

801.2; 801.40; 801.11(a)



April 27 1998

Richard Smith, Esq.
Premier Office
Federal Trade Commission
Six Pennsylvania Avenue
Washington, DC 20580

Re: [Redacted]

[Redacted]

To effect the Proposed Acquisition, a newly formed corporation (Newco) will be formed and then merged with and into the Target (the "Merger"), with the Target being the surviving corporation following the Merger.

As discussed, there would be three (3) stockholders of Newco: Stockholder A, Stockholder B and Stockholder C (each an "Investor Stockholder" and collectively, the "Investor Stockholders"). Both Stockholders A and B are large institutional investors with

[Redacted]

preferred stock of Newco.

Stockholder C is an individual with comparatively nominal assets and would hold 2% of each of the Newco Common Stock and the Newco Preferred Stock.³

Each of Stockholders A and B will hold more than \$15 million of voting stock of Newco.

In connection with the Merger, in exchange for their Newco Shares, each of the Investor Stockholders will receive voting common stock of Target ("Target Common Stock") and non-voting preferred stock of Target ("Target Preferred Stock") in amounts in each case equal to (or less than) such Investor Stockholder's percentage ownership of voting stock of Newco and percentage ownership of preferred stock of Newco, respectively. Following the Merger each of Stockholder A and Stockholder B will own 49% (or less) of the Target Common Stock, which is the only voting stock.

It is also contemplated that they will own 49% or less of the Target Preferred Stock, but that percentage is not relevant to the HSR analysis.

¹ I had not mentioned the preferred stock in our phone conversation as it has no vote. In addition, it is not convertible. If it were convertible, that would not change the conclusion that no filings are required for the transaction. There might be a later HSR filing prior to conversion of the preferred stock.

² It is possible that there may be more initial investors in Newco stock, with lesser investments than Stockholders A and B, which would not affect the conclusion.

³ test contained in the HSR Act and therefore no transaction with such person could be subject to the filing requirements of the HSR Act.

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(Note: If Newco were a partnership or an LLC treated like a partnership for HSR

This rule applies whether or not the Target survives the Merger (as here) or whether Newco survives the Merger.

The transformation of Newco Common Stock (voting stock) into Target Common Stock (voting stock) in the Merger, which happens automatically under the corporate merger statutes, does not require an HSR filing under (c)(10) of the HSR Act since Target is viewed for this purpose as the same issuer as Newco (which is in essence the acquiring person although not the technical corporate survivor) and since the percentages of voting stock held by Stockholders A and B in the acquiring corporation in the Merger will not be increased above their percentages

From the point of view of HSR and a number of other purposes, it is fortuitous that Target survives, and if Newco had survived, the fact that the Stockholders' investments in

I believe that I have accurately stated the conclusion you and I reached last week that no HSR filings are required under the circumstances described above (other than the 801.40 joint venture filings in connection with the formation of Newco). I would appreciate your calling

if I have not accurately reflected this conclusion

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filings would be required from A + B. The merger is not required since Target can be viewed as a successor to Newco and the % holdings in Target that (c)(10) would exempt such

response to the 4/21/98 letter from the same source. / VCH Smith