

\$801.11
2 regularly prepared
bal. sheets covering
the same period.

[REDACTED]

[Handwritten scribble]

[REDACTED]

[REDACTED]

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OCT 22 1991
FEDERAL TRADE COMMISSION

October 1, 1991

VIA FEDERAL EXPRESS

PERSONAL & CONFIDENTIAL

Premeger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Director of Operations
Antitrust Division
Department of Justice
Room 3218
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Interpretation Under 16 C.F.R. §801.11

Ladies and Gentlemen:

On behalf of [REDACTED]

[REDACTED] are collectively referred to herein as the [REDACTED], pursuant to §803.30 of the Code of Federal Regulations promulgated under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), this letter shall serve as a formal request of the Federal Trade Commission and Department of Justice to confirm the method of calculation and reporting of "annual net sales" and "total assets" under 16 C.F.R. §801.11 for a United States property and casualty insurance company.

Inquiries for which Confirmation is Sought

What is the proper method of calculating and reporting "annual net sales" and "total assets" for a United States property and casualty insurance company under 16 C.F.R. §801.11? In the event that there are regularly prepared annual and quarterly statements of income and balance sheets prepared in accordance with statutory insurance conventions (Statutory Convention Standards) and regularly prepared annual statements of income and balance sheets prepared in accordance with Generally Accepted Accounting Principles ("GAAP") which differ, which computations and which periods should be used for reporting "annual net sales" and "total assets" under 16 C.F.R. §801.11?

Material Facts; Transaction Pending Closing

On August 22, 1991, [REDACTED] entered into a stock purchase agreement by which the [REDACTED] agreed to purchase all of the capital stock of [REDACTED] a property and casualty insurer domiciled in the State of [REDACTED] in consideration of an aggregate cash payment by the [REDACTED] of approximately [REDACTED] and subject to the terms and conditions therein, including the satisfaction of all required regulatory approvals. [REDACTED] is a regulated (i.e., fully admitted)



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[redacted] insurance company and a wholly-owned subsidiary of [redacted]. Its fiscal year is July 1st through June 30th.

[redacted] and the ultimate parent entity of the [redacted] (as defined in 16 C.F.R. §801.1(a)(3)) both have annual net sales or total assets on a consolidated basis of more than \$100,000,000.

[redacted] files regular and periodic reports, namely Annual Statements on a calendar year basis and Quarterly Statements on a calendar quarter basis, with the [redacted] Insurance Department, both of which are required by law, prepared in accordance with Statutory Convention Standards, and sworn to be true and correct by an officer of [redacted]. Such reports are filed on standardized National Association of Insurance Commissioners ("NAIC") forms.

[redacted] "annual net sales" (i.e., net premiums written) for the periods indicated below as computed in accordance with Statutory Convention Standards and as computed in accordance with GAAP are as follows:

<u>Period</u>	<u>Statutory Convention Standards¹</u>	<u>GAAP</u>
7/1/90 - 6/30/91	[redacted] (last four Quarterly Statements)	[redacted] (end of fiscal year)
1/1/90 - 12/31/90	[redacted] (latest Annual Statement)	[redacted] (end of calendar year)

All above annual statements of income were "regularly prepared".

[redacted] "total assets" as of the date indicated below as computed in accordance with Statutory Convention Standards and as computed in accordance with GAAP are as follows:

<u>Date</u>	<u>Statutory Convention Standards</u>	<u>GAAP</u>
6/30/91	[redacted] (latest Quarterly Statement)	[redacted] (end of fiscal year)
12/31/90	[redacted] (latest Annual Statement)	[redacted] (end of calendar year)

¹ Statutory Convention Standards applicable to [redacted] require that annual net sales be determined on a calendar year basis, irrespective of the fiscal year of the reporting company. Such statutorily required calendar year basis report is called the "Annual Statement". Periodic reports are also prepared and filed by [redacted] for each calendar quarterly period. These statutorily required reports are called "Quarterly Statements". Both Annual Statements and Quarterly Statements are sworn as true and correct and both are prepared in accordance with Statutory Convention Standards. We have included annual net sales on a fiscal year basis to provide additional information.

[REDACTED]

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The last regularly prepared balance sheets for [REDACTED] were prepared as of June 30, 1991 and consisted of both a Quarterly Statement balance sheet required under Statutory Convention Standards and a balance sheet computed in accordance with GAAP. Both balance sheets were "regularly prepared".

The transaction between [REDACTED] and the [REDACTED] is expected to close on or about October 30, 1991, pending confirmation by the FTC and Department of Justice of the matters set forth herein with the attendant result that no filings are required by the parties under the Act or, alternatively, the expiration of the waiting period under the Act if the parties are so required to report.

Analysis Under the Act and Basis for Exemption

Section 802.20 of Part 16 of the Code of Federal Regulations provides that:

"An acquisition which would be subject to the requirements of the act and which satisfies section 7A(a)(3)(A), but which does not satisfy section 7A(a)(3)(B), shall be exempt from the requirements of the act if as a result of the acquisition the acquiring person would not hold:

- (a) Assets of the acquired person valued at more than \$15 million; or
- (b) Voting securities which confer control of an issuer which, together with all entities which it controls, has annual net sales or total assets of \$25 million or more."

Subparagraph (a) of §802.20 would not apply to the transaction in question because no assets of [REDACTED] are being acquired. Because all of the capital stock of [REDACTED] would be acquired by the Lawrence Buyer upon consummation of the transaction, the [REDACTED] would hold voting securities which would confer control of [REDACTED] the issuer, to the [REDACTED]. In order to analyze whether under §802.20(b) [REDACTED] (together with all entities which it controls) has annual net sales or total assets of \$25 million or more, you must first determine how to calculate and report "annual net sales" and "total assets" under §801.11.

Annual Net Sales

Section 801.11(c) provides that the "annual net sales" of a person shall be as stated on the last regularly prepared annual statement of income and expense of that person and that the "total assets" of a person shall be as stated on the last regularly prepared balance sheet of that person (and, therefore, not necessarily annual). Because of the nuances surrounding what annual net sales and total assets of an insurance company would be proper for inclusion in "annual net sales" and "total assets" under §801.11, the FTC Staff has heretofore issued an interpretation of §801.11 contained in letter #96, dated June 21, 1978 (the "Letter"), set forth on page 69 in that certain Premier Notification Manual, prepared by the Premier Notification Subcommittee, the Section 7 (Clayton Act) Committee and the Section of Antitrust Law of the American Bar Association (copyright dated 1985). A copy of the Letter is attached hereto as Exhibit A for your reference.

Pursuant to the Letter, the "annual net sales" of casualty (and property — as the category "property and casualty insurer" is normally indivisible) insurers that report on NAIC Annual Statement Blank for Fire and Casualty Insurance (Form 2) should use "net premiums written" for calculation of their "annual net sales". Therefore, pursuant to the FTC's interpretation as set forth in the Letter, [REDACTED] would not have \$25 million or more in annual net sales and, assuming it did not meet the "total assets" threshold, would be exempt from the filing requirements of the Act by reason of §802.20(b).

Total Assets

The Letter does not indicate the Staff's position on the proper method to calculate "total assets" for a property and casualty insurance company, although it does indicate that title insurers that file asset balance sheets under the format of the NAIC Annual Statement Blank for Title Insurance (Form 9) may use "admitted value" on their most recent Form 9 for their "total assets" under §801.11(c)(2), whether or not those figures are calculated in accordance with GAAP. The Letter also indicates that as an alternative title insurers "... may simply use their last regularly prepared balance sheet, prepared in accordance with GAAP". The Letter does not purport to mandate the use of balance sheets or other statements prepared in accordance with GAAP, but instead merely proffers it as a discretionary alternative source for reporting. The Letter also does not expressly delineate for a property and casualty insurance company (as opposed to a title insurance company) whether the last regularly prepared Quarterly Statement or Annual Statement balance sheets should or may be reported for Hart-Scott-Rodino purposes under Statutory Convention Standards in lieu of a regularly prepared GAAP statement prepared at the same time.

Conclusion

On behalf of [REDACTED] we believe that based on 16 C.F.R. §801.11 and the Letter, the annual net sales of [REDACTED] as computed and sworn to in accordance with Statutory Convention Standards and as stated on [REDACTED] last regularly prepared Annual Statement of income would be the appropriate method for calculating annual net sales under §801.11. We believe that when statements are contemporaneously and regularly prepared in accordance with Statutory Convention Standards and in accordance with GAAP, the Staff should not instead rely on the GAAP statements reflecting different annual net sales. Similarly, we believe that based on 16 C.F.R. §801.11 and the Letter, the total assets of [REDACTED] as computed and sworn to in accordance with Statutory Convention Standards and as stated on [REDACTED] last regularly prepared Quarterly Statements (or Annual Statement balance sheet if prepared and filed with the [REDACTED] Insurance Department after the Quarterly Statements) would be the appropriate method for calculating total assets under §801.11, and that the Staff should not instead rely on contemporaneously and regularly prepared statements in accordance with GAAP reflecting different total assets. Because of the highly regulated and standardized accounting requirements applicable to insurance companies, we believe it would be misleading for purposes of the Act in computing either "annual net sales" or "total assets" to rely on statements not prepared in accordance with Statutory Convention Standards, even though such statements were prepared in accordance with GAAP. The difference between calculating and reporting total assets in accordance with Statutory Convention Standards and GAAP results primarily from the exclusion of certain "non-admitted assets" such as deferred policy acquisition costs and deferred taxes in the Statutory Convention Standard statement.

[REDACTED]

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Therefore, in summary, we believe that the determinations under §801.11 with respect to [REDACTED] should be based on (a) "net premiums written" in the latest regularly prepared Annual Statement prepared in accordance with Statutory Convention Standards for purposes of determining "annual net sales" and (b) "admitted value" in the latest regularly prepared Quarterly Statement or Annual Statement (whichever is most recently prepared and filed with the [REDACTED] Insurance Department) prepared in accordance with Statutory Convention Standards for purposes of determining "total assets".

Based on the provisions of §801.11 and the Letter, as well as the foregoing analysis, it is our belief that no filings under the Act are required in connection with the contemplated transaction and that annual net sales and total assets as most recently reported under Statutory Convention Standards for a property and casualty insurance company should be those utilized for determinations made under §801.11.

If the Staff reaches a contrary conclusion in this regard, please notify us accordingly and at your earliest convenience. Pursuant to conversations with Staff members, we understand that we could expect a reply within ten to fifteen days of your receipt of this letter. To the extent that you will require additional information and/or clarification of the matters set forth herein for confirmation of the inquiries being made hereunder, please contact the undersigned.

It is the desire of [REDACTED] and the undersigned that this letter and the matters contained herein be handled with utmost confidentiality and not be disclosed nor used for any purpose except in accordance with this request and the Act.

We would appreciate your acknowledging the receipt of this letter by stamping the enclosed extra copy of this letter and returning it to the undersigned in the self-addressed enclosed envelope.

Very truly yours,
[REDACTED]

Enclosure
[REDACTED]

If two regularly prepared balance sheets or financial statements exist covering same period, both must be used to determine size. In this case, the GAPP balance sheet ("admitted value") would meet the size test and company must file with [REDACTED]

EXHIBIT A

96 *Applicable subsection of the rules:* § 801.11(c).

Brief statement of the question or problem: How do insurance companies determine annual net sales and total assets for purposes of the size-of-person test?

Interpretation and discussion: Many insurance companies report their operations to state insurance authorities on forms developed by the National Association of Insurance Commissioners (NAIC).

Life insurance companies that in their last regularly prepared annual report of operations used the format of the NAIC "Annual Statement Blank for Life and Accident and Health Insurance (Form 1)" should refer to "total net premiums written" as their "annual net sales" within the meaning of § 801.11(c)(1).

Title insurance companies that report annual operations on "NAIC Annual Statement Blank for Title Insurance (Form 9)" and casualty insurers that report on "NAIC Annual Statement Blank for Fire and Casualty Insurance (Form 2)" should use "net premiums written" for their "annual net sales."

Title insurers that file asset balance sheets under the format of the "NAIC Annual Statement Blank for Title Insurance (Form 9)" may use "admitted value" on their most recent Form 9 for their "total assets" under § 801.11(c)(2), whether or not those figures are calculated in accordance with generally accepted accounting principles (GAAP). Alternatively, they may simply use their last regularly prepared balance sheet, prepared in accordance with GAAP.

Documents pertaining to this issue: Memorandum to File from [REDACTED]
(Subject: Size of assets and sales by insurance companies for purposes of the size-of-person test of § 7A(a)(2)), dated June 21, 1978.