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DOCUMENT NUMBER

April 10, 1991

VIA FACSIMILE (202) 326-2050

Jeffrey Dahnke, Esq.
Staff Attorney
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303
6th Street and Pennsylvania Ave., N.W.
Washington, DC 20580

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FILE PREMERGER
NOTIFICATION
OFFICE

Re: Acquisitions of Partnership Interests Under the Hart-Scott-Rodino
Antitrust Improvements Act of 1976

Dear Jeff:

I am writing as you suggested in order to obtain informal advice regarding the rules under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") relating to acquisitions of partnership interests.

We represent a husband and wife who are the sole shareholders of a corporation which is the general partner of a Delaware limited partnership. The only other partner is an unaffiliated, publicly held financial institution which is the limited partner of the partnership. The general partner owns a 62% interest in the partnership, and the limited partner owns the remaining 38% interest. Our clients are interested in acquiring, through a newly formed sister corporation of the general partner, the interest of the limited partner in the partnership, and have reached an agreement in principle with the limited partner regarding such acquisition. The parties are now involved in the preparation and negotiation of a definitive acquisition agreement. As you know, we have been researching the available authorities in order to determine whether the prospective acquisition would require the filing of Notification and Report Forms under the Act.

To begin with, as you and I have discussed, it is only the fact that this transaction would involve acquisition of a 100% interest in a partnership that creates any question at all as to whether we fall within the jurisdiction of the Act. If the

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limited partnership were instead a corporation, the acquisition would be exempt from the filing requirements under Section 7A(c)(3) of the Act and 16 C.F.R. § 802.30. Furthermore, if our clients were acquiring anything less than a 100% interest in the partnership, the purchase would again fall outside the jurisdictional scope of the Act, as a transaction involving the acquisition of neither voting securities nor assets. Since, however, upon consummation of the acquisition our clients would own all of the limited partnership, the acquisition is treated for purposes of the Act as an acquisition of assets and must therefore be analyzed as such.

The proposed acquisition clearly satisfies the Act's Commerce Test, and we are assuming for purposes of the analysis at present that it also satisfies the Size-of-the-Parties Test. The only question, then, is whether the transaction would satisfy the Size-of-the-Transaction Test. The rules under the Act provide, in 16 C.F.R. § 801.10(b), that "[t]he value of assets to be acquired shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price." We understand that for purposes of determining the size of our proposed acquisition, we must treat the transaction as an acquisition of the entire partnership and, thus, determine for valuation purposes what the fair market value is of the assets of the partnership as a whole. 52 Fed. Reg. 20,058, 20,061 (1987); S. Axinn, B. Fogg, N. Stoll & B. Prager, Acquisitions Under The Hart-Scott-Rodino Antitrust Improvements Act, § 6.04[3] at 6-25 and n. 7.

Our clients have agreed to pay \$4.75 million for the interest of the limited partner in the partnership. This purchase price was reached after extensive arms-length negotiations and with the advice of a leading investment banking firm. However, this purchase price represents only the price for acquisition of a 38% interest in the partnership. Since the acquisition of the entire partnership has not specifically been in issue, the parties have not formally determined what the acquisition price would be for the entire partnership.

In the absence of any agreement as to an applicable acquisition price, 16 C.F.R. § 801.10(c)(3) requires that our clients, as the prospective acquiror, determine the fair market value of the partnership. Fair market must, of course, in accordance with the requirements of 16 C.F.R. § 801.10(c)(3), "be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if unincorporated, by officials exercising similar functions, or by an entity delegated that function by such board or officials. Such determination must be made as of any day within 60 calendar days prior to the filing of the notification required by the act, or, if such notification has not been filed, within 60 calendar days prior to the consummation of the acquisition." See 43 Fed. Reg. 33,450, 33,471-72 (1978).

Our review of the applicable authorities indicates that the process of determining the fair market value of a partnership in the circumstances with which we are confronted is a highly inclusive one. We understand that the process does not

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involve a mere balance sheet analysis (i.e., a determination of the net worth of the partnership based on historical costs of assets and the face amounts of liabilities), but instead a more comprehensive examination along the same lines that an investment banking firm might make. Determination of fair market value may involve consideration of a wide range of factors, such as asset value, earning power, industry position, management and so forth. See S. Axinn, B. Fogg, N. Stoll & B. Prager, Op. Cit., § 5.01[1]-[3] at 5.41-5.42. Although the acquiring person may retain consultants to assist in making the valuation, the acquiror nonetheless bears responsibility for the determination and must ensure that the determination has been made in good faith and is current.

Our clients, aware of the requirements of 16 C.F.R. § 801.10(c)(3), have made a determination that the fair market value of the assets of the entire partnership is between \$12 and \$13 million. This determination has been based in considerable measure on the analysis that was performed and negotiations that were conducted in the course of reaching the \$4.75 million purchase price for the 38% limited partnership interest that our clients are actually acquiring. On the basis of this valuation, the transaction would fall within the minimum dollar value exemption provided by 16 C.F.R. § 802.20, and would be exempt from the filing requirements of the Act.

From the available authorities, we believe that the fair market value determination made by our client has been conducted in accordance with all applicable requirements of the Act and the underlying regulations. The determination has been made in good faith, and after careful consideration of all available evidence, including the arms-length negotiations carried out only very recently with the prospective seller of the limited partnership interest. The determination is also current, and will be made again if the closing does not occur within 60 days. However, before finally concluding that the acquisition is exempt from the jurisdictional requirements of Act, we would appreciate any advice which you could give us concerning our interpretation of the applicable statutory and regulatory provisions.

Thank you for your assistance.

Very truly yours,

4/11/91
Called. Interpretation correct.
-JW

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