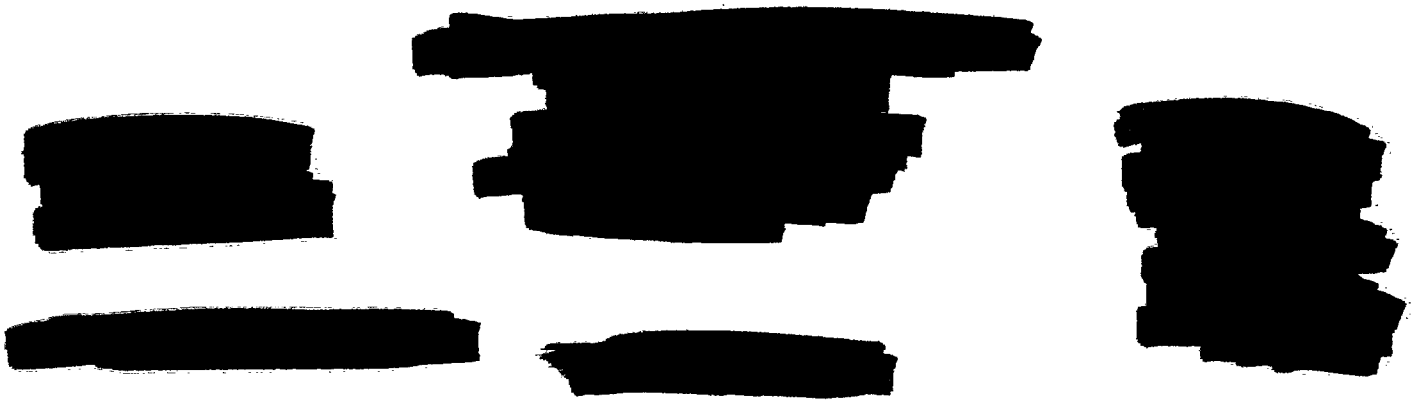

January 23, 1992

BY TELECOPIER

Richard B. Smith, Esq.
Federal Trade Commission
Premerger Office
6th and Pennsylvania Ave., N.W.
Washington, D.C. 20583

Dear Mr. Smith:

As you and I discussed earlier today, we would appreciate receiving the views of the Premerger Office on the following hypothetical transaction:

> Corporation X and Corporation A enter into a single agreement whereby X will transfer 100% of the stock of its wholly-owned subsidiary, Corporation Z, to P, a partnership 90% controlled by A, in exchange for a 60% interest in P. Thus, after the acquisition, P will be owned 60% by X, 30% by A, and 10% by a third party. P will hold 100% of Z.

I believe that we agreed that the transaction has two elements: (1) the acquisition of the 60% partnership interest in P by X; and (2) the acquisition of 100% of the stock of Z by the entity P. With respect to the first element, I believe that we agreed that the acquisition of the 60% interest in P by X is non-reportable since it is the acquisition of less than 100% of a partnership.

The analysis of whether the second element is reportable is much more involved. Starting first with the question of who is the acquired person, it seems clear that Corporation X, as the ultimate parent entity prior to the transaction of the entity to be acquired, is the acquired person. As our discussions made clear, the more difficult question is who is the acquiring person.

In defining "acquiring person", the Premerger Notification Rules provide:

> Any person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents or other entities acting on behalf of such person, is an acquiring person.

16 C.F.R. § 801.2(a) (emphasis added). As the hypothetical is structured, it appears that X is also the acquiring person. When X "sells" its shares of Z to P, the consideration it receives as part of that sale is the 60% interest in the partnership. Thus, as a result of the acquisition, the entity whose voting securities will be acquired, Z, will be included in the person X since X will own 60% of P which will in turn hold 100% of Z. Moreover, if X is both the acquired person and the acquiring person, the acquisition of the shares of its more than 50%-owned subsidiary is exempt under Section 7A(c)(3) of the HSR Act.

The hypothetical described above assumes that the transaction will be effected by having the parties sit down at a single closing where the ownership interests will be simultaneously transferred.* I understand that the Premerger Office has indicated some concern that even though the transaction will occur simultaneously, for HSR analysis purposes, the two "possible" time sequences of the transfers must be separately examined. Thus, if the partnerships interests in P are deemed to be transferred first, and the voting securities of Z transferred second, it would be clear that X is the acquiring person since P would be under X's control. However, if the fiction that the voting securities

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* I fully agree with your statement that if the hypothetical transaction is not structured as a simultaneous exchange or that somehow one aspect of the transaction is postponed while the other goes forward, different HSR implications may result.

are transferred first is adopted, then there would be a period of time (albeit fictional) that Z was within A's person. My understanding of the position that the Premerger Office now has under consideration is that, since one of these two fictions leads to a reportable transaction, the transaction is reportable.

There are at least three reasons why the analysis described above cannot be correct. First, the plain language of the rule clearly demonstrates that its focus is on who will control the entity to be acquired as a result of the acquisition. The clear import of this language is that the analysis should be a post-acquisition look at who will end up holding the voting securities. In this case, there is one acquisition involving the transfer of shares for consideration of the transfer of partnership interests. As a result of that single transaction, X will control P which in turn will own all of the voting securities of Z. Thus, looking at the acquisition immediately after the transaction occurs (which the "as a result of the acquisition" language requires), X is the acquiring person.

This straightforward application of the plain language of the rule is fully supported by the Statement of Basis and Purpose issued by the FTC in connection with its rulemaking:

> The final rule makes several changes to revised § 801.2(a). For example, the revised rule identified an acquiring person as one which "is acquiring voting securities or assets." The size-of-transaction test of section 7A(c)(3), however, is couched in terms of the amount of voting securities or assets that "as a result of such acquisition, the acquiring person would hold" (emphasis supplied). Thus, the statute focuses on holding as a result of an acquisition rather than on the act of acquiring. This focus is reflected in the language of final § 801.2(a), which describes an acquiring person as one "which, as a result of an acquisition, will hold voting securities or assets . . ."

43 Fed. Reg. 33,467 (July 31, 1978) (emphasis added). The commentary in the Statement of Basis and Purpose shows that the determination of the acquiring person is accomplished by taking a post-acquisition snapshot of who will hold (directly

or indirectly) the voting securities to be acquired. Analysis of how the transaction was effected, including its internal timing, is not relevant.

A second reason that A cannot be the acquiring person in this transaction is that under no set of circumstances contemplated by the hypothetical can A be deemed to hold the voting securities of Z. Since in the real world the transaction will occur simultaneously for all practical purposes, A would never have direct control of P while P had direct control of Z. Even if there was some fleeting instant in time where P had control of Z and A had not yet legally surrendered its control of P, A still could not be the acquiring person under the concept of beneficial ownership contained in the definition of hold. See 16 C.F.R. § 801.1(c)(1). Once X transfers the shares of Z to P, the contract is executory and X is the beneficial owner of the 60% interest in P. Thus, at no time can A be deemed to "hold" the securities of Z for HSR Act purposes and therefore cannot be the acquiring person.

Finally, ignoring the simultaneous nature of the transaction and imposing a fiction makes for difficult HSR policy to enforce. First, it makes little sense to adopt fictional views of the structure of transactions, especially in cases where they are not needed to interpret and to apply the Premeger Notification Rules. Second, reliance on such a fiction in analyzing HSR reportability encourages parties to write into their contracts a prescribed order of steps such that the transaction would be non-reportable. For example, in this instance, the parties could agree that at closing the partnership interest will be transferred one second prior to the transfer of the shares of Z. Finally, it is not too difficult to imagine situations where the adoption of the fiction described above leads to the conclusion that two reportable transaction have occurred when in fact there has been no practical change of control -- one when A is the acquiring person and one when X "reobtains" control of Z and is therefore the acquiring person in a "second" transaction.

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It seems to us that there can be little question that the acquiring person in this hypothetical is X. We would, of course, very much appreciate receiving the thoughts and comments of the Premerger Office on the issues raised in this letter. As our client is contemplating its course of

action, it would be very helpful to have your comments as soon as it is convenient. If I can be of assistance on this matter, please do not hesitate to call me.

Very truly yours,

[redacted]