

[REDACTED]

August 5, 1999

Alice M. Villavicencio
Premerger Office
Federal Trade Commission
Washington, DC 20580

Dear Ms. Villavicencio:

REC'D
AUG 11 12 3 02
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Thank you for the assistance you have been giving me in connection with the proposed transaction that we have been discussing. You asked me to describe the transaction in writing for your further consideration:

Our client, Company A, is negotiating a transaction in which it will acquire 6 percent of the voting securities of Company B and simultaneously enter into a services and supply agreement with Company B. The services and supply agreement is an arms length agreement and will solely be a fee-for-service relationship. Company B is a private company that is undertaking a major reorganization that includes soliciting a number of new investors. Company A is only one of eight companies that has already indicated an interest in investing – some of these investments will be larger than Company A's and some smaller. In addition, apparently there are at least another six or more companies that are involved in discussions with Company B concerning possible investment.

Company A's proposed investment meets the size-of-person test and the size-of-transaction test. It would appear, however, that the transaction is exempt as an acquisition of less than 10 percent of the voting securities of an issuer provided that the acquisition is made "solely for the purpose of investment." We believe that the exemption does apply – in our discussions, you have asked me to describe more fully the right of Company A to have a representative attend Board meetings of Company B.

All investors in Company B will have the same right to attend Board meetings to "observe" and to receive information concerning business developments at Company B. The type of information that would be supplied is similar to that that would be received by investors in a public company. Specifically, the stock subscription agreement that will be signed by all

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investors contains a section entitled "Observation and Information Rights", which provides that as long as the investor continues to hold at least 50 percent of its original investment, it will be entitled to have an observer present at Board meetings of Company B. In addition, each investor will be entitled to receive all periodic reports and information packages that are provided to the Board (this right will end only if Company B's stock is sold to the public in a registered public offering, at which point the same type of information would be available in the company's SEC filings).

Company B's purpose in providing observation and information rights to its investors is to allow them to monitor their investment in Company B. Company A will not have the right to designate a member of the Board of Company B. Neither Company A nor any other investor will have the right to direct the business decisions of Company B as a result of their observation right. In one of our conversations, you asked if Company A's representative would express his or her opinion of the services and supply agreement. There may be times when Company A would be asked to make a presentation to the Board concerning the agreement, but that would be no different than any other company being invited to make a presentation concerning an ongoing contractual relationship. However, Company A will have no right to participate in the deliberations of the Board concerning the services and supply agreement.

Based on the above description, I continue to believe that Company A's investment fulfills the requirements of the "solely for purpose of investment" exemption. Company A is merely one of a number of minority shareholders that are being given the right to observe at Board meetings in order to monitor their investment; Company A will have no right to vote, to appoint a member of the Board or in any way direct or control the business decisions of Company B.

If you have any questions, please let me know. There is critical time sensitivity because if Company A does not sign its subscription agreement today, the debt offering associated with the reorganization will be delayed. Therefore, we would like to resolve this issue as soon as possible. Thank you very much for your help.

Sincerely,

[Redacted signature]

8/6/99 Writer advised that observer might be asked by board "how is services and supply agreement going?" Observer would respond on status of such agreement. (Supply Company A (through observer or other personnel) might make presentation to board of progress under the agreement. Writer recalls that observer (and Company A) have no intention to become involved in basic business decision of Company B (the decision by B to enter into the supply agreement with A had been reached before the observation rights could enter into place). B has sought the "Observation and Information Rights" section of the agreement rather than A. Based on this info, I determined that s. 9 could be used. (Writer confirmed that A & B are not competitors.)

FRB Smith