



October 24, 1983



CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Federal Trade Commission
Premerger Notification Office, Room 301
Washington, D.C. 20580
Attention: Wayne Kaplan, Esquire
Staff Attorney

Dear Wayne:

In a series of telephone calls between October 6 and October 12, 1983, I discussed with you a course of action being taken by one of my corporate clients to "spin off" to its shareholders ownership of a portion of its business operations. I initiated those discussions to obtain the benefit of your advice as to whether or not premerger notification filings would be required with regard to one particular aspect of the spin-off pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") and the regulations promulgated by the Federal Trade Commission pursuant to the Act (the "Regulations"). The transaction on which our discussions focused was one of the last of a series of steps which will comprise the spin-off: the intended distribution by my client to its principal individual shareholder (as part of a pro rata distribution to all its shareholders) of stock of a first-tier subsidiary corporation which at the time of the distribution will own, directly or indirectly, all of the assets involved in the business operations being spun-off by my client.

Our discussions of the intended spin-off and the legal issues involved led to the conclusion that no premerger notifications would be required in connection with this stock distribution, and the purpose of this letter is to confirm your advice to that effect, and to restate the facts and reasoning on which you based that advice. For the sake of convenience, throughout this letter I will refer to my client as "Corporation A", to my client's principal individ-

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ual shareholder as "Mr. X.", and to my client's first-tier subsidiary corporation whose stock will be distributed in the spin-off as "Corporation B".

PERTINENT FACTS

Through its own operations and the operations of its 67 subsidiaries, Corporation A presently is engaged in three distinct lines of business. A primary purpose of the spin-off is to separate one of those lines of business from the other two by, in effect, splitting Corporation A's "corporate family" into two groups instead of the present one. After the spin-off, Corporation A and its subsidiaries will own all assets now owned by the Corporation A group which relate to the operation of two of its present lines of business; and Corporation B and its subsidiaries will own all such assets which relate to the third line of business presently engaged in by the Corporation A group.

Even though the spin-off will involve divestiture by Corporation A of all its subsidiary corporations engaged in this third line of business, it will not result in any change in ultimate control of the divested companies, because it will be accomplished by pro rata distributions of Corporation B stock from Corporation A to its shareholders. Thus, each person or trust presently holding stock in Corporation A will end up as a result of the spin-off holding exactly the same amounts and types of stock in Corporation B.

Mr. X holds (and will hold when the spin-off is consummated) 33% of the issued and outstanding voting stock of Corporation A. A trust of which Mr. X is one of two cotrustees holds (and will hold when the spin-off is consummated) 21% of the issued and outstanding voting stock of Corporation A. In the spin-off Corporation A will distribute 33% of Corporation B's voting stock to Mr. X and 21% of it to this trust. While the instrument governing this trust gives Mr. X voting control of all stock of Corporation A (or any successor corporation) held by the trust, it does not give him (and he does not otherwise have) any present or future power to appoint a majority of trustees for the trust.

The fair market value of the Corporation B voting stock to be distributed to Mr. X in the spin-off will be substantially less than \$10,000,000. Because the spin-off is not a purchase

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and sale transaction, there is no "acquisition price" for the Corporation B stock to be distributed to Mr. X and the other Corporation A shareholders.

ISSUES UNDER THE ACT AND REGULATIONS

For purposes of our earlier discussions, we assumed that the size-of-person requirements of Section 7A(2) of the Act would be met with regard to the spin-off distribution of Corporation B stock to Mr. X, and I will make that same assumption for purposes of this letter. The size-of-transaction requirement of Section 7A(3) of the Act will be met by that distribution, because as a result of it Mr. X will hold 33% of the voting stock of Corporation B. With those two threshold requirements fulfilled, the Act and Regulations would require the filing of premerger notifications in connection with the stock distribution to Mr. X unless an exemption from such filings is available. You and I discussed the possible application of three separate exemptions to this stock distribution, and the following paragraphs are intended to summarize our discussions and conclusions in that regard.

Regulation 802.30 Intra-Person Exemption

A Regulation 802.30 exemption is available if "by reason of holdings of voting securities" an individual acquiring stock controls the corporation whose stock he is acquiring before the acquisition occurs. In the case at hand, Mr. X does control Corporation B (because he controls its parent Corporation A), but his control does not derive solely from his holdings of voting securities. Rather, his control of both Corporations A and B derives from the combination of his ownership of Corporation A voting securities and his right as a cotrustee to direct the voting of other Corporation A stock. Because of this fact, we concluded that literal application of Regulation 802.30 and related sections of the Regulations makes the intra-person transaction exemption unavailable for the distribution of Corporation B stock to Mr. X.

Regulation 802.10 Stock Dividend Exemption

Regulation 802.10 provides that "[t]he acquisition of voting securities, pursuant to a stock split or pro rata stock dividend, shall be exempt from the requirements of the act under section 7A(c)(10)." We agreed in our discussions that the distributions of Corporation B stock to be made by

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Corporation A will be tantamount to pro rata stock dividends, and that, therefore, conceptually, this exemption should apply to the stock distribution to be made to Mr. X. However, because Section 7A(c)(10) of the Act infers that this exemption is available only for distributions by an issuer of its own stock, you advised me that we should not rely on these provisions in the Act and Regulations as exempting the distribution of Corporation B stock to Mr. X from filing requirements.

Regulation 802.20 Minimum Dollar Value Exemption

Regulation 802.20 exempts from the requirements of the Act any voting securities acquisition which results in the acquiring person holding less than 50% of the voting securities of any issuer, so long as the value of all voting securities of the issuer held by the acquiring person after the acquisition is \$15,000,000 or less. The value of the voting securities of Corporation B which will be held by Mr. X after the spin-off stock distribution to him will be less than \$15,000,000. Accordingly, unless Mr. X will hold 50% or more of the voting securities of Corporation B after the stock distribution, this acquisition will be exempt under Regulation 802.20. Clearly Mr. X will hold 33% of the voting securities of Corporation B as a result of the stock distribution to him, but, under the definition of the term "hold" contained in Regulation 801.1(c), he will not hold the additional 21% of Corporation B's voting securities distributed to the trust for which he serves as cotrustee.

This is so because under the definition of the term "control" contained in Regulation 801.1(b) Mr. X does not control the trust, and because paragraph (3) of Regulation 801.1(c) makes clear that a trust--and not its trustee--is considered to be the holder of all voting securities constituting the corpus of the trust. Moreover, as stated in the example contained in that Regulation paragraph, a "trustee, if making an acquisition for its own account, need not aggregate its holdings with those of any trusts for which it serves as trustee."

Thus, as a result of the spin-off stock distributions, Mr. X will "hold" only 33% of the voting securities of Corporation B, and his acquisition of those securities will be exempt from the requirements of the Act under Regulation 802.20, even though the combination of his holdings and his right to control the voting of the trust's holdings of Corporation B stock will leave him in control of Corporation B after the spin-off.

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CONCLUSIONS

In our telephone conversations we discussed the applicability of Regulation 802.20 to the Corporation B stock distribution to Mr. X, and, after consulting with others in your office, you advised me that in your view the analysis summarized above was correct and a Regulation 802.20 exemption would be available for this stock distribution. That result is correct because it is reached by strict application of the language of the pertinent Regulations, but it also is consistent with the general purpose of the Act and Regulations. As it is a transaction which, in fact, will not result in any change in the degree of control that Mr. X or any other shareholder has over Corporation B, my client and I feel that the spin-off is not the sort of "acquisition" that the Act and Regulations were written to cover in the first place. Because of those feelings, I greatly appreciate your help and advice which will permit us to avoid expending the further time and effort that would be needed to make Hart-Scott-Rodino filings with regard to this transaction.

In reliance on your advice, my client and Mr. X intend to forego submittal of premerger notification filings to your agency and the Justice Department in connection with the distribution of Corporation B stock to Mr. X, unless you advise me prior to November 4, 1983, that such filings must be submitted. Because numerous actions are going forward on many fronts in order that the spin-off can be completed at the earliest possible date, and because it would take some time to prepare them if premerger notifications need to be filed, it is exceedingly important that I hear from you before November 4 if you feel I have misunderstood your advice, or if you have reconsidered it in any way.

Sincerely yours,

cc: 