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March 4, 1991

VIA FEDERAL EXPRESS

Mr. Patrick Sharpe
Premerger Notification Office
Federal Trade Commission
Room 303
6th Street and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Mr. Sharpe:

This letter serves to confirm our telephone conversation of Thursday, February 28, 1991. During that conversation, you, [redacted] and I discussed the application of the test set forth in 16 C.F.R. § 801.1(b)(1)(ii) with respect to control of a partnership. The facts we discussed are as follows:

P-1, a partnership, has contracted to make an acquisition (the "Acquisition"). P-1 has two partners, P-2 (also a partnership) and A. By the terms of the P-1 partnership agreement, P-2 has the right to at least 80% of the profits of P-1, as well as the right in the event of P-1's dissolution to at least 80% of its residual assets.

P-2 has two partners, B and C. The P-2 partnership agreement establishes the following priority of payment upon dissolution of P-2:

(a) To non-partner creditors, including provision for contingent or unforeseen liabilities;

(b) To B to the extent of any unpaid portion of its preferred return (i.e., the return of its capital contribution, plus an annualized 16% rate of return);

(c) To C to the extent of any unpaid portion of its preferred return (i.e., the return of its capital contribution plus an annualized 8% rate of return);

(d) To the repayment of loans and advances made to P-2 by the partners;

(e) To B and C in repayment of their respective capital accounts as adjusted for their respective shares of liquidating profits and losses, provided that no distribution to B may exceed the amount of its maximum return (i.e., return of its capital contribution plus an annualized 25% rate of return);

(f) To B and C in equal proportions, provided that no distribution to B may exceed the amount of its maximum return; and

(g) The balance, if any, to C.

B is contributing 40% of the capital of P-2, and C is contributing 60% of the capital of P-2. If P-2 makes the Acquisition and then immediately winds up and dissolves, the net dissolution proceeds will flow roughly 60% to C and 40% to B pursuant to paragraphs (b) and (c) above.

With respect to profit allocations, the P-2 partnership agreement provides that losses for each fiscal year will be allocated 60% to C and 40% to B and that any profits realized in a fiscal year will be allocated as follows:

(a) 99% to B and 1% to C until B has been allocated profits equal to the losses allocated to it;

(b) 99% to B and 1% to C until B has received its preferred return;

(c) 100% to C until C has been allocated profits equal to the losses allocated to it;

(d) 100% to C until it has received its preferred return;

(e) To B and C in equal proportions, provided that no profits will be allocated to B which would cause total distributions to B to exceed its maximum return; and

(f) 100% to C.

The parties anticipate that neither P-2 nor P-1 will generate any profits in an accounting sense for several years after the Acquisition and that profitability from a tax perspective is even more distant.

Given the facts set out above, it is my understanding that the Federal Trade Commission's Premerger Notification Office considers that P-2 controls P-1 and that C controls P-2. I understand that in the case of a partnership with complex or shifting provisions regarding dissolution and profit allocation, the Premerger Notification Office believes that the percentage tests of 16 C.F.R. § 801.1(b)(1)(ii) should be applied as of the time of each potentially reportable acquisition. Thus, P-2 controls P-1 because liquidation of P-1 immediately after the Acquisition would result in distribution of 50% or more of the dissolution proceeds to P-2. Similarly, C controls P-2, because liquidation of P-2 immediately after the Acquisition would result in distribution of 50% or more of the dissolution proceeds to C. Under the dissolution test, B does not control P-2, because B would receive less than 50% of the net proceeds in the event of an immediate liquidation.

Application of the profits test as of the time of the Acquisition does not, in itself, yield the conclusion that either B or C is in control of P-2. Although each of B and C will likely control P-2 from a profits standpoint at various points in the life of the partnership, neither B nor C controls P-2 in a profits sense at the time of the Acquisition, since no short-term profits are in prospect. Accordingly, as of the time of the Acquisition, you indicated that P-2 is controlled solely by C, and I have so advised my client on the basis of our conversation.

If this letter does not correctly reflect our conversation or misstates the views of the Premerger Notification Office, please contact me as soon as possible. Unless I hear from you to the contrary, I will continue to advise my client in accordance with the analysis set forth above. Thank you for your consideration.

Sincerely yours,

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