

801.40

[REDACTED]

March 24, 1999

VIA FACSIMILE

Confidential Treatment Requested

Mr. Richard B. Smith  
Compliance Specialist  
Federal Trade Commission  
Premerger Notification Office  
6<sup>th</sup> and Pennsylvania Avenues, N.W.  
Washington, D.C. 20560

REC'D V. S. 3/25/99  
MAR 25 1999

Re Reportability of Multi-Step Transaction as Single HSR Filing  
Under Continuum Approach

Dear Dick,

than 15M

In follow up to my letter of March 22, 1999 and our telephone conversation yesterday, this letter will confirm that (1) the transaction described in my March 22 letter is covered by the continuum theory, and may be filed as a corporate formation under 16 C.F.R. § 801.40, and (2) that the only parties required to file HSR notification will be Company A (by its UPE<sup>1</sup>) and any shareholders of Third Party that are receiving \$15 million or more in Newco stock and not exempted under 16 CFR § 802.9. Please let me know if I have in any way misunderstood your analysis or conclusions.

Best regards,

[REDACTED]

For purposes of this analysis necessary 801.40 rule of person tests are required to be met. 3/25/99 with confirm that it is 100% person. RB Smith

<sup>1</sup> Although it is not relevant to the analysis, please note that Company A is not its own UPE; its UPE, therefore, would be filing as the acquiring person.

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Proposed transaction. The proposed transaction involves the combination by two UPEs – Company A and Third Party --- of their presently separately controlled businesses in a newly formed corporation, Newco.<sup>1</sup> Company A will contribute several businesses of its controlled entities, and obtain control of Newco, whereas Third Party will contribute its entire business, and survive as a Newco subsidiary. The transaction entails the following steps:

Step 1: Company A will contribute stock of Company C, an indirect (through Company B) non-wholly-owned subsidiary of Company A, to LLC.<sup>2</sup> Company A holds a controlling (approximately 50.1%) interest in LLC. In exchange for contributing the stock of Company C to LLC, Company A will receive an increased ownership interest (going to approximately 65%) in LLC.<sup>3</sup>

Step 2: Merger Sub 1, recently created as a wholly-owned subsidiary of Newco (again, with only nominal assets), will be merged into Third Party, with Third Party's public shareholders receiving, in the aggregate, a minority holding (approximately 30%) of Newco common (voting) stock in exchange for their Third Party shares. Based on presently available information, none of these Third Party shareholder acquisitions is expected to be reportable under §801.2(e).<sup>4</sup>

Step 3: Merger Sub 2, also recently created as a wholly-owned Newco subsidiary (and thus within Company A), will be merged into Company C (also within Company A, although not by reason of holdings of voting securities, following the transfer to LLC in the first-described transaction). LLC will receive approximately 11%, and the public shareholders of Company C will receive less than 10%, in the aggregate, of Newco common stock in exchange for their Company C shares. As with Third Party's shareholders, based on presently available information, none of the

<sup>1</sup> Newco is presently formed as a wholly-owned subsidiary of Company A, but has only nominal assets.

<sup>2</sup> The formation of LLC (pre-Formal Interpretation #15) was exempt from reporting given its member-managed structure.

<sup>3</sup> I previously discussed this aspect of the transaction with Patrick Sharpe, who agreed that this step, viewed alone, is not reportable. Formal Interpretation #15 provides that "[i]n post-formation acquisitions of membership interests in LLCs will not be reportable except in two situations: (1) when the acquisition of the membership interest results in the acquiring person ... holding 100% of the membership interests in the LLC," which is not the present case, and "(2) when the acquiring person contributes a business to the LLC in exchange for the membership interest." In this second case, "[i]f the PNO will treat [the] contribution of an additional business to the business(es) already in the LLC as a formation of a new LLC," an approach which, in the present case, results in this step remaining non-reportable. Because Company A, through Company B, presently controls LLC, and will control the newly formed LLC, the new formation does not entail a combination of two or more pre-existing, separately controlled businesses being brought under common control – a pre-requisite for reportability of any LLC formation under Formal Interpretation #15. For this same reason, we assume that if Company B contributes Company C's business to LLC as well, as may occur, in exchange for a further increased interest in LLC by approximately [5%] (to approximately [65%]), the transaction would remain non-reportable.

<sup>4</sup> See footnote 1, *supra*. Certain officers of Third Party will also receive options to purchase Newco common stock. The acquisitions of these options is, of course, non-reportable.

Mr. Patrick Sharpe  
March 12, 1999  
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Company C public shareholder acquisitions of Newco stock is expected to be reportable under §801.2(e).<sup>6</sup>

Step 4. LLC (within Company A) will transfer certain assets (the "LLC Assets") to Newco in exchange for additional shares which, when combined with the shares received in Step 3, will give LLC a post-transaction holding of approximately 61.5% of Newco common stock.

Post-transaction structure: See Attachment 2 for an illustration of the post-transaction structure.

Although the four steps described above may, if viewed individually and out of their larger context, technically represent several reportable events, they are in fact simply constituent elements of one reportable transaction -- the contribution by Company A (through LLC) and Third Party of their Combined Businesses to a newly formed company jointly owned by their shareholders -- under the "continuum" approach. The first step is non-reportable in any event, Company A and Third Party are the only two reporting persons involved in the remaining steps (with step 3 being essentially intra-person, but for not meeting the "by reason of holdings of voting securities" aspect of §802.30); the remaining steps are all conditioned upon each other under the transaction agreements, the businesses contributed by Company A and Third Party are consideration for each other's resulting interest in Newco, and the entire transaction will occur at one closing. Under such a continuum approach, given that each element is an inseparable part of one continuous transaction, the Premerger Notification Office should look at the result of the transaction when the parties "get up from the table," which is two reporting persons' formation of a new company combining their previously separately owned businesses. As a result, Company A and Third Party would be the sole parties filing as acquiring persons, and Newco as the single acquired person, pursuant to 16 C.F.R. §801.40.

Please let me know as soon as possible, and in any event by March 23, 1999, your thoughts on the applicability of the continuum approach. I request confidential treatment of this letter and the enclosed pursuant to the FTC Rules of Procedure and 15 U.S.C. § 18a(h). As always, I appreciate your very valuable assistance in these matters.

Best regards,

Attachments

<sup>6</sup> See footnote 1, supra.