

[REDACTED]

March 23, 1995

Mr. Richard Smith
FEDERAL TRADE COMMISSION
Premerger Notification Office
Bureau of Competition
Room 303
Washington, D.C. 20580

Subject: Hart-Scott-Rodino Act Notification

Dear Mr. Smith:

By letter of January 17, 1995, a copy of which is enclosed for your ease of reference (the "**January Letter**"), Washington, D.C. counsel for our client requested confirmation from the Federal Trade Commission ("**FTC**") that, based on the terms of the therein described transaction, the requirements of the Hart-Scott-Rodino Act (the "**Act**") are not met and that the parties to the transaction are not therefore required to submit a Premerger Notification and Report Form (the "**Form**") and wait the applicable waiting period prescribed by the Act prior to the consummation of their proposed transaction. Upon FTC receipt of the informal determination request, you contacted such counsel's offices and, on January 26, 1995, spoke via teleconference with representatives of such counsel and our office.^{1/} During that conversation, you requested confirmation from our client regarding the fair market value of the transaction and that no liabilities were being assumed which would affect the value of the transaction for reporting purposes. This letter serves to confirm our discussions with you regarding the outstanding issues you raised during the teleconference and to memorialize your conclusions based upon those representations that the transactions are not reportable

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Telephone conference of Richard Smith, [REDACTED]
[REDACTED] January 26, 1995.

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because the requirements of the Act are not met with respect to the size-of-transaction test.

As you may recall, the proposed transaction, which is accomplished in two steps, involved the acquisition by a corporation (the "**Acquiring Person**") of substantially all of the assets of two sellers, unaffiliated with the Acquiring Person.^{2/} The first transaction described a seller which was a parent corporation and its two subsidiaries which proposed to sell to the Acquiring Person substantially all of their assets (the "**Asset Acquisition**"). The second transaction described a seller, organized as a limited partnership, which proposed to sell substantially all of its assets to the Acquiring Person (the "**Real Property Acquisition**") (both transactions referred to collectively as the "**Transaction**").

Based upon the January Letter and our conversations with you, you confirmed that no filing would be required for the parties based upon your understanding of the Transactions. However, you stated that your confirmation assumed that neither the fair market value of the assets being acquired nor the inclusion of any assumed liabilities in the purchase price for the assets would cause either part of the Transaction to exceed the FIFTEEN MILLION AND NO/100 DOLLARS (\$15,000,000) threshold for reporting purposes. Assuming that either part of the Transaction did not exceed the threshold amounts, you informally determined that the transaction was exempt from the Act pursuant to 16 C.F.R. § 802.20.

1. **Fair Market Value of the Assets and the Real Property.** As a threshold matter, in valuing a business, the value of the assets used in the business and the earning power of the business, among other factors are considered. Asset valuation may be based on the value of the assets as carried on the books of the acquired company (cost less accumulated depreciation), on replacement cost, or on a judgement as to what a willing buyer would pay a willing seller to acquire the assets. As you know, there are several other approaches by which the fair market value of assets can be determined. See 1 Stephen M. Axinn *et. al.*, Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act, § 504(4)(c)(vii) (rev. ed. 1993). Rather, subject only to a determination made in "good faith" (which does not mandate a high value), the Acquiring Person should be able to choose a value that is reasonable and appropriate under the circumstances. Accordingly, consistent with interpretations within the ABA Premerger Notification Manual (as specified in the January Letter), "[t]he fair market value shall be

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Recall that the two sellers had common investors, but for reporting purposes each was considered its own "ultimate person."

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determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person. . . ." (emphasis added).

For purposes of the Asset Acquisition portion of the Transaction, we understand from local counsel representing our client that, consistent with the above discussion, the fair market value of the assets does not exceed FIFTEEN MILLION AND NO/100 DOLLARS (\$15,000,000). Consequently, as stated in our January Letter, the "size-of-transaction" test will not be satisfied because the total consideration for the assets to be acquired in the Asset Acquisition transaction is less than FIFTEEN MILLION AND NO/100 DOLLARS (\$15,000,000).

As stated in the January Letter the fair market value of the real property to be acquired which is the subject of the Real Property Transaction will be based on a current market appraisal. The appraisal is not expected to exceed FOURTEEN MILLION AND NO/100 DOLLARS (\$14,000,000). Consequently, as stated in our January Letter, the "size-of-transaction" test will not be satisfied because the total consideration to be paid for the assets to be acquired in the Real Property Transaction is less than FIFTEEN MILLION AND NO/100 DOLLARS (\$15,000,000).

2. Assumption of Liabilities. We have been informed by our client that the liabilities assumed in connection with the Asset Acquisition are insubstantial. Further, any such assumption will not cause the Asset Acquisition to exceed the threshold requirements of the Act of FIFTEEN MILLION AND NO/100 DOLLARS (\$15,000,000). With respect to the assets to be acquired in connection the with the Real Property Acquisition, no liabilities will be assumed.

Accordingly, based upon the foregoing, when read in connection with the January Letter, we ask that you please again confirm our understanding that the requirements of the Act are not met and that a Premerger Notification and Report Form need not be filed. If you have any further questions or need any further information, please do not hesitate to call.

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