801.10(c)(2)

[redacted] [redacted] [redacted]

[redacted]

August 29, 1990

This material ... the conf... Section 7A ... which ... Freedom of Information Act

BY HAND

Richard B. Smith, Esq.
Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Informal Opinion Letter

Dear Mr. Smith:

I am writing to confirm the substance of our telephone conversation on August 28, 1990 in which, based on the facts I provided you, which are outlined below, you concluded that a Hart-Scott-Rodino filing was not required for the described transaction.

Facts

Company A, its own ultimate parent entity, will acquire 100% of the voting securities of Company C from Company B.*/ Company C currently owes Company B approximately $9 million in intra-company debt. The Letter of Intent between Company A and Company B essentially provides that Company A will pay Company B approximately $18 million in cash, approximately $9 million of which is attributable to intra-company debt, which shall be retired.

The parties currently contemplate structuring the transaction such that Company A will convey approximately $18 million worth of its stock to Company B at closing. Prior to closing, Company B will have extinguished the debt owed to it by Company C. At closing, Company B will convey the stock of Company C to Company A and also Company B will immediately resell

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*/ Company B as used in this letter refers to and includes Company C's ultimate parent entity and other subsidiaries of the ultimate parent entity.

[redacted]

the stock of Company A to or through an investment banking firm for approximately $18 million.

Analysis

Company A's Acquisition of Company C Stock

Because Companies A and B collectively satisfy the size-of-person test and because Company C does not have $25 million in annual net sales or total assets, the critical inquiry is whether the consideration being paid by Company A for Company C stock is greater than $15 million. As we discussed, Company A would pay to Company B far less than $15 million if Company B had not agreed to retire just prior to closing the approximately $9 million in debt owed by Company C to Company B. Put another way, if the stock of Company C were sold to Company A with Company C's existing debt in place, Company A would pay less than $15 million for that stock. Thus, although there may be one $18 million payment being made from Company A to Company C, not all of it is properly attributable to consideration for Company C's voting securities; in fact, approximately half of it is attributable to retirement of Company C's debt.

To further illustrate the issue, we discussed two variations on this structure. First, if Company A purchased the voting securities of Company C (with the intra-company debt in tact) for less than $15 million and the next day wrote Company B a check for $9 million to retire the intra-company debt, such a transaction will clearly not be reportable. This transaction described above is, in substance, no different than this example. Similarly, the FTC has historically excluded from consideration for the voting securities money that is paid at closing but not attributable to the value of the voting securities. For example, if Company A were hiring as consultants executives of Company B the money paid to those consultants would not be used to calculate the size of the transaction, assuming they were not sham payments disproportionate to the services being rendered. The same principle should apply here. The portion of the $18 million attributable to the retirement of the debt has not been artificially inflated and is clearly severable from the value of the voting securities.

In sum, the value of the consideration being conveyed for the voting securities of Company C is less than $15 million and thus, the acquisition of Company C by Company A should not be reportable.

[redacted]

<u>Acquisition of Company A's Voting Securities by Company B</u>

For a brief moment, Company B will acquire title to approximately $18 million of Company A's voting securities before Company B resells those voting securities to or through an investment banker for cash. The voting securities conveyed to Company B by Company A constitute less than 10% of the voting securities of Company A. Accordingly, because Company B will be holding Company A's voting securities "solely for the purpose of investment", that transaction is also exempt from the Act. <u>See</u> 16 C.F.R. § 802.9.

Because the parties are taking immediate steps in reliance on our conversation and the conclusion that the transactions described above do not require notification under the Act, I would appreciate learning from you as soon as possible whether you agree or disagree with any of the conclusions stated in this letter.

Sincerely,

[redacted]

[redacted]

cc: [redacted]

8/30 Advised [redacted] that as long as none of the repayment of Company C's debt to Company B was disguised consideration for the purchase of C's stock, there is no basis for questioning the 9MM acquisition price negotiated by A and B for C's stock. No filing is required.

RBSmith