801.13(b)

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September 16, 2004

BY FEDERAL EXPRESS AND E-MAIL

Mr. Michael Verne, Esq.
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303, 6th Street and
Pennsylvania Ave. N.W.
Washington, DC 20580

Re: Hart-Scott-Rodino Compliance Inquiry

Dear Mr. Verne:

This letter summarizes our telephone conversation today regarding my inquiry concerning the correct interpretation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), and the rules promulgated thereunder, 16 C.F.R. § 801.1 et seq. (the "Rules"). For the sake of clarity, it also states additional facts in some instances. Finally, it also states a few further assumptions that I have made based on the advice that you provided to me.

A. Transaction Summary.

An acquiring person contemplates simultaneously executing separate agreements for the purchase of assets from an acquired person. These transactions will close at separate times, and the closing of the first transaction is a precondition of the closing of the second transaction. The parties to the transaction meet the Size-of-Persons test under the HSR Act; the transactions contemplated by the agreements collectively will meet the Size-of-Transaction test under the HSR Act; and the use of two agreements and two closings is not an artifice to avoid a filing under the HSR Act in violation of Section 801.90 of the Rules.

B. My Question.

Section 801.13(b)(2) of the Rules establishes the aggregation rules for asset acquisitions:

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(i) If the acquiring person has signed a letter of intent or enters into a contract or agreement in principle to acquire assets from the acquired person, and

(ii) Subject to the provisions of § 801.15, if the acquiring person has acquired from the acquired person within 180 calendar days preceding the signing of such agreement any assets which are presently held by the acquiring person, and the acquisition of which was not previously subject to the requirements of the act or the acquisition of which was subject to the requirements of the act but they were not observed, then for purposes of the size-of-transaction tests of Section 7A(a)(2) and for § 801.1(h), both the acquiring and the acquired persons shall treat such assets as though they had not previously been acquired and are being acquired as part of the present acquisition.

However, this aggregation requirement does not apply in instances where two agreements are executed simultaneously because, in order for aggregation to be required, the transactions contemplated by the first agreement must be closed before the second agreement is signed. Accordingly, Interpretation 154 of the ABA Premerger Notification Practice Manual (3rd Ed. 2003) notes, "[I]f a second agreement for the acquisition of assets is entered into prior to the closing of a previous asset acquisition, as long as the two agreements are separate..., no aggregation would be required for the second asset acquisition."

However, I also reviewed Informal Staff Opinion 0312008, which was a letter addressed to you. In the advice reflected in that letter, you appeared to advise that the aggregation of the acquisition prices for two separate asset acquisitions by an acquiring person from an acquired person was required, although the asset purchase agreements were executed simultaneously. This advice appeared to me to contradict Interpretation 154. I called you and asked you to explain the apparent contradiction.

C. Your Advice.

You advised me that separate agreements between an acquiring person and an acquired person are treated as a single agreement for purposes of the HSR Act if the closing of the transactions contemplated by the second agreement are contingent upon the closing of the transactions contemplated by the first agreement. You also advised me that the parties in Informal Staff Opinion 0312008 were advised that they could close the transactions contemplated by the first acquisition before the termination or expiration of any waiting period under the HSR Act because that acquisition standing alone did not meet the size-of-transaction test.

Based on this advice, it appears that the agreements described in Section A above would be deemed to be a single agreement for purposes of the HSR Act and that the considerations adduced in Interpretation 154 accordingly are not implicated in this instance. However, it also appears that the parties may close the transactions contemplated by the first

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agreement prior to the expiration or termination of the waiting period under the HSR Act as long as the acquisition price of the assets in the first agreement is $50 million or less.

D. Further Assumptions.

I assume and desire to confirm that item 3(a) of the HSR Notification and Report Form to be filed for both agreements should describe both of the agreements and the interrelationship pursuant to which they are deemed to be a single agreement. I further assume and desire to confirm that item 3(b)(i) of such HSR Notification and Report Form should describe the assets being acquired under both of the agreements.

I understand that the Premerger Notification Office does not confirm informal advice in writing. However, I would appreciate it if you would call me at [redacted] when you have the chance to confirm whether or not this letter correctly represents our discussion and the advice that you gave to me. I also would appreciate it if you could confirm whether or not my further assumptions are accurate and, to the extent that they may be inaccurate, explain how they are inaccurate. Thank you for your prompt assistance regarding this inquiry.

Very truly yours,

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Agree -
B. Michaels
9/20/03