

[redacted] [redacted] P.02 VC  
[redacted] [redacted] 801.1  
an acquisition of voting securities. In this case PMM# 94  
Company B can [redacted] by nominate & cannot  
appoint a director [redacted] [redacted] A.V.  
person obtained a contracted power to appoint [redacted]  
convertible securities. October 23, 1996 [redacted]

Via Telecopy

Victor Cohen, Esq.  
Premerger Notification Office  
Bureau of Competition, Room 303  
Federal Trade Commission  
6th N. Pennsylvania, N.W.  
Washington, DC 20580

Dear Mr. Cohen:

This letter is to confirm the conversation held on October 11, 1996 among you, [redacted] and me concerning the filing status of a party to an acquisition.

B  
can  
only  
nominate

We provided you with the following facts: Company A plans to acquire a business from Company B. The acquisition is structured as the sale of both assets and the capital stock of one subsidiary of Company B. In consideration for the business, Company B will receive \$100,000,000 in cash and shares of Class A Cumulative Preferred Stock (the "Preferred Stock") of Company A with a stated value of \$25,000,000. (The terms of the Preferred Stock are described below.) Company B will also receive a warrant to purchase 234,568 shares of Company A's Common Stock, which represents 19% of the Common Stock of Company A. In addition, Company B will be a party to a Stockholders Agreement with the stockholders of Company A pursuant to which it will have the contractual right to designate a member of the Board of Directors of Company A. The Stockholders Agreement will not provide Company B with the right to vote any shares of Company A's capital stock, nor do such rights attach to the shares of Preferred Stock.

The shares of Preferred Stock to be received by Company B will not have the current right to vote for members of the Board of Directors of Company A. However, in the event of a default in the payment of dividends or the redemption amounts provided for in Company A's charter, the holders of the Preferred Stock will have the right to elect one-third of the Board of Directors of the Company A so long as the default continues. The shares of Preferred Stock are also entitled to certain rights under Delaware law to vote on certain extraordinary transactions, such as mergers, charter amendments, etc.



Victor Cohen, Esq.  
October 23, 1996  
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Based on the foregoing facts, you agreed with our analysis that a Notification and Report Form relating to the acquisition of the business should be filed by Company A as an acquiring person and by Company B as an acquired person.

Furthermore, you also agreed with our analysis that Company B is not an acquiring person due to its acquisition of the Preferred Stock. We agreed that the Preferred Stock is not a "voting security" under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and related regulations as (i) the Preferred Stock does not currently entitle the holder thereof to vote for the election of directors, (ii) the Stockholders Agreement merely provides Company B with a right to nominate a member of the Board of Directors, but does not confer voting rights or the right to actually appoint a director, (iii) the rights under the Stockholders Agreement do not attach to the shares of Preferred Stock and (iv) no proxy to vote shares has been granted to Company B by any stockholder of Company A. We also confirmed to you that, in the event that a stockholder violates the Stockholders Agreement, Company B will have the right to sue the stockholder but will not have the right to vote the stockholder's shares.

NOTE

Based on our discussion, your review of certain internal materials and Interpretation #94 set forth in the Premerger Notification Manual (1991 Edition) you agreed that Company B is not an acquiring person for purposes of the HSR Act.

Finally, we agreed that the exercise of the warrant at a future date will require a separate analysis as to its reportability.

Thank you very much for taking the time to discuss this matter with us. Please call me if you should have any further questions or comments on this matter.

Best regards.

[REDACTED]