

801.40

[REDACTED]

March 24, 1999

VIA FACSIMILE

Mr. Richard B. Smith
Compliance Specialist
Federal Trade Commission
Registration Office

Confidential Treatment Requested

RECEIVED
MAR 25 1999
REGISTRATION OFFICE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20540

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

Dear Dick,

than 15M

[REDACTED]

examples under 15 CFR 312.5(a)(2) for
analysis or conclusions.

Best regards,

[REDACTED]

For purposes of this analysis, necessary 801.40 rule of person tests
are presumed to be met. 3/25/99. With confirm that it is
a person.

* Although it is not relevant to the analysis, please note that Company A is not its own LPE; its DPE, therefore, would

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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

Step 1: Company A will contribute stock of Company C, an indirect (through Company B) non-wholly-owned subsidiary of Company A, to LLC.² 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.³

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

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

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

² The formation of LLC (see Internal Memorandum #13) was created from operations from its member-managed structure.

³ I previously discussed this aspect of the transaction with Patrick Sharpe, who agreed that this step, viewed alone, is not reportable. Internal Memorandum #13 provides that "to best formation, contributions of membership interests in LLC will not be reportable except in two situations: (1) when the acquisition of the membership interest results in the

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).⁶

Step 4. LLC (within Company A) will transfer certain assets (the "LLC

shares received in Step 2, with give LLC a post-acquisition holding of approximately 61.5% of Newco common stock.

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.

formation agreements, the business combination by Company C from this first step.

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.

letter and the enclosed pursuant to the ETC Rules of Procedure and 15 U.S.C. § 18a(h). As always, I appreciate your very valuable assistance in these matters.

Best regards,

Attachments

⁶ See footnote 1, supra.