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September 26, 2000

VIA FACSIMILE

Mr. Patrick Sharpe
Federal Trade Commission
Premerger Notification Office
Bureau of Competition, Room 301
6th & Pennsylvania, N.W.
Washington, D.C. 20580

Re: **Size of Person 801.11(e) -- Multiple Acquisitions From Same UPE**

Dear Mr. Sharpe:

This is to confirm the advice you rendered regarding the applicability of 16 C.F.R. § 801.11(e) to the following proposed transaction during our telephone conference on September 15, 2000. I have also posed an additional twist on which I would appreciate your thoughts. The new question is reflected in Paragraph No. 3 of the Analysis section below.

MATERIAL FACTS

A is a newly formed corporation and its own ultimate parent entity. No other entity has beneficial ownership of 50 percent or more of its voting securities or has a contractual right to designate 50 percent or more of its directors. A plans to acquire nine related entities that are all controlled by the same ultimate parent entity, natural person B. A will acquire 100% of the voting securities of several of the corporate entities among the nine entities to be acquired, merge with a few others, and acquire 100% of the membership interests in several limited liability companies. As consideration, A will pay B \$120 million in cash and A will transfer to B voting securities in A valued, for the purpose of this transaction, at \$50 million, making the total consideration \$170 million. It is expected that all of the transactions will be closed simultaneously, although it is not yet clear whether they will be "papered" as one deal between A and B or as several different deals (e.g., the entities acquired by merger may be in a separate agreement than the other acquisitions for reasons unrelated to HSR.).

We understand that B has more than \$10 million in total assets, but less than \$100 million in net sales or total assets. At the time A commences the acquisitions, it will have no regularly prepared balance sheet or statement of income and expense. Accordingly, it must prepare a pro forma to determine whether it meets the size of person test. A will have no assets other than cash at the time that it closes the transaction. This cash may include up to \$100 million reflecting equity contributions as well as additional cash borrowed to be used as additional consideration for the acquisition. Thus, A will have more than \$100 million cash assets, on a pro forma basis, immediately prior to consummating the acquisition of the nine entities from B. When the aggregate amount of cash that A will use as consideration (\$120 million) for all nine entities controlled by B and to pay for incidental expenses in the acquisition is subtracted from A's total assets immediately before the closing, A will have less than \$100 million in assets.

ANALYSIS

1. Under these circumstances, you have advised me that A may treat its acquisition of nine entities from B as a single acquisition for the purpose of A availing itself of the "pass through" rule of 16 C.F.R. § 801.11(e). Based on the facts described above, you have confirmed that applying this rule in creating a pro forma for A would result in a conclusion that A is not a \$100 million person for HSR purposes. In other words, the Premerger Notification Office would not take the position that we would need to look separately at A's size of person for its acquisition of each of the nine entities seriatim from B. We understand that the PNO distinguishes between this situation -- involving multiple simultaneous acquisitions from one UPE -- from the situation where an acquiring person purchases several different entities from several different UPEs at the same time. In that situation, you advised me that it is the view of Premerger Notification Office that the acquiring person must apply 801.11(e) separately against each acquisition seriatim, and that if any sequence of the simultaneous acquisitions would result in a filing obligation (because, for example, the acquirer would first obtain control of an issuer that does have a regularly prepared balance sheet and therefore cannot use 801.11(c) for its "next" simultaneous acquisition), then a filing would be required. This distinction appears logical since the nine acquisitions -- if reportable -- would trigger only a *single* HSR filing for A, *unlike* the scenario where an acquiring firm seeks to make a number of acquisitions from different UPEs.

2. You have further advised me that for the purpose of calculating A's assets in the first instance (before applying 801.11(c), if applicable), A must include the value of any borrowed monies being used for the acquisition *regardless* of whether such assets (cash) were ever deposited into A's bank accounts. In other words, if A borrowed funds from a bank but directed the bank to pay B directly for the entities to be purchased, the value of those payments would still be included as an asset of A for the purpose of calculating A's size of person.

not included if passing through

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3. A third scenario that we did not discuss the other day is as follows. Suppose in the example above, that newly formed entity A which is its own UPE and has no regularly prepared balance sheet acquires C (which is its own ultimate parent entity), before the nine entities held by B, for more than \$100 million in cash and stock in A. C has a regularly prepared balance sheet showing total assets and net sales at about \$1 million. Upon completing that acquisition -- assuming that A had not prepared a different balance sheet -- A would have total assets for HSR purposes of \$1 million plus whatever other cash or other assets A holds. Thereafter, A acquires the nine entities from B in a predetermined sequence, pursuant to the contract, at one closing. Suppose that each entity in B has a regularly prepared balance sheet. The total consideration to be paid for the nine entities is \$170 million in cash and stock. After the acquisition of each entity from B, A will inherit that entity's regularly prepared balance sheet. The balance sheets of all nine entities reflect aggregate assets of only about \$30 million. If A only borrows (or draws down on a line of credit) as much money as necessary to pay B the consideration for each entity as it is purchased, A may never be a \$100 million person before consummating any of the acquisitions for B. For example, after acquiring 8 entities with balance sheets valued at \$27 million, suppose A acquires the last entity from B for \$70 million. The cash A has before closing this acquisition (assuming \$70 million), when added to the book value of the entities already purchased would be \$97 million. Assuming that A would have no other assets, A would therefore still not be a \$100 million person and arguably no HSR would be required. Of course, this is exactly the "deal by deal" approach for multiple acquisitions from one UPE that you indicated the PNO would not require. Hence, the question becomes whether the PNO staff takes the position that A *must include* the \$120 million cash to be used to acquire the nine entities in A's size of person, or will the PNO *permit* A to include *seriatim only that cash* that it holds immediately before each of the acquisitions of an entity from B even though it may result in no filing.

If Paragraph Nos. 1 and 2 of the above analysis do not comport with the advice that you have previously rendered, please let me know as soon as possible. In addition, I would appreciate hearing your views on the scenario set forth in Paragraph 3 above.

Respectfully submitted,
[REDACTED]

[REDACTED]
[REDACTED]
I concur. called [REDACTED] 9/26/00
P. Sharpe