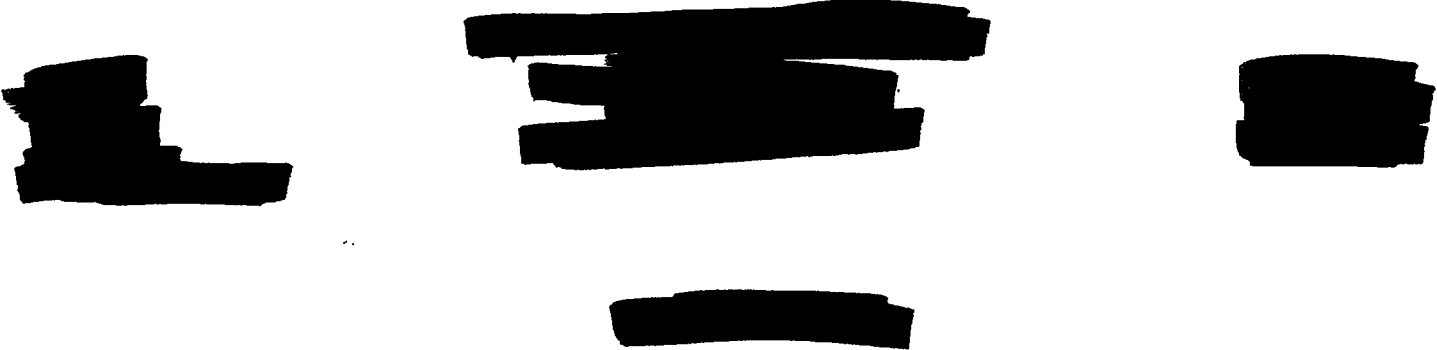


801.1



August 28, 1991

BY HAND

Ms. Nancy Ovuka  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
Room 303  
Sixth and Pennsylvania Avenue  
Washington, D.C. 20850

Material may be subject to  
confidentiality provision of  
15 U.S.C. 7A (h) of the Clayton Act  
which restricts release under the  
Freedom of Information Act.

Aug 28 4 42 PM '91  
FEDERAL TRADE COMMISSION  
BUREAU OF COMPETITION  
PREMERGER NOTIFICATION OFFICE

Dear Ms. Ovuka:

I am writing to inquire whether the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (the "Act"), and the regulations promulgated thereunder require a premerger notification filing to be made in connection with the transaction described below, which you and I have previously discussed by telephone. We believe that no filing is required because the transaction constitutes a nonreportable formation of a partnership. We ask that you review this letter and call me back as soon as possible to let me know whether the Premerger Notification Office agrees with our conclusion.

The facts of the transaction are as follows. Company A owns several retail store buildings at different locations as well as the land underneath each of these buildings. All of the stores are leased to the same lessee, which is not a party to the transaction that is the subject of this letter. The terms of the different leases vary from store to store.

Company A and Company B propose to form a partnership. Each company will contribute cash to the partnership, and Company A's interest in the stores, the leases and an estate for years in the land underneath each of the stores (each of which estate for years will correspond in length to the time left on the particular lease) will then be placed into a trust that will be controlled by the partnership.

[REDACTED]

Ms. Nancy Ovuka  
August 28, 1991  
Page 2

The lessee of the stores will pay base and percentage rents to the trust. Percentage rents based on the sales of stores will be paid to Company A. Base rents will be paid to Company B. Initially, the value of the base rents paid to Company B, as well as the assets it would be entitled to upon dissolution of the partnership will be greater than the value of the percentage rents paid to Company A or the value of the assets to which it would be entitled upon dissolution. In time, as the lease terms near their end and depending on the level of store sales, the value of Company A's interests may become greater than those of Company B. Based on my conversations with you, I understand that because Company B's interests would be greater initially, it would be considered to control the partnership under 16 C.F.R. § 801.1(b)(1)(ii).

A partnership agreement will be executed providing for the formation of the partnership. The partnership agreement makes clear that the sole purpose of the formation of the partnership is to consummate the transaction described above, and it refers to and incorporates by reference the contract of sale between Company A, the partnership, and the entity formed to hold the remainder interest in the land that will be executed simultaneously with the partnership agreement and that describes the transaction in detail. After execution of these agreements the following events will occur simultaneously: (a) the partners will make their cash contributions, (b) cash will be paid to Company A, and (c) the property will be transferred to the trust.

We have concluded that this transaction does not require an HSR filing. This conclusion is based on the fact that formation of a partnership, including the initial contribution of assets to the partnership by the partners, is not a reportable transaction. See Informal Interpretation No. 59, ABA Premerger Notification Practice Manual (1985), at 43-44. The substance of this transaction is that Company A and Company B are forming a partnership, with Company A contributing the stores, leases and estates for years while Company B is contributing cash.

Finally, in our telephone conversation yesterday, you indicated that if the same agreement that forms the partnership also serves as the contract providing for the acquisition of assets by the partnership, the acquisition is considered part of the formation and is nonreportable. Here, the partnership agreement makes clear that the partnership is being formed solely to make the acquisition described in the contract of sale, and

[REDACTED]

Ms. Nancy Ovuka  
August 28, 1991  
Page 3

incorporates the acquisition agreement by reference. In addition, the two agreements will be executed simultaneously and neither is capable of being performed without the other. The agreements thus evidence that the acquisition of assets is an inseparable element of the formation of the partnership, and so should not be reportable.

Please call me as soon as possible to let me know whether the Premerger Notification Office concurs with our analysis.

Very truly yours,

[REDACTED]

cc: [REDACTED]