Partnership Formation
7-31-78 SPP at 33485
801,40

[redacted]

I am not an attorney

November 27, 1991

Patrick Sharp, Esq.
Premerger Notification Office
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Sharp:

This letter is furnished to confirm our telephonic conference today concerning any requirement that our client might be required to file a premerger notification under Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") and the rules and interpretations (the "Rules") of the Federal Trade Commission (the "Commission") thereunder in the following circumstances. (While the following description is simplified, it sets forth the essential facts for the purposes of an analysis of the issues.)

I informed you in substance as follows. Our client is an investment fund (the "Fund") which seeks to enter into the following transaction with an operating company (the "Company"). The Company presently operates a subsidiary (the "Subsidiary") which has operating assets (the "Assets") having a value of approximately $125,000,000, subject to preexisting intercompany debt owed by the Subsidiary to the Company of approximately $100,000,000 (the "Debt"). It has been agreed that (a) the Fund and the Subsidiary will form a partnership organized under [redacted] law (the "Partnership"); (b) the Fund will contribute $50,000,000 of cash to the Partnership and the Subsidiary will contribute the Assets to the Partnership, subject to the Debt; (c) the Partnership will borrow $50,000,000 from a third party financial institution; and (d) the Partnership will utilize the capital contributed by the Fund and the third party borrowing to make a payment of $100,000,000 to the Company to discharge the Debt. At the conclusion of these transactions, which are expected to occur simultaneously, the Fund will hold a two-thirds interest in the Partnership and the Subsidiary will hold a one-third interest, which it will be seen

is proportional to their net contributions to the Partnership. Both the Fund and the Company exceed the threshhold size specified in the Act.

I also told you that the partnership agreement of the Partnership specifies a mechanism for the governance of the Partnership which provides, generally, that there is to be a management committee which will have "the same powers and responsibilities over the business and affairs of the Partnership ... which the board of directors of a Delaware corporation exercises over its business and affairs." The partnership agreement further specifies the method of selection of the members of the committee (the Fund and the Subsidiary are entitled each to select a specified number of members), with the result that, except for certain actions which require unanimous approval, the Fund will control the committee.

Based on the foregoing facts, and after consultation with Thomas Hancock of your office, you responded to me that no filing requirement exists. In reaching that conclusion, it is my understanding that the following considerations are relevant.

You did not believe that the Partnership should be considered as anything other than it purports to be. In this connection, the following should be relevant. First, it is in actuality a partnership organized under [redacted] law. This organizational form was selected after careful analysis of the tax and business considerations applicable to the transaction. The status of the Partnership as a partnership for tax purposes, for example, is critical to the economic terms of the transaction. While the governing body of the Partnership has some similarities to a board of directors of a corporation, the management committee is only a mechanism selected by the partners for decision-making within the Partnership. It does not alter the status of the Fund and the Subsidiary as partners with, among other things, the liabilities of partners under applicable partnership law. §801.90 of the Rules therefore whould not be applied to challenge the status of the Partnership as a partnership.

§801.40 of the Rules (including the related interpretations of the Commission) should then be applicable. Under that Section, it is the settled policy of the Commission that a partnership formed as a joint venture will never be subject to the reporting requirements of the Act unless there is some shifting of the economic interests of the parties involved in the process. In the present case, the Fund will have contributed $50,000,000 in cash for a two-thirds interest in the Partnership and the Subsidiary will have contributed the Assets, which, after being offset by the Debt to which the Assets are

PHN Chief

Already concluded that §01.40 does not apply since it is a partnership formation

subject, have a net value of $25,000,000, for a one-third interest. While the contributed cash and the additional cash realized by the borrowing by the Partnership will then be paid by the Partnership to the Company to eliminate the Debt, this does not change the fact that the initial net contributions will be in the same proportionate relationship as the Partnership interests of the parties.

I believe it is your view that the payment by the Partnership to the Company to eliminate the Debt should be viewed as an equalizing payment, within the contemplation of the Rules. In this connection, the result when all of the transactions have been completed is that the Partnership will have gross assets having a value of $125,000,000, subject to indebtedness of $50,000,000, with a resulting net value of $75,000,000, and the contributions of the partners, respectively, of $50,000,000 and $25,000,000 are directly equal to their respective interests in this net Partnership value. Thus, the discharge of the Debt does not result in a shift in economic values which would cause the transactions to be recharacterized as a purchase.

We greatly appreciate your prompt attention to our inquiry. Thank you very much for your courtesy and responsiveness.

Very truly yours,

[redacted]

[redacted]

This transaction is a formation of a partnership — not a corporation — not reportable

contacted [redacted]
not reportable
(PS)

(PS) concurs - but notes minor flaws in letter