

801.1(c); 801.2

August 18, 1995

VIA FACSIMILE

Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Smith:

Our firm represents a party in a transaction that was recently discussed with you by [redacted] and [redacted] at [redacted]. Our analysis of the filing requirements differs slightly from theirs, and I would appreciate the opportunity to discuss the issues with you.

Our client A has entered into a definitive agreement with client B, to acquire more than \$50 million of assets of B. [redacted] is a \$100 million person and B is a \$10 million person. [redacted]

This Agreement may be assigned in whole or in part

Agreement attached as Exhibit A (the "Assignment

that no such assignment shall be effective until the Closing; provided, further, however, that the Assignment Agreement is strictly between [A] and the assignees named therein, and [B] shall have no liability or obligations under and shall not otherwise be bound by any of the provisions of the Assignment Agreement. If all or a portion of this Agreement is assigned by [A], [A] shall notify [B] of such assignment in writing and shall specify which of the [assets] is being purchased by an

Premerger Notification Office
August 18, 1995
Page 2

assignee, whereupon the assignee or assignees shall succeed to [A]'s rights under the Agreement to purchase those [assets] as may be designated by such assignment.

(italics mine). Although the first italicized phrase denies priority between B and the assignee, the second arguably may create

entered into a definitive agreement with C whereby C has agreed to acquire more than \$15 million of the B assets. B has been notified of A's assignment to C of A's purchase rights as to those assets.

million person. Virtually all of the assets of B are within a single SIC Code.

Here is our analysis of the filing requirements:

1. A must file and wait with respect to its acquisition of more than \$50 million of assets of B (and B files as the acquired person). Although A does not expect to buy all of those assets, in order to be in a position to fulfill its agreement with B, A must file with respect to the whole bundle in the event C defaults, goes out of business or some other unforeseen circumstance occurs.

3. If C is not a \$100 million person, then C and B need not file and wait, since neither of them is a \$100 million person.

Whether as a technical matter there is privity of contract between B and C seems to be irrelevant. Absent an exemption, the Hart-Scott-Rodino Act prohibits a person engaged in

than \$15 million of assets of another large person unless both the

those assets are being acquired (and it will have the relevant

fulfills its contractual obligations, A will not at any time have title (transitory or otherwise) to the assets of B to be acquired by C.

As to the manner in which C and B should respond to item 2(d) of the notification and report form, I assume B can furnish

Premarmer Notification Office
August 18, 1995
Page 3

its contract with A (since that is the document that describes the assets that C will acquire), and perhaps can furnish the notice from A that specifies the assets that C will acquire. In its filing, C can furnish its agreement with A and the contract between A and B (to which it will succeed, in part, as of the closing).

We understand [redacted] has suggested that the second transaction should be analyzed as an acquisition between A and C, since B and C have never had face-to-face negotiations, and probably never will have them. All negotiations with C were conducted by A, which had the contractual power to acquire the assets of B. Even so, our reading of the Hart-Scott-Rodino Act and Rule § 801.2 leads us to believe that under these circumstances (if B and C are large enough) the Act and Rules require filings by parties who in effect are strangers to each other.

I would greatly appreciate the opportunity to discuss this transaction with you when you have a free moment (and I can arrange for someone [redacted] to participate as well). My

Very truly yours [redacted]

cc: [redacted] (by facsimile)

11/10/95 10:10 AM
assignment from H to C then C can [redacted]
can use agreement between A & B and assignment to C. [redacted] Write advice that if
does not default on assignment, A will not take beneficial ownership of assets going
[redacted] or it is [redacted] I could file for [redacted]

All the assets in state C definitely under [redacted]
refile. However, note in filing as to what's going on would be useful
[redacted] [redacted]