

801.1(9)(3)

[REDACTED]

[REDACTED]

1999 JUN 15 A 11:28

FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

June 15, 1999

BY FACSIMILE AND FIRST-CLASS MAIL

Mr. Richard B. Smith
Premerger Notification Office
Bureau of Competition
Room H-323
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Smith:

I am writing to follow up on our telephone conversation of Monday, June 14, regarding the application of the Hart-Scott-Rodino Antitrust Improvements Act and regulations to a fact situation.

We represent a client that (along with other investors) acquired convertible preferred securities in a start up company. Our client acquired \$5 million worth of the securities in May 1996 and \$1 million worth of securities in June 1997. The Act and regulations were not applicable to these acquisitions. One of the terms and conditions attached to the convertible preferred securities (at the insistence of the start up company) was that if the start up company ever engaged in an initial public offering, the convertible preferred securities would automatically become voting common stock in the company. The start up company has now decided to engage in an initial public offering. If that offering takes place, our client's convertible preferred securities will automatically be converted into more than \$15 million (but less than 15%) of the outstanding voting securities of the start up company. Our client and the start up company satisfy the "size of persons" test of the Act. Our client also has a representative on the start up company's board of directors.

[REDACTED]

Mr. Richard B. Smith
June 15, 1999
Page 2

After we discussed this factual situation, you referred me to page 33463 of the original Statement of Basis and Purpose and its discussion of conversion. In particular, you referred me to the language that states: "The definition emphasizes that 'conversion' represents an exchange of 'voting securities,' as defined in section 801.1(f)(1), for 'voting securities' and that an exchange, as opposed to automatic maturation of inchoate rights, must take place to effect conversion." Inasmuch as the client's convertible preferred securities automatically convert into voting common stock when the initial public offering is effected, without the client doing anything or being able to control the conversion, it appears that the "automatic maturation of inchoate rights" language controls the situation and that no filing under the Act and regulations is required by our client in this situation.

Based on this factual situation and conversation, our client will not be making a filing under the Act and regulations. If, after reviewing this letter, you believe a filing is required, I would appreciate you letting me know. It is expected that the initial public offering that will trigger the transformation of the convertible preferred securities into voting common stock will take place in the near future.

I also note that you telephoned me after our initial conversation to discuss a situation in which an acquirer acquired convertible preferred securities while aware that an initial public offering would soon convert those shares into voting common stock. Our client did not acquire the convertible preferred securities in the start up company in the hope or expectation that an initial public offering would soon convert the securities into voting common stock, a fact supported by the passage of time between the acquisitions in 1996 and 1997 and the planned initial public offering in 1999. Accordingly, it would appear that the situation discussed in our second telephone conversation is different from, and is inapplicable to, our client's situation. Once again, if you disagree, I would appreciate you letting me know.

Thank you for your attention to this matter. The client and I very much appreciate your assistance.

Sincerely,


6/15/99 - Advised writer that this was not a conversion and that no filing need be made by the client since no action was being taken by it to "convert" the convertible preferred securities, and the "conversion" was beyond its control, and it had not taken the stock in anticipation of the conversion. No agrees with conclusion.
R.B. Smith