

801.1(c)(1) [continuum theory]

FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

JUL 26 1 58 PM '95

July 21, 1995

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

Re: Written Confirmation of Oral Advice

Dear Mr Smith:

We have previously had several discussions with you regarding a merger transaction (the "Merger") between our client (hereinafter the "Company") and another corporation (hereinafter the "Purchaser"). Pursuant to the Merger, the Purchaser would acquire 100% of the voting securities of the Company.

As we have advised you, the Merger is one of four interrelated acquisitions that potentially are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"). The Company and the Purchaser have each filed notification under the HSR Act with respect to the Merger itself and each of the Company and the Purchaser is its own ultimate parent. Two of the three other acquisitions are likely to be exempted from the HSR Act notification requirements. The purpose of this letter is to seek written confirmation of the oral advice that you provided to us that the fourth "acquisition", the Company's exercise of the "Option" referenced below, would be viewed as a conduit situation for purposes of the HSR Act and need not be preceded by notification under the HSR Act.

In addition to the Merger, the three other acquisitions are as follows:

(i) the Company's exercise, immediately prior to the Merger, of an outstanding

letter to maintain confidentiality) (the "Option Corp.") that the Company does not "control" for purposes of the HSR Act;

(ii) the Company's distribution (after exercising the Option and immediately prior to the Merger) to its existing stockholders, option holders and warrant holders (the "Distribution") of the Option Shares and substantially all of the other shares of Third Party Common Stock already owned by the Company; and

(iii) the secondary acquisition by Purchaser ("Secondary Acquisition") of the pre-existing shares of Third Party Common Stock held by the Company and not distributed in the Distribution.

These three events are discussed in greater detail below

801.15, all of the Option Shares and all pre-existing shares of Third Party Common Stock held by the Company would be treated as held by the Company as a result of the acquisition.)

The Company anticipates that in the case of one of its stockholders, the Distribution may

The Secondary Acquisition by the Purchaser also is potentially acceptable under the HSR Act

[REDACTED]
Richard B. Smith, Esq.

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Based upon the theory of the HSR Act and our several conversations with you, we believe and understand that the exercise of the Option can be treated by the Company as a "conduit transaction" without filing notification under the HSR Act as long as all of the Option Shares are included in the Distribution and no Option Shares are acquired by the Purchaser. The Company and Purchaser will amend the Merger Agreement in order to make this a contractual obligation of the Company, thereby providing "adequate assurance" of the conduit nature of the transaction. In fact, virtually immediately upon exercise of the Option by the Company, the Option Shares will be distributed to the Company's stockholders, optionholders and warrant holders. In our view, the facts make it clear that the Company is merely a conduit in this situation. (In the remote situation where the Option is exercised but the Distribution and Merger do not occur, the Company will promptly notify the Federal Trade Commission, Department of Justice, and the State of California (under the HSR Act.)

Because of the complexity of the transactions and the facts relating to them, we have written

[REDACTED]
Very truly yours,
[REDACTED]

7/31/95 Advised writer that it was the view of [REDACTED]

stock and distribution to the shareholders was required by the Merger Agreement and, as such, such purchase (and distribution) could fall within the continuum / conduit exemption.

RBSmith