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FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

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July 19, 1993

Richard Smith, Esq.
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Pennsylvania Avenue &
6th Street, N.W.
Washington, D.C. 20580

Dear Richard:

Pursuant to our telephone conversation, I am writing this letter to request the views of the Premerger Notification Office regarding the following question under the Hart-Scott-Rodino Act and Rules:

Under the circumstances outlined below, does an investment advisor hold voting securities which it purchases on behalf of clients?

The investment advisor will enter into agreements with clients under which the investment advisor will receive client funds and have investment discretion regarding those funds. The investment advisor will also have voting rights in connection with any securities which it acquires on behalf of its clients. The securities will be purchased for the clients and some clients may allocate the securities among various investment funds which they themselves operate on behalf of their investor clients.

The investment advisor will be compensated by receiving a percentage (in the range of 10-20%) of the appreciation in the value of the funds provided by the client, net of costs associated with the investment activity. This compensation would include the compensation percentage of the gain in the value of securities, plus the compensation percentage of any dividends paid, minus costs of the account, including interest expense incurred on margin accounts. Clients may revoke the discretion which the investment advisor has, either at any time or after sixty days' notice.

[REDACTED]

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Richard Smith, Esq.
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The investment advisor does not qualify for an exemption under § 802.64 of the HSR Rules and would not seek to rely upon the investment-only exemption as a general matter. The investment advisor would be a totally passive investor with respect to investments which performed well. However, should an investment perform poorly, the investment advisor may contact management and recommend courses of action. The investment advisor may, depending on circumstances, seek to take advantage of the new proxy rules.

* * *

The facts as set forth above would appear to indicate that the securities are held by the clients of the investment advisor, rather than the investment advisor itself. The risk of loss and the benefit of gain of the securities would be in the hands of the clients and they would be entitled to receive the dividends. At the end of each year, a portion of the gain, if any, would be paid to the investment advisor, as compensation for the services provided. This is a common method of compensation for investment advisors. Trading discretion and voting rights are commonly held by investment advisors for the type of accounts involved and would not appear to change the result. The ability of the clients to revoke the discretion and rights of the investment advisor either immediately or upon sixty days' notice, underscores the fact that beneficial ownership would appear to be in the hands of the clients and that they, rather than the investment advisor, hold the securities.

I would appreciate your confirming the view reflected herein that the investment advisor would not be deemed to hold the voting securities it acquires on behalf of its clients.

Your consideration in this regard is appreciated.

Sincerely,

[REDACTED]

[REDACTED]

7/21/93 called letter writer and advised that the Premerger Office's view is that the investment advisor does not hold the voting stock it acquires on behalf of its clients. (Also discussed possible impact on clients' "solely for purpose of investment" exemption should investment advisor engage in activities inconsistent with such exemption since it may be viewed as an "agent" of the client.)

RSB