801.40 · 801.2 · 802.9 · 802.30

[redacted]

[redacted]

March 6, 1996

Via Facsimile
Richard B. Smith
Premerger Notification Office
Room 303
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Smith:

I am writing to you to confirm your conclusions regarding the appropriate Hart-Scott-Rodino analysis of a transaction I described to you on the telephone on March 4, 1996.

As you recall, I told you that A, a non-profit company, owns 80% of the voting securities of B, a for-profit corporation. The remaining 20% of B's voting securities are publicly owned. A is its own ultimate parent entity. As part of the recapitalization of B, the parties are planning to undertake the following steps.

Step One. A will convert to a for-profit corporation and will unilaterally form a non-profit foundation, A1. A will transfer to A1 certain assets and 100% of A's voting securities.

Step Two. B will merge into the new for-profit A, forming a new entity, AB. B will transfer its assets and business to A. AB will be a new corporation, with new bylaws and newly issued securities. B's shareholders will exchange their stock in B for stock in AB.

A1 will hold 80% of AB's voting securities. The shareholders who currently hold 20% of B's voting securities, will hold the same percentage of AB's voting securities. AB will also pay cash to A1 as compensation for certain of A1's assets that AB will now own.

[redacted]

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I understand that this transaction would not be evaluated as the formation of a joint venture corporation under 16 C.F.R. § 801.40. Instead, it would be evaluated as the merger of A and B.

Neither A1 nor AB would have a reporting obligation as an acquiring person because the intraperson exemption of 16 C.F.R. § 802.30 would apply. Under this exemption, a person need not report its acquisition of voting securities or assets if that person is both the acquiring and acquired person by virtue of its holdings of voting securities. In my hypothetical, with respect to A1's acquisition of voting securities of AB, and AB's acquisition of assets from A1, A1 is both the acquired and acquiring person by virtue of holdings of over 50% of the voting securities of A, B, and AB.

I understand that the only entities with a possible reporting obligation as acquiring persons are the shareholders other than A1 who will acquire voting securities of AB. No shareholder, other than A1, however, will hold more than 10% of AB's voting securities. Even if a shareholder (other than A1) would hold in excess of $15 million worth of AB's voting securities, that shareholder's acquisition would be exempt from a reporting obligation under the passive investor exception (16 C.F.R. § 802.9) so long as that acquisition was solely for the purpose of investment and that shareholder is not involved in the management of AB. Voting for AB's directors is not, I understand, inconsistent with playing a passive role in the management of AB.

If this letter does not accurately reflect your analysis of the hypothetical I posed to you, please call me as soon as possible. Thanks, once again, for your help.

Sincerely,

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Enclosures

3/7/96 - Advised writer that only possible reportable event is taking of AB shares by former public shareholders, who hold 20% of B. If each such shareholder will take 10% or less of AB's voting stock and will be a purely passive investor in AB, then 802.9 can be used since A+B are both controlled by Foundation & Foundation will contribute A/B after merger with B's shareholders holding shares for A/B shares, 801.4 seems more applicable than 801.4a. RBSmith

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