

801.10 (c)(iii)(2)

May 18, 1994

Richard B. Smith, Esquire
Premerger Notification Office
Federal Trade Commission
Washington, D.C. 20580

Dear Dick:

The purpose of this letter is to confirm certain advice which you gave me during a telephone conversation on May 17. The issue concerned whether the agreement by a purchaser of certain assets to assume certain additional future obligations of the seller of the assets would be included within the acquisition price of the assets.

The seller's obligations related to reimbursement of certain [REDACTED] expenditures incurred by retired former employees of the seller. The obligations arose by reason of contracts between the seller and its former employees.

At the time of the closing of the asset purchase, it is anticipated that the seller will have discharged any then-outstanding obligations to reimburse any [REDACTED] expenses incurred by its former employees. After the closing, the buyer of the assets will reimburse any such former employees to the extent that the seller was obligated to do so under its contractual arrangements with such former employees.

While the amounts of any such future reimbursement cannot be precisely determined in advance, certain accounting procedures permit such amounts to be estimated from a combination of such factors as prior claims history, and

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historic inflation rates applicable to [REDACTED] costs. Using such techniques, the buyer has in fact estimated the amount of its future reimbursement obligations under these arrangements.

My question to you was whether such estimated future reimbursement amounts were required to be included in the acquisition price of the assets. Your response was that such amounts should not be included in the purchase price.

We discussed possible reasons for not including such amounts in the acquisition price. One is that the liability is contingent upon future events. Second, while the amount of the seller's future obligation may be capable of estimation, no such obligation has accrued as of the time of the closing. The amount of future reimbursement which the purchaser of the assets will actually be required to pay will be determined only after [REDACTED] expense claims are filed by retirees. Third, the obligations assumed by the purchaser of the assets are not those arising from the purchaser's conduct of the ongoing business acquired from the seller. Rather, the obligations arose from the conduct of the business by the seller prior to the purchaser's acquisition of that business; these obligations to former employees of the seller have nothing to do with the purchaser's ongoing operation of the business.

The conclusion we came to, which you confirmed, was that the purchaser of the assets was not required to include in the acquisition price of the assets any amount representing anticipated future payments to retired former employees of the seller.

If this letter differs in any respect from your recollection of our conversation, please give me a call. Thanks very much.

Sincerely yours,
[REDACTED]

[REDACTED] 5/18/94 - Advised writer that I disagreed with his conclusion. Estimated future [REDACTED] cost reimbursement amounts must be included as a liability assumed by the buyer and must, therefore, be part of the acquisition price. The estimate of such future liabilities described in letter may be ideal but must be the sum of all future estimated pay-outs and cannot be reduced to an estimated present value of such future pay-outs. RBS/Smith
P.D. MAY 18 1994 FAX [REDACTED] 15:28