

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

July 14, 1983

Re: Hart-Scott-Rodino Amendment  
Proposed Exemption

This material may be subject to  
the confidentiality provisions of  
Section 7A (b) of the Clayton Act  
which restricts release under the  
Freedom of Information Act

Wayne Kaplan, Esq.  
Premerger Notification Office  
Room 301  
Federal Trade Commission  
Seventh & Pennsylvania Avenues, N.W.  
Washington, DC 20580

Dear Mr. Kaplan:

The purpose of this letter is to confirm our telephone conversation of July 13, 1983, concerning the proposed transaction described below, and the applicability of the exemptions from the Hart-Scott-Rodino Amendment to the proposed transaction.

#### FACTUAL BACKGROUND

Our client (hereinafter referred to as the "acquiring company") is a holding company which controls, through ownership of stock, two motor carriers holding authority from, and subject to the jurisdiction of, the Interstate Commerce Commission ("ICC"). The acquiring company proposes to purchase all of the issued and outstanding stock of another corporation (hereinafter referred to as the "acquired company") which controls, through stock ownership, a motor carrier and two freight forwarders, all of which hold authority from, and are subject to the jurisdiction of, the ICC.

The acquiring company, the acquired company and the shareholders of the acquired company have entered into an agreement for the purchase by the acquiring company of all the issued and outstanding shares of capital stock of the acquired company. The agreement contains provisions which make consummation of the transaction contingent upon the exemption, or if required, the prior approval of the transaction by the ICC and any other necessary regulatory agencies.

Wayne Kaplan, Esq.  
Page Two  
July 14, 1983

#### APPLICABLE LAW

The parties have acknowledged that the proposed transaction is subject to the jurisdiction of the ICC pursuant to 49 U.S.C. §11341, et seq., and is the type of transaction which is subject to ICC approval under 49 U.S.C. §§11343 and 11344. However, the Bus Regulatory Reform Act of 1982, ("the Bus Act") P.L. No. 97-261, which was passed by Congress on August 20, 1982, and signed into law by President Reagan on September 20, 1982, gave the ICC the powers to exempt certain transactions from ICC approval. The aforesaid exemption powers have been incorporated into the Interstate Commerce Act at 49 U.S.C. §11343(e).

Under 49 U.S.C. §11341(a), as amended by the Bus Act, an entity participating in a transaction approved or exempted by the ICC is exempt from the antitrust laws.

As you know, the Hart-Scott-Rodino Amendment, 15 U.S.C. §18a establishes requirements for notification to the Federal Trade Commission ("FTC") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to as "the Attorney General") and for a waiting period, applicable to certain acquisitions of voting securities or assets. The requirements for the applicability of these provisions are set forth in 49 U.S.C. §18a(a) which, for the purposes of this letter, we shall assume are applicable to the transaction described herein.

Under 15 U.S.C. §18a(c), certain transactions are exempt from the requirements of the Hart-Scott-Rodino Amendment. Subsection (5) thereof exempts transactions which are specifically exempted from the antitrust laws by Federal statute. Subsection (6) thereof exempts transactions which are exempted from the antitrust laws by Federal statute "if approved by a Federal agency". The latter provision requires that copies of all information and documentary material filed with the Federal agency be contemporaneously filed with the FTC and the Attorney General.

Copies of the statutory provisions cited above are attached hereto for ease of reference.

#### DISCUSSION

The parties to the proposed transaction have filed with the ICC a petition for exemption pursuant to 49 U.S.C. §11343(e). The petition contains all of the information required by the regulations enacted by the ICC pursuant to the

Wayne Kaplan, Esq.  
Page Three  
July 14, 1983

aforsaid provision, and requests that the ICC find that the proposed transaction is exempt from the merger, consolidation, and acquisition of control provisions for the reason that the requirements of 49 U.S.C. §11343(e)(1)(A) and (B) are satisfied. This would require a finding by the ICC that the application of such provisions is not necessary to carry out the national transportation policy (49 U.S.C. §10101), and either that the transaction is of limited scope, or that the application of such provisions is not needed to protect shippers from the abuse of market power.

It is anticipated that the petition will be granted and that the ICC will determine that the proposed transaction is exempt from the approval requirements of 49 U.S.C. §§11343 and 11344. If the petition is granted and the ICC determines that the transaction is exempt, the exemption from the antitrust laws contained in 49 U.S.C. §11341(a) will apply, even though the transaction has been "exempted" rather than "approved" by the ICC.

Alternatively, if such petition is denied, resulting in an ICC determination that the transaction is not exempt, the parties will be required to proceed to seek the approval of the proposed transaction by the ICC pursuant to 49 U.S.C. §§11343 and 11344. In the event that such approval is obtained, the antitrust exemption of 49 U.S.C. §11341(a) would still be applicable, but in this case the exemption would be based upon the fact that the transaction had been "approved" by the ICC.

In either event, the transaction would be exempt from the notification and waiting period requirements of 15 U.S.C. §18a(a) pursuant to the exemptions under 15 U.S.C. §18a(c)(5) or (6). If, as is anticipated, the ICC determines that the transaction is exempt from the requirements of ICC approval pursuant to 49 U.S.C. §11343(e), the transaction would be exempt from the requirements of the Hart-Scott-Rodino Amendment pursuant to §18a(c)(5).

If, on the other hand, the ICC determines that the transaction is not exempt, and it becomes necessary to obtain the approval of the transaction by the ICC, the applicable exemption from the Hart-Scott-Rodino Amendment would be 49 U.S.C. §18a(c)(6).

In either event, it would not be necessary to comply with the notification and waiting period requirements of the Hart-Scott-Rodino Amendment, since the transaction

Wayne Kaplan, Esq.  
Page Four  
July 14, 1983

would be exempt. If, however, the transaction must be approved by the ICC in order to trigger the applicability of the exemption from the antitrust laws, 15 U.S.C. §18a(c)(6) would require that copies of the application for approval and all related documents filed with the ICC be contemporaneously filed with the FTC and the Attorney General.

#### CONCLUSIONS

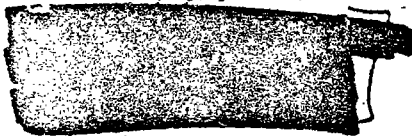
Based upon the foregoing, our understanding of your position with respect to the applicability of the provisions of 15 U.S.C. §18a to this transaction may be summarized as follows:

1. The parties have petitioned the ICC for a determination that the transaction is exempt from approval by the ICC. If the ICC issues an order exempting the transaction from ICC regulations, the antitrust exemption would become operative without the ICC having "approved" the transaction and no documents need be filed with the FTC or the Attorney General pursuant to 15 U.S.C. §18a.
2. In the event that the petition for exemption is denied, so that the applicability of the antitrust exemption would be dependent upon approval of the transaction by the ICC, upon the filing of such application for approval with the ICC, it would be necessary to contemporaneously file such application for approval and related materials with the FTC and the Attorney General, pursuant to 15 U.S.C. §18a(c)(6).
3. Assuming that the ICC either exempts the transaction pursuant to 49 U.S.C. §11343(e), or approves the transaction pursuant to 49 U.S.C. §§11343 and 11344, the antitrust exemption set forth in 49 U.S.C. §11341(a) will be applicable, and it will not be necessary to comply with the notification and waiting period requirements of the Hart-Scott-Rodino Amendment contained at 15 U.S.C. §18a.

We understand that if the conclusions set forth herein are not a correct statement of the applicable law in any respect, that you will contact us promptly. If we do not hear from you, we shall advise our client to proceed to act on the basis of the conclusions stated herein.

Thank you for your cooperation and prompt attention to this matter.

Sincerely yours,



Enclosures

[REDACTED]

C-6

[REDACTED]

[REDACTED]

July 14, 1983

Re: Hart-Scott-Rodino Amendment  
Proposed Exemption

This material may be subject to  
the confidentiality provisions of  
Section 7A (b) of the Energy Act  
which restricts release under the  
Freedom of Information Act

Wayne Kaplan, Esq.  
Premerger Notification Office  
Room 301  
Federal Trade Commission  
Seventh & Pennsylvania Avenues, N.W.  
Washington, DC 20580

RECEIVED  
FEDERAL TRADE COMMISSION  
JUL 15 1983

Dear Mr. Kaplan:

The purpose of this letter is to confirm our telephone conversation of July 13, 1983, concerning the proposed transaction described below, and the applicability of the exemptions from the Hart-Scott-Rodino Amendment to the proposed transaction.

FACTUAL BACKGROUND

Our client (hereinafter referred to as the "acquiring company") is a holding company which controls, through ownership of stock, [REDACTED] holding authority from, and subject to the jurisdiction of, the Interstate Commerce Commission ("ICC"). The acquiring company proposes to purchase all of the issued and outstanding stock of another corporation (hereinafter referred to as the "acquired company") which controls, through stock ownership, a [REDACTED] and [REDACTED] all of which hold authority from, and are subject to the jurisdiction of, the ICC.

The acquiring company, the acquired company and the shareholders of the acquired company have entered into an agreement for the purchase by the acquiring company of all the issued and outstanding shares of capital stock of the acquired company. The agreement contains provisions which make consummation of the transaction contingent upon the exemption, or if required, the prior approval of the transaction by the ICC and any other necessary regulatory agencies.

Wayne Kaplan, Esq.  
Page Two  
July 14, 1983

#### APPLICABLE LAW

The parties have acknowledged that the proposed transaction is subject to the jurisdiction of the ICC pursuant to 49 U.S.C. §11341, et seq., and is the type of transaction which is subject to ICC approval under 49 U.S.C. §§11343 and 11344. However, the Bus Regulatory Reform Act of 1982, ("the Bus Act") P.L. No. 97-261, which was passed by Congress on August 20, 1982, and signed into law by President Reagan on September 20, 1982, gave the ICC the powers to exempt certain transactions from ICC approval. The aforesaid exemption powers have been incorporated into the Interstate Commerce Act at 49 U.S.C. §11343(e).

Under 49 U.S.C. §11341(a), as amended by the Bus Act, an entity participating in a transaction approved or exempted by the ICC is exempt from the antitrust laws.

As you know, the Hart-Scott-Rodino Amendment, 15 U.S.C. §18a establishes requirements for notification to the Federal Trade Commission ("FTC") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to as "the Attorney General") and for a waiting period, applicable to certain acquisitions of voting securities or assets. The requirements for the applicability of these provisions are set forth in 49 U.S.C. §18a(a) which, for the purposes of this letter, we shall assume are applicable to the transaction described herein.

Under 15 U.S.C. §18a(c), certain transactions are exempt from the requirements of the Hart-Scott-Rodino Amendment. Subsection (5) thereof exempts transactions which are specifically exempted from the antitrust laws by Federal statute. Subsection (6) thereof exempts transactions which are exempted from the antitrust laws by Federal statute "if approved by a Federal agency". The latter provision requires that copies of all information and documentary material filed with the Federal agency be contemporaneously filed with the FTC and the Attorney General.

Copies of the statutory provisions cited above are attached hereto for ease of reference.

#### DISCUSSION

The parties to the proposed transaction have filed with the ICC a petition for exemption pursuant to 49 U.S.C. §11343(e). The petition contains all of the information required by the regulations enacted by the ICC pursuant to the

Wayne Kaplan, Esq.  
Page Three  
July 14, 1983

aforesaid provision, and requests that the ICC find that the proposed transaction is exempt from the merger, consolidation, and acquisition of control provisions for the reason that the requirements of 49 U.S.C. §11343(e)(1)(A) and (B) are satisfied. This would require a finding by the ICC that the application of such provisions is not necessary to carry out the national transportation policy (49 U.S.C. §10101), and either that the transaction is of limited scope, or that the application of such provisions is not needed to protect shippers from the abuse of market power.

It is anticipated that the petition will be granted and that the ICC will determine that the proposed transaction is exempt from the approval requirements of 49 U.S.C. §§11343 and 11344. If the petition is granted and the ICC determines that the transaction is exempt, the exemption from the antitrust laws contained in 49 U.S.C. §11341(a) will apply, even though the transaction has been "exempted" rather than "approved" by the ICC.

Alternatively, if such petition is denied, resulting in an ICC determination that the transaction is not exempt, the parties will be required to proceed to seek the approval of the proposed transaction by the ICC pursuant to 49 U.S.C. §§11343 and 11344. In the event that such approval is obtained, the antitrust exemption of 49 U.S.C. §11341(a) would still be applicable, but in this case the exemption would be based upon the fact that the transaction had been "approved" by the ICC.

In either event, the transaction would be exempt from the notification and waiting period requirements of 15 U.S.C. §18a(a) pursuant to the exemptions under 15 U.S.C. §18a(c)(5) or (6). If, as is anticipated, the ICC determines that the transaction is exempt from the requirements of ICC approval pursuant to 49 U.S.C. §11343(e), the transaction would be exempt from the requirements of the Hart-Scott-Rodino Amendment pursuant to §18a(c)(5).

If, on the other hand, the ICC determines that the transaction is not exempt, and it becomes necessary to obtain the approval of the transaction by the ICC, the applicable exemption from the Hart-Scott-Rodino Amendment would be 49 U.S.C. §18a(c)(6).

In either event, it would not be necessary to comply with the notification and waiting period requirements of the Hart-Scott-Rodino Amendment, since the transaction

Wayne Kaplan, Esq.  
Page Four  
July 14, 1983

would be exempt. If, however, the transaction must be approved by the ICC in order to trigger the applicability of the exemption from the antitrust laws, 15 U.S.C. §18a(c)(6) would require that copies of the application for approval and all related documents filed with the ICC be contemporaneously filed with the FTC and the Attorney General.

#### CONCLUSIONS

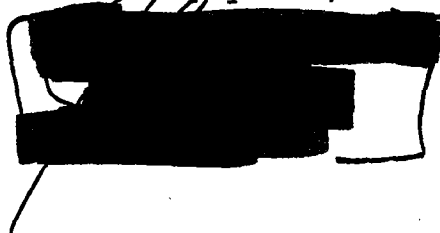
Based upon the foregoing, our understanding of your position with respect to the applicability of the provisions of 15 U.S.C. §18a to this transaction may be summarized as follows:

1. The parties have petitioned the ICC for a determination that the transaction is exempt from approval by the ICC. If the ICC issues an order exempting the transaction from ICC regulations, the antitrust exemption would become operative without the ICC having "approved" the transaction and no documents need be filed with the FTC or the Attorney General pursuant to 15 U.S.C. §18a.
2. In the event that the petition for exemption is denied, so that the applicability of the antitrust exemption would be dependent upon approval of the transaction by the ICC, upon the filing of such application for approval with the ICC, it would be necessary to contemporaneously file such application for approval and related materials with the FTC and the Attorney General, pursuant to 15 U.S.C. §18a(c)(6).
3. Assuming that the ICC either exempts the transaction pursuant to 49 U.S.C. §11343(e), or approves the transaction pursuant to 49 U.S.C. §§11343 and 11344, the antitrust exemption set forth in 49 U.S.C. §11341(a) will be applicable, and it will not be necessary to comply with the notification and waiting period requirements of the Hart-Scott-Rodino Amendment contained at 15 U.S.C. §18a.

We understand that if the conclusions set forth herein are not a correct statement of the applicable law in any respect, that you will contact us promptly. If we do not hear from you, we shall advise our client to proceed to act on the basis of the conclusions stated herein.

Thank you for your cooperation and prompt attention to this matter.

Sincerely yours,

A large rectangular area of the document is completely redacted with black ink, obscuring the signature and any text below it.

Enclosures



### SUBCHAPTER III—COMBINATIONS

#### § 11341. Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

**§ 11343. Consolidation, merger, and acquisition of control**

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than \$2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e)(1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely af-

ected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1434; Pub.L. 96-296, § 18(b), July 1, 1980, 94 Stat. 811; Pub.L. 97-261, § 21(b) Sept. 20, 1982, 96 Stat. 1122.

**§ 11344. Consolidation, merger, and acquisition of control:  
general procedure and conditions of approval**

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section

5(a)-(d) of the Department of Transportation Act (49 U.S.C. 1654 (a)-(d)), accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1436; Pub.L. 96-448, Title II, § 225(a)-(c), Oct. 14, 1980, 94 Stat. 1931; Pub.L. 97-261, § 21(f), (g), Sept. 20, 1982, 96 Stat. 1123.

## 15 § 18

## COMMERCE AND TRADE

Note 345

after passage of deadline Government which failed to allege that corporation was breaching any terms of judgment and which did not challenge bona fides of corporation's efforts to sell, was not entitled to modification of decree to consummate divestiture. *U. S. v. Combination Engineering, Inc.*, D.C. Conn. 1972, 368 F.Supp. 151.

## 347. Rescission

Although fact that sellers are not technical violators of this section against acquisitions which may substantially lessen competition or would tend to create a monopoly is itself a strong equity consideration against remedy of rescission, if effective implementation of public policy cannot be decreed without adversely involving third parties, courts in equity may, within limits, involve such parties in relief to be granted. *U. S. v. Coca-Cola Co.*, of Los Angeles, C.A. Cal. 1975, 573 F.2d 722, certiorari denied, 99 S.Ct. 302, 439 U.S. 829, 58 L.Ed.2d 323.

## 322. Hold separate order

In suit under sections 12 to 27 of this title wherein the Government sought to

enjoin corporation from proceeding with its tender offer and from taking any other action to acquire certain stock or assets of another corporation, the Government was not guilty of undue delay in moving for a hold separate order where the Government filed its moving papers only three weeks after the Second Circuit affirmed federal district court's denial of the Government's request for a preliminary injunction and where, under the circumstances, the delay could not be regarded as unreasonable. *U. S. v. United Technologies Corp.*, 406 F.Supp. 150.

Where, should a violation of sections 12 to 27 of this title be found after a trial on the merits, divestiture could be accomplished by means of a sale to another company, a public offering or a spinoff, and where the record did not warrant conclusion that an acceptable corporate buyer could not be found, provisions of Government's proposed hold separate order barring tender offeror from acquiring additional shares of offeree's stock was not necessary to insure effective divestiture and, therefore, was not included in the hold separate order. *Id.*

## § 18a. Premerger notification and waiting period—Filing

(a) Except as exempted pursuant to subsection (e) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d) (1) of this section and the waiting period described in subsection (b) (1) of this section has expired, if—

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

(2)(A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of \$10,000,000 or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 or more;

(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of \$10,000,000 or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 or more; or

(C) any voting securities or assets of a person with annual net sales or total assets of \$100,000,000 or more are being acquired by any person with total assets or annual net sales of \$10,000,000 or more; and

(3) as a result of such acquisition, the acquiring person would hold—

(A) 15 per centum or more of the voting securities or assets of the acquired person, or

(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of \$15,000,000.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d) of this section.

## Waiting period; publication; voting securities

(b) (1) The waiting period required under subsection (a) of this section shall—

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the "Assistant Attorney General") of—

(i) the completed notification required under subsection (a) of this section, or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsections (e) (2) or (g) (2) of this section.

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section—

(A) The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

**Exempt transactions**

(c) The following classes of transactions are exempt from the requirements of this section—

(1) acquisitions of goods or realty transferred in the ordinary course of business;

(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

(4) transfers to or from a Federal agency or a State or political subdivision thereof;

(5) transactions specifically exempted from the antitrust laws by Federal statute;

(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(7) transactions which require agency approval under section 1825(c) of Title 12, or section 1842 of Title 12;

(8) transactions which require agency approval under section 1843 of Title 12, section 1726 or 1730a(c) of Title 12, or section 1464 of Title 12, if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;

(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;



15 § 18a COMMERCE AND TRADE

(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and

(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B) of this section.

Commission rules

(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of Title 5, consistent with the purposes of this section—

(1) shall require that the notification required under subsection (a) of this section be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

(2) may—

(A) define the terms used in this section;

(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

Additional information; waiting period extensions

(e)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 20 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) of this section.

Preliminary injunctions; hearings

(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission alleging that a person's acquisition violates section

18 of this title or section 45 of this title, or an action is filed by the United States, alleging that a proposed acquisition violates such section 18 of this title or section 1 or 2 of this title, and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and (2) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection—

(A) upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; and

(E) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of Title 18, and shall be in every way expedited.

**Civil penalty; compliance; power of court**

(g)(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, the United States district court—

(A) may order compliance;

(B) shall extend the waiting period specified in subsection (b)(1) and as may have been extended under subsection (e)(2) until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate, upon application of the Federal Trade Commission or the Assistant Attorney General.

**Disclosure exemption**

(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

**Construction with other laws**

(i)(1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission to take any action under this section

15 § 18a

COMMERCE AND TRADE

shall not bar any proceeding or any action with respect to such acquisition at any time under sections 12 to 27 of this title or any other provision of law.

(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

*Report to Congress; legislative recommendations*

(j) Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

Oct. 15, 1914, c. 323, § 7A, as added Sept. 30, 1976, Pub.L. 94-435, Title II § 201, 90 Stat. 1390.

9...  
[REDACTED]  
July 15 [REDACTED]

But client-Broker enter  
agreement. to buy & sell  
& vote and cant revoke  
for 60 days-90 days