801.11(e)
801.1

[redacted]

[redacted]

February 11, 1994

Via Facsimile

Ms. Nancy Ovuka
Compliance Analyst
Premerger Notification Office
Federal Trade Commission
Bureau of Competition
Washington, D.C. 20580

This material may be subject to the confidentiality provisions of Section 7A(h) of the Clayton Act which restrict release under the Freedom of Information Act.

Re: Request for Determination on Whether Described Acquisition is Subject to the Premerger Notification Requirements Under the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976

Dear Ms. Ovuka:

I am writing to confirm the substance of two telephone conversations between this office and you on January 21, 1994 and February 8, 1994. During those conversations, we requested your view as to whether an acquisition made in accordance with the following set of facts would require the filing of an Anti-Trust Improvements Act Notification and Report Form ("HSR Form") pursuant to the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, as amended, (the "Act"), 15 U.S.C. §18(a), and the Pre-Merger Notification Rules, 16 C.F.R. §801.1-803.90 (the "Rules") promulgated under the Act. Our analysis, which is set forth following the Statement of Facts, lead us to conclude that the transaction does not require the filing of an HSR Form. As you may recall, you informally concurred with this conclusion, but stated that you would review the issue more carefully if we set forth our position in writing. After you have reviewed this letter, please advise us at your earliest convenience that you concur in our conclusion.

STATEMENT OF FACTS

A group of investors (the "Investors") desires to form a limited liability company ("Acquisition Co.") under the laws of the [redacted] for the purpose of acquiring substantially all of the assets of the [redacted]) of seller company

[redacted]

("Seller"). [redacted] is engaged in the manufacture and sale of component parts for the auto industry. The assets to be acquired include all of the shares of capital stock of a subsidiary of Seller, the business of [redacted] and substantially all other assets owned or used by Seller exclusively in the operation of [redacted] (the "Assets").

Seller is engaged in commerce and has annual net sales or total assets in excess of $100,000,000. The Assets have a fair market value in excess of $15,000,000.

The ownership structure of Acquisition Co. will be as follows:

Member Name	Ownership Percentage
Individual A	49%
Individual B	20%
Individual C	20%
Irrevocable Trust[1]	11%
Total	100%

None of the Investors will be entitled to 50% or more of the profits of Acquisition Co. or to 50% or more of the Assets of Acquisition Co. on liquidation. In addition, at the time of formation, Acquisition Co. will have equity capital of less than $10,000,000. (excluding cash provided by non-contributors)

Investors A, B and C currently own several corporations which operate similar businesses to that to be conducted by Acquisition Co. Investors have decided not to use one of these existing entities, but rather to form Acquisition Co. for the acquisition for the following reasons:

1. The Investors of Acquisition Co. desire to conduct the business as a limited liability company formed under the recently enacted [redacted] because of certain tax and non-tax benefits available to a limited liability company which are not available to corporations, the current form of entity for the Investors' other enterprises.

2. The Investors desire to isolate the business operations to be conducted by Acquisition Co. from the operations of their other enterprises for creditors' rights, operational and control reasons.

3. To achieve part of his estate planning objectives, Individual A at this time

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[1] Individual A is the settlor of this trust which is for the benefit of Individual A's minor children. The trust will be formed on or about the date of the formation of the Acquisition Co., and Individual A will not retain a reversionary interest in the corpus of the trust. ok

desires to place funds in an irrevocable trust for the benefit of his minor children. The trustee, in turn, will subscribe to an 11% ownership interest in Acquisition Co. Additionally, because of Individual A's estate planning objectives, it is necessary that Acquisition Co. be a limited liability company rather than an S Corporation because a trust is an impermissible shareholder of an S Corporation under the Internal Revenue Code or 1986.

ANALYSIS

A. Control.

The Act provides that if the ultimate parent entity of Acquisition Co. has total assets of more than $10,000,000, then Acquisition Co. and Seller's ultimate parent entity are both required to file an HSR Form. Section 801.1(a)(3) of the Rules defines "ultimate parent entity" as an entity which is not controlled by any other entity. The Rules define the term "control" as:

> (1) *Either.* (i) Holding 50 percent or more of the outstanding voting securities of an issuer or (ii) in the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or
>
> (2) Having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

16 C.F.R. §801.1(b). Thus, absent control by an Investor, Acquisition Co. would be deemed to be the ultimate parent entity under the Rules.

Although Individual A is also the settlor of the irrevocable trust for the benefit of Individual A's minor children, the ownership interest held by the trust is not attributed to Individual A by virtue of §801.1(c)(3) of the Rules. Therefore, no Investor is in "control" of Acquisition Co. within the meaning of §801.1(b). Hence, Acquisition Co. is the "ultimate parent entity" as defined in Rule 801.1(a)(3). Accordingly, for purposes of the asset test, we must look to the assets of Acquisition Co. to determine whether an HSR Form must be filed.

[redacted]

B. Asset Test.

Because Acquisition Co. will be a newly formed entity, it will not have a "regularly prepared balance sheet" as that term is described in §801.11(c)(2) of the Rules. As a result, Acquisition Co. is subject to §801.11(e) of the Rules. Section 801.11(e) generally provides that the "total assets" of an acquiring person that does not have a regularly prepared balance sheet is equal to all assets held by the acquiring person at the time of the acquisition less all cash that will be used by the acquiring person as consideration in the acquisition of the assets from the acquired person and less all cash that will be used for expenses incidental to the acquisition. Id.

All of the assets of Acquisition Co. at the time of the acquisition, including the cash proceeds of any acquisition financing, less the amount of cash used to acquire the Assets and pay expenses incidental to the acquisition equals an amount less than $10,000,000. Accordingly, subject to the provisions of §801.90 of the Rules (dealing with devices for avoidance of filing), we believe there is no filing requirement under the Act.

C. Devices for the Avoidance of Filing.

Section 801.90 of the Rules, dealing with devices for avoidance of filing, provides:

> Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the Act shall be disregarded, and the obligation to comply shall be determined by applying the Act and the Rules to the substance of the transaction.

16 C.F.R. §801.90.

In previous telephone conferences which this office has had with the Federal Trade Commission (the "FTC")[2], we have been informed that if there is any reason other than the avoidance of the filing requirement to create and use a new ultimate parent entity, then §801.90 is not operable. We understand from our discussions with the FTC that valid reasons may include, by way of example: (i) having operations in different geographical locations; (ii) ownership differences; (iii) tax ramifications; (iv) control and operation differences; (v) structuring for the protection from creditors; and (vi) other legitimate reasons for establishing a new entity.

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[2] Telephone conferences between [redacted] Hy Rubenstein of the FTC on July 19, 1991 and August 5, 1991.

and

[redacted]

In view of the reasons for forming Acquisition Co. for the purpose of acquiring the Assets, as set forth in the Statement of Facts, we believe that §801.90 does not apply and, therefore, no reporting requirement under the Act exists with respect to this transaction.

Finally, we point out that although no definite plan has been formulated, it is possible that at some point in the future (possibly one to five years from the date of the acquisition), the Investors of Acquisition Co. may act to consolidate into a new or existing corporation the operations of Acquisition Co. and certain commonly owned corporations, either for the purpose of making an initial public offering of securities in such consolidated enterprise or for operational or other reasons. However, the probability of the occurrence of such an event can be accurately characterized as merely speculative at this time.

may require reporting?

CONCLUSION

Because an irrevocable trust to which no reversionary interest is retained by the settlor is deemed to hold all assets and voting securities constituting the corpus of the trust, the interest in Acquisition Co. held by the irrevocable trust formed for the benefit of Individual A's minor children is not attributed to Individual A for purposes of determining control of Acquisition Co. Accordingly, Acquisition Co. is not controlled by any other entity and is therefore the "ultimate parent entity" under the Rules. Because Acquisition Co. has assets of less than $10,000,000, calculated in accordance with the Rules, and is not formed for the purpose of avoiding a filing of an HSR Form, the acquisition of the Assets by Acquisition Co. from Seller will not give rise to a reporting obligation under the Act.

We look forward to your concurrence in this conclusion.

Very truly yours,

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[redacted]

2/14/94

[redacted] is our UPE. It does not meet size-of-person requirement