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§ 801.40

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WRITER'S DIRECT DIAL

[redacted]

March 24, 1999

Melia Epps, Esq.
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

VIA FACSIMILE TRANSMISSION
(202) 326-2624

Re: Hypothetical Transaction Discussed

Dear Ms. Epps:

In telephone conversations with you on March 19, 1999, we sought clarification of our client's filing obligations in respect of a transaction hypothetically described as follows.

In 1996, our client ("A") entered into agreement with a corporation ("D") and its major shareholders ("B" and "C")(the "Investment Agreement"), providing for direct acquisitions of common shares of D from D and acquisitions of common shares of D by way of one immediate, and three successive delayed, tender offers to purchase common shares of D made by A to the other shareholders of D ("Other Shareholders"). The purchase price pursuant to such tender offers was to be calculated on a formula basis, reflecting the profitability of D. The direct acquisitions and the initial tender offer resulted in the acquisition of an aggregate of over 40% of the outstanding voting securities of D by A; B and C continue to hold less than 20% each of the voting securities of D. The Investment Agreement prohibited A from acquiring interests in D exceeding 50% of the outstanding interests prior to the consummation of the purchase of shares pursuant to the second tender offer without obtaining Board of D approval and without giving a proxy for the voting of interests exceeding 50% to a person designated by the Board of D. The Investment Agreement provided for a warrant of D issued to A insuring that after the fourth

tender offer A would acquire sufficient ownership of D to insure majority control (the "Warrant"). As shareholders of D, the parties A, B and C also entered into a shareholders agreement

In connection with the acquisition, A and D each filed H-S-R Notification and Report Forms (the "1996 H-S-R Notification"). None of the A and D SIC Codes overlapped. A reported that it would cross the 25% threshold in connection with the acquisitions, but did not at the time claim it would cross the 50% threshold because of the delayed effect of the warrant Early termination was requested and granted

The parties now propose a revision of the arrangement which would in effect confer majority control of D upon A immediately upon consummation. A, B and C would contribute their shares in D to a new entity, E, and would receive shares of E in proportion to their contributions of shares of D. As over 40% shareholder of D, A will receive over 50% of the voting securities of E, and B and C will each receive slightly less than 25% each of the shares of E. (As a result of the transactions, E will own some 80% of the shares of D). A will possibly contribute other assets to E initially or from time to time, and will receive therefor additional shares of E, although B and C would have preemptive rights allowing them to retain proportionate ownership after such subsequent contributions. E would enter into certain licenses and other arm's length agreements with D, permitting it to use D's name, services and expertise outside the United States. A, B and C will enter into a shareholders' agreement with respect to E similar to the D shareholders' agreement

As transferee of A, E would also become obligated by A's obligations under the Investment Agreement and the D Shareholders' Agreement, including the obligations to the Other Shareholders of D to purchase their common shares under certain circumstances, which obligations will be guaranteed by A. The business of D is the operation of laboratories in testing of food and other substances in the United States. A has agreed that if it becomes aware of opportunities to purchase additional testing laboratories, its normal strategy will be to refer potential acquisitions outside of the United States to E, and to refer all potential acquisitions in the United States to D. E has undertaken certain other obligations in respect of such Other Shareholders of D, including a commitment to allow such Other Shareholders to convert their common shares of D into common shares of E prior to the occurrence of any registered public offering of common shares of E, and to include the E shares so obtained in the public offering.

The revised arrangements entail the acquisition of voting control by A of D in excess of the 50% threshold, greater than the highest threshold of 25% reported in the 1996 H-S-R Notification. You have advised us, however, that instead of filing a new H-S-R Notification and Report Form reporting the acquisition of control of more than 50% of D by A, A, B and C should report the acquisition as the formation of a joint venture or other corporation pursuant to 16 C.F.R. § 801.40 ("Rule 801.40") if the requirements of Rule 801.40(b) are met, and that A need not file a separate H-S-R Notification and Report Form reporting the crossing of

the 50% threshold. Accordingly, D would not need to file an additional H-S-R Notification and Report Form.

We are asking that you confirm by telephone the interpretation set forth above of A's and D's filing obligations. Please call me [redacted] or [redacted] to discuss the foregoing.

Thank you.

Very truly yours,

[redacted]

The writer is correct in concluding that the transaction is a joint venture subject to the requirements of §801.40. If the transaction meets the size requirements of §801.40(b)(1) or (2), then A, B and C may each have a potential reporting requirement as an acquiring person subject to the jurisdictional thresholds of §7A(a). For HSR purposes the potentially reportable transactions are of the v/s of E by A, B and/or C. (If B and C meet the size of person test but the value of the E v/s that they are receiving is less the $15MM, then acquisition would be exempt under §802.20 —)