

January 17, 1996

PRIVILEGED AND CONFIDENTIAL

VIA FACSIMILE

Ms. Alice Villavicencio
Mr. Richard Smith
FEDERAL TRADE COMMISSION
Premerger Notification Office
Bureau of Competition
Room 303
Washington, D.C. 20580

Subject: Hart-Scott-Rodino Act Notification

Dear Ms. Villavicencio and Mr. Smith:

This letter is a follow-up of our prior discussions regarding a proposed transaction involving our client. We understand that the Hart-Scott-Rodino Act (the "Act") requires that any person who acquires securities of any other person and meets the threshold requirements of the Act must file a premerger Notification and Report Form (the "Notification"). Accordingly, this letter is to request confirmation that, based on the terms of the transaction specified below (the "Transaction"), the requirements of the Act are not met and, as such, the Notification need not

Please be advised as follows:

\$20 million in favor of Company B (the "Acquiring Person"). The note is secured by the senior indebtedness of Company A and is convertible into Common Stock, one of the two (2)

CONFIDENTIAL
2A(b) of the
Please understand

Federal Trade Commission
January 17, 1996
Page 2

classes of voting common stock of Company A.¹ The convertible promissory note is being issued pursuant to a Note Purchase Agreement by and among Company A, Company B and certain individual shareholders of Company A (the "Principal Shareholders"). The Principal Shareholders are two (2) individuals who are unrelated to each other and who together own or

excess of 50% of the combined voting power of the Class A Common Stock and the Common Stock will be able to elect all of the directors of Company A.

The promissory note provides for a seven (7) year term and requires Company A to pay interest to Company B on a quarterly basis at a rate of six percent (6%) per annum. Interest payments are due on a quarterly basis.

So long as Company B holds at least three percent (3%) of Company A's Common Stock or common stock issued or issuable upon conversion of the Notes, Company B will have the right to designate that number of nominees to Company A's Board of Directors equal to the voting power represented by such common stock (rounded upward) but in no event less than one or more than two nominees.² The Principal Shareholders executed the Note Purchase Agreement in their individual capacities and agreed thereby to vote all of their respective shares of common stock in the Company for the nominees of Company B. In this regard, the Principal Shareholders have agreed to support Company B to elect the nominees designated by Company B to the Board of Directors of Company A. In the event that any nominee of Company B ceases to serve as a director of Company A for any reason, the Note Purchase Agreement

¹ The other class of voting common stock, Class A Common Stock, is identical in all respects to the Common Stock except for voting rights, conversion rights and

accordingly must be converted into Common Stock in the event the holder desires to sell or otherwise transfer Class A Common Stock.

² One individual owns or controls 37.7% of the total voting common stock and the second individual owns or controls 16.4% of the total voting common stock.

conversion of the Notes, it shall be entitled to nominate no more than one (1) nominee.

requires Company A to use its best efforts to cause the vacancy to be filled by a nominee proposed by Company B.

The Acquired Person and the Acquiring Person meet the size-of-the-person test for purposes of the Act.

2. Analysis of the Act. Based on our analysis of the Act, as applied to the

a. The Acquisition of Convertible Securities is Not Reportable.

Section 7A(c)(2) of the Act exempts "acquisition of bonds, mortgages, deeds of trust, or other obligations which are not voting securities." Thus, the first question is whether the note which is convertible into common stock constitutes "voting securities" for purposes of the Act. 16 C.F.R. section 801.1(f)(1) of the Hart-Scott Transitional Rules (the "Rules") defines "voting securities" to include "any securities which at present or may hereafter entitle the owner to elect or

801.1(f)(3) of the Rules to mean the exercise of a right inherent in the ownership or holding of particular voting securities to exchange such securities for securities which represent all of

convertible notes may be exchangeable for voting securities, they are themselves voting securities and their acquisition is not exempt under Section 7A(c)(2) of the Act. See ABA Premerger Notification Manual (the "Manual"), Interpretation No. 27.

Section 802.31 of the Rules, however, furnishes an exemption for the acquisition of convertible voting securities from the requirements of the Act in certain circumstances. In particular, section 801.1(f)(2) of the Rules defines a "convertible voting

b. The Contractual Agreement to Allow Company B to Nominate Certain Directors to the Board of Company A Does not Constitute a Present Right to Vote Under the Act. An issue arises however, as to whether the Note Purchase Agreement conveys upon Company B a present right to vote under the Act. Pursuant to the terms of the Note Purchase

to provide that the acquisition of a combination of present voting rights and convertible voting

4

We note, however, that the subsequent conversion of the notes into common stock would, itself, be a potentially reportable event. See Section 801.32 of the Rules.

rights are acquired by Company B.

The nominating right provisions of the Note Purchase Agreement do not result in a reportable transaction among the parties. Manual Interpretation No. 54 provides that

is provided for in Manual Interpretation No. 54. As such, it is a contractual agreement which falls

additional insight in this regard when it provides that the "[e]xecution of shareholder voting agreements . . . are normally viewed as nonreportable events . . . because they are not, by themselves, acquisitions." See ABA Premerger Notification Manual Interpretation No. 241. Further, the rights granted to Company B by virtue of the Note Purchase Agreement are personal

c. Conclusion and Understanding. In conclusion, and with reference to the Act's requirements, we understand that:

i. The acquisition of a convertible note in the amount of \$20

"present right to vote securities" within the contemplation of the Act.

Company B are subject to the reporting requirements of the Act as a result of the Transaction.

[REDACTED]

Federal Trade Commission
January 17, 1996
Page 5

Please confirm our understanding that the requirements of the Act are not met and, accordingly, no filing of the Notification is required. If you have any questions or need any further information, please do not hesitate to call.

In addition to any verbal response, we respectfully request a written response as soon as practicable. If no written response will be given, please let us know. Otherwise, please let us know when we might expect any such response.

to this request would be greatly appreciated. Please direct any response or inquires to the undersigned.

Respectfully submitted

[REDACTED]