

Entering into a contract, which will be assigned to a third person, does not require an NSR filing since it is not an acquisition. Other points discussed in letter are correct. They relate to size, formation of a corporate joint venture, control

SO/VC
SO/11
SO/40(C)

FEDERAL TRADE COMMISSION NOTIFICATION OFFICE

OCT 18 10 41 AM '95

October 17, 1995

VIA FEDERAL EXPRESS + aggregation of voting stock.

Victor L. Cohen, Esq.
Premerger Notification Office
Room 33
Bureau of Competition
Federal Trade Commission
7 Pennsylvania Avenue, NW
Washington, D.C. 20580

This material may be subject to the confidentiality provisions of Section 7A(h) of the Clayton Act which restricts release under the Freedom of Information Act.

Dear Mr. Cohen:

This firm represents [redacted] Inc. in regards to a proposed acquisition of certain [redacted] related assets. This letter confirms our conversation on October 6, 1995, in which we discussed whether premerger notification is required for the proposed acquisition. It is our understanding that our communications are confidential. We also understand that your opinions were based on the facts presented you and you will not provide us with a written response to this letter; however, you will contact us by telephone to confirm its accuracy.

In the proposed acquisition [redacted] will sign an agreement to purchase approximately \$46 million of assets. All of the assets will ultimately be purchased by one or, potentially, two assignees of [redacted]. The first assignee/purchaser will be a new corporation to be formed. This corporation will either purchase all of the assets or \$36 million of assets.

The second potential purchaser is [redacted] which may purchase those assets located in [redacted] valued at approximately \$10 million. [redacted] does not purchase those assets, the new corporation will purchase them. Our clients have only recently advised us of this possibility, so we did not discuss it on October 6. We do not believe that this change is such as to require premerger notification.

[Large redacted area at the bottom of the page]

[REDACTED]

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In our conversation, we stated to you that:

- ◆ The parties to the proposed transaction are engaged in activities affecting commerce.
 - ◆ The proposed transaction will involve a purchase of assets.
 - ◆ The purchase price will be \$46 million.
 - ◆ There will be four parties to the proposed transaction: [REDACTED] Inc. (a corporation); [REDACTED] (a corporation); [REDACTED] (an individual); and [REDACTED] (an individual).
 - ◆ [REDACTED] California, Inc. is a wholly-owned subsidiary of [REDACTED] which has annual net sales or total assets of \$100 million or more.
 - ◆ Under the asset purchase agreement, [REDACTED] will agree to purchase certain assets from [REDACTED] however, they will have the right to assign the purchase rights to a new corporation to be formed, which will consummate the transaction.
 - ◆ Prior to its purchase of [REDACTED] assets, the new corporation will not have any sales or assets.
 - ◆ None of the stockholders in the new corporation will own or vote more than 50% of its stock.
 - ◆ None of the stockholders in the new corporation will be spouses or minor children of each other.
 - ◆ [REDACTED] each own 50% of another company [REDACTED]
- [REDACTED]

◆ [REDACTED] is the general partner of a limited partnership. Under the limited partnership agreement, [REDACTED] is responsible for "the management and operation of the business and affairs of the partnership," but is allocated only 2% of the partnership's profits, losses or other distributions.

◆ [REDACTED] does not have any subsidiaries.

◆ [REDACTED] and [REDACTED] each own 30% of the common stock of [REDACTED]. [REDACTED] and [REDACTED] each also vote an additional 15% of the stock, pursuant to trusts established for each others' minor children.

◆ Except as noted above, none of the remaining stock in [REDACTED] is owned by spouses or minors.

◆ [REDACTED] most recent balance sheet was prepared on December 27, 1994. The balance sheet was not audited, but was prepared in accord with the procedures normally used by [REDACTED]. The recent balance sheet reflects annual gross sales of \$8,679,885 and total assets of \$3,687,327. A new annual financial statement will not be prepared before closing.

◆ On December 27, 1994, another company [REDACTED] was merged into [REDACTED].

◆ The most recent annual financial statement for [REDACTED] is dated December 27, 1994. As of that date, [REDACTED] had gross sales of \$5,169,525 and total assets of \$2,340,436.

Based upon these facts, you advised us that:

◆ Premerger notification is not required when [REDACTED] execute the asset purchase agreement. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 does not require premerger notification unless a person will hold assets or voting securities as a result of the transaction, and [REDACTED] plan to assign the right to purchase the assets to the new corporation.

Even if trust is not its own U.P.E. would only have a 45% share of voting power.

*correct
- [initials]
[initials]*
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- ◆ None of the stockholders in the new corporation are required to provide notice of its formation, unless either:

one of the stockholders (including all persons or entities encompassed by that stockholder) has annual net sales or total assets of \$100 million or more; another has annual net sales or total assets of \$10 million or more; and the new corporation will have total assets of \$10 million or more; or

Public
Company
Rights

two of the stockholders in the new corporation each have annual net sales or total assets of \$10 million or more; and the new corporation will have total assets of \$100 million or more.

- ◆ In determining the respective "sizes" of [redacted] under FTC Rule 801.40(b), the assets of the limited partnership which [redacted] is general partner of are *not* included. This is so even though [redacted] each own 50% of the stock of [redacted] and, thus, each "controls" [redacted]. Under FTC Rule 801.1(b)(1)(ii), a general partner does not "control" a partnership unless it has the right to 50% of the partnership's profits or assets (in the event of dissolution). In our case, [redacted] is not entitled to 50% or more of the profits or assets of the partnership and, thus, does not "control" it.

control

- ◆ When determining [redacted] for any stockholder in the new corporation must report its formation under FTC Rule 801.40(b), the value of the assets to be purchased from [redacted] are *not* included in determining these persons' respective sizes.

control

- ◆ In determining the size of the new corporation under FTC Rule 801.40(b), the value of any assets transferred to it, any cash and any loan guarantees are included.

control

(c)



[REDACTED]

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◆ [REDACTED] and the other stockholders in the new corporation (including any persons or entities controlled by them) each do not have annual net sales or total assets in excess of \$10 million, notification of the formation of that corporation is not required.

◆ In determining the size of the new corporation at the time it purchases the [REDACTED] assets, any cash or loan guarantees contributed at formation "pass through." What this means is that, under FTC Rule 801.11(e)(ii), the value of any cash or loan guarantees is *not* included in determining whether the new corporation has annual net sales or total assets of \$10 million or more and, thus, satisfies the "size of person" test.

correct
(1) no balance sheet

◆ Neither [REDACTED] control [REDACTED] or the limited partnership described above under FTC Rule 801.1.

◆ When determining the size of the new corporation at the time of the asset purchase, the net sales or total assets of [REDACTED] and the limited partnership described above are *not* included.


correct
Assets: part of last report prepared by subject

◆ We should *not* rely on [REDACTED] December 27, 1994 annual statement to determine its size. Rather, we must look to more recent financial statements or reports prepared for the internal use [REDACTED] officers.

Subs: part annual statement

As noted above, there is a possibility that [REDACTED] will purchase \$10 million of [REDACTED] assets. Those assets are related to certain properties in [REDACTED] where [REDACTED] already does business. This purchase would be part of the same transaction as the purchase of the remaining \$36 million in [REDACTED] assets. However, this part of the transaction would be closed several weeks before the remaining assets are purchased by the new corporation. Since the size of this part of the transaction will not exceed \$15 million and the purchase of the [REDACTED] assets is not otherwise reportable, we do not believe that it must be reported. In addition, we do not believe that the purchase of the remaining \$36 million in assets by the new corporation must be reported if the new corporation does not satisfy the \$10 million "size of person" test.

[REDACTED]



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Please advise us if we are in error.

Thank you for your attention to this matter. We look forward to hearing from you.

Yours very truly,

