribunal so as to protect the safety of the public and the Company A policyholders.

The Commissioner's statutory powers as Conservator of Company A include the exercise of all of Company A's legal and equitable rights, including the power to sell or transfer or otherwise dispose of any property of Company A, with the permission of the Court.

Our client, Company C, wishes to purchase certain assets of Company A directly from the Commissioner. The definitive agreement, which is currently being negotiated, will be signed by the Commissioner in his official capacity as Conservator, and will require Court approval. The proposed transaction satisfies the size-of-person and size-of-transaction tests.

ANALYSIS

We have concluded that the transfer of assets from the Conservator to our client would be exempt under (c)(4) and because the Conservator is the State or a State agency and not an "entity." Section 7A(c)(4) of the Act exempts "transfers to or from ... a State or political subdivision thereof" from the Act's filing requirement. In addition, the Act only applies to an "entity," which is defined to exclude "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). See Statement of Basis and Purpose, 43 Fed. Reg. 33456 (July 31, 1978).

The position that the Staff has taken with respect to the Resolution Trust Corporation ("RTC") is fully consistent with concluding that this is an exempt transaction. The Company C acquisition is much like an acquisition from the RTC, when it acts as Conservator for the assets of a failed savings and loan. The Staff has repeatedly concluded that an acquisition from the RTC as Conservator is exempt; the same logic and conclusion apply here.

As with an RTC transaction, Company C would be acquiring the Company A assets directly from the Conservator, i.e., the Insurance Commissioner of State X in his official capacity, and not from a "corporation engaged in commerce", Company A. The assets would be transferred pursuant to a written agreement signed by the Commissioner in his capacity as

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Conservator. The agreement will not be signed by any officer or agent of Company A. Indeed, even were Company A, acting as a corporation, inclined to sell the Company A assets, it would be enjoined from doing so by the order of the Court. As an elected State X official, the Commissioner is clearly part of the "State" and, therefore, not an "entity" within § 801.1(a)(2).

You and I discussed a letter dated April 30, 1985 in which the Staff was asked for its position on the (c)(4) exemption and definition of "entity" with respect to an [REDACTED]

acting as conservator for an insolvent insurance company. Although the public version of that letter does not reveal the Staff's position, you informed me that the letter indicates that the Staff found the acquisition reportable. Whatever the reasoning employed by the Staff in 1985, that position cannot be reconciled with the Staff's more recent position on RTC transactions and thus should not control here. The Staff's position with respect to the RTC is fully consistent with the (c)(4) exemption and fully consistent with finding this transaction exempt.

The rationale for the (c)(4) exemption and definition of entity as explained in the SBP is also fully consistent with concluding that this transaction is exempt. The SBP states that asset acquisitions from the State are exempt. 43 Fed. Reg. at 33456. It also provides that "State-owned ... corporations are included within the definition of entity" because they are invariably engaged in commercial activities over which courts will have jurisdiction. *Id.* In this instance, Company A is not a State-owned corporation; the State, through its Conservator, is not a shareholder of Company A. Indeed, as noted above, Company A is a wholly-owned subsidiary of Company B. Title to the assets of Company A were, however, transferred to the State by court order pursuant to state statute. Thus, the fact that Company A was engaged in commerce prior to its insolvency is irrelevant. This also makes inapposite the situations you and I discussed regarding State owned or controlled municipal hospitals or other corporations.

In addition, pursuant to court order, no other court has jurisdiction over the assets held by the Conservator. The court to which the Conservator applied found that this matter "involves the vital public interest" of State X. This is not a matter of a corporation engaged in commerce.

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In sum, it is our view that Company C would purchase the Company A assets from the State as Conservator, and not from Company A or any corporation engaged in commerce. Therefore, we believe this transaction is consistent with the "to or from a State" exemption.

We would appreciate learning from you as soon as practicable the Staff's position on this matter. We would, of course, be pleased to answer any questions or discuss this matter further.

Sincerely,

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[REDACTED] 12/3/91 called [REDACTED] and advised that where a state Commissioner of Insurance, an elected state official, becomes the receiver or conservator of an insurance company pursuant to a state statute, he or she may sell the assets of the insurance company (but not including reportable amounts of voting stock in other issuers) and be exempt from reporting under 7A (c)(4) as a "state" or under 801.1(a)(2) as a "state agency".
RBSmith

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