[redacted]

Company)
802.20
801.1(a) & (b)
801.90
801.40

[redacted]

March 7, 1994

Mr. Patrick Sharpe
Compliance Specialist
Pre-Merger Notification Office
Bureau of Competition, Room H-303
Federal Trade Commission
Sixth Street and Pennsylvania Avenue
Washington, D. C. 20580

**VIA FACSIMILE**

Dear Mr. Sharpe:

On January 21 and February 18 of this year, I sent you letters about the same proposed series of transactions (collectively, the "**Formation/Acquisition Transactions**"). I have spoken with you several times about the Formation/Acquisition Transactions via telephone and, in addition, you have spoken with [redacted] our outside Hart-Scott-Rodino counsel with respect to the Formation/Acquisition Transactions. Because this will be the last letter to you on the transactions in question, I have solicited [redacted] input in drafting it. The letter now includes more appropriate terminology and narrative, as well as statutory, regulatory and other references, wherever appropriate.

The structure of the Formation/Acquisition Transactions has recently changed, motivated solely by desires to insulate certain institutional entities from exposure to personal liability and by federal tax considerations (I will go into greater detail later in this letter). I have explained these changes to our Hart-Scott-Rodino counsel and it is our common belief that no premerger notification filing is required as to any aspect of the restructured Formation/Acquisition Transactions.

My previous discussions with you have been devoted to two potentially reportable events:

1. the formation of a limited liability company (the "**Formation Transaction**"); and

2. the withdrawal of certain partners from a partnership which would have resulted in the remaining partner holding 100% of the interests in that partnership (the "**Acquisition Transaction**").

Under the Formation/Acquisition Transactions, as currently structured, we have reached the following conclusions:

1. The Formation Transaction is not reportable because:

   (a) No contributor to the limited liability company will receive $15 million in voting securities and the limited liability company (together with any entities controlled by it) will not have $25 million or more in annual net sales or total assets, thereby failing the size of transaction test [**16 C.F.R. Sec. 801.20**]; and

a

[redacted]

(b) The limited liability company will not have $10 million or more in assets, thereby failing the special size of person test [16 C.F.R. Sec. 801.40]. OK

2. The Acquisition Transaction is not reportable because it will not result in any one person holding all or substantially all of the partnership interests in the partnership in question [ABA Premerger Notification Practice Manual, Par. 93 (1991)].

Rather than try to reconcile the present (which, for your information, is the final) structure of the Formation/Acquisition Transactions with my earlier letters, I believe the simplest approach is to restate everything in this letter and let it stand on its own. Of course, I understand that you will still keep the earlier letters in the same file as this letter. P O

Here is the description of the relevant facts of the Formation/Acquisition Transactions as currently structured.

I. Background

A. The Formation/Acquisition Transactions involves a [redacted] whose present fair market value ("FMV"), free and clear of all mortgage indebtedness, is believed by its owners to be approximately $184 million. — Is this correct? NO

B. The [redacted] is currently encumbered by two mortgages securing a total of $164 million.

1. The senior mortgage, which secures $104 million of debt, is held by a bank which is unaffiliated with any of the present owners of the [redacted]

2. The junior mortgage, which secures $60 million of debt, is held by a partnership whose principals consist of public and private pension funds and insurance companies whose investment in the [redacted] is managed by [redacted] Those particular institutional entities are also the principals of a second partnership [redacted] which has an ownership interest in the [redacted] as described below.

C. Legal title to the [redacted] is currently owned by a limited partnership ("XYZ Partnership"). The current ownership of XYZ Partnership is broken down as follows:

| Description of Partner | Share of Partnership Profits and Assets upon Liquidation |
|---|---|
| Numerous entities which are unaffiliated with the principals of [redacted] | 30% (in the aggregate) |
| [redacted] | 70% |

All of the [redacted] are general partners in XYZ Partnership. [redacted] is the sole limited partner in XYZ Partnership.

**Because [redacted] is entitled to 50% or more of the profits (or assets upon liquidation) of XYZ Partnership, [redacted] "controls" XYZ Partnership pursuant to 16 C.F.R. Sec. 801.1 (b) (1) (ii) and, as explained in Paragraph D below, is the ultimate parent entity of XYZ Partnership.**

D. The current ownership of [redacted] is broken down as follows:

| Description of Partner | Share of Partnership Profits and Assets upon Liquidation |
|---|---|
| Fund A, a corporate pension plan[1] | 33.33% |
| Fund B, a revocable group trust whose settlor/beneficiaries are public and private pension plans | 16.67% |
| Corporation X, whose shares are 100% owned by a pension plan | 21.67% |
| Corporation Y, whose shares are 100% owned by a pension plan | 21.67% |
| Corporation Z, whose shares are 100% owned by a life insurance company | 6.66% |

**Because none of the above described entities has the right to receive 50% or more of the profits (or assets upon dissolution) of [redacted] that [redacted] is not controlled by any other person and is its own ultimate parent entity (see 16 C.F.R. Sections 801.1 (b) (1) (ii) and 801.1 (a) (1) (3)).**

II. The Proposed Formation/Acquisition Transactions

A. The [redacted] currently have significant contingent financial obligations which run in favor of XYZ Partnership. In exchange for a release by

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[1] Rather than acquiring direct partnership interests in the [redacted] Fund A and Fund B, as settlor/beneficiaries, caused to be formed a revocable trust known as the ABC Group Trust to acquire and own a 50% interest in that partnership. Fund A owns 66.6667% of the beneficial interests in the ABC Group Trust and Fund B owns the remaining 33.3333%. Because the Federal Trade Commission will look through the ABC Group Trust to its settlor/beneficiaries in the determination of the ultimate parent entity for the [redacted] (see 16 C.F.R. Sec. 801.1(c)(4)), I have shown each of these funds in the table as partners with their derivative partnership interests set opposite their names.

[redacted] of those obligations on a discounted basis[2], the [redacted] have agreed to sell their interests in XYZ Partnership to the following principals of [redacted] for the following nominal sums of money:

| Purchaser | Percentage of XYZ | Selling Price |
|---|---|---|
| Corporation X | 6.6% | $ 66.00 |
| Corporation Y | 6.6% | $ 66.00 |
| Corporation Z | 1.8% | $ 18.00 |
| ABC-LLC, a newly formed limited liability company owned by Fund A (as to 66.67%) and by Fund B (as to 33.33%) | 15% | $150.00 |

ok sale of partnership interests

The reasons for the formation of ABC-LLC are detailed in Paragraph C below.

As a result of the sale, the above purchasers will all be general partners in XYZ Partnership.

B. In order to preserve the federal tax treatment of XYZ Partnership as a partnership rather than a corporation, it has been determined to convert that partnership from a limited partnership to a general partnership. The clear consequence of that conversion will be that all of the constituent partners in XYZ Partnership will become general partners, including [redacted] (which is presently a limited partner).

ok

C. As a result of [redacted] becoming a general partner in XYZ Partnership, each of its constituent partners will, by operation of law, become personally liable for all of the obligations of XYZ Partnership. In order to insulate the settlor/beneficiaries of ABC Group Trust from such personal liability, it has been determined to do two things:

irrelevant for HSR

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[2] While it does not affect the HSR analysis, we note that the [redacted] will be paying to XYZ Partnership the negotiated sum of $1.3 million in return for the simultaneous cancellation of certain guaranties which will relieve affiliates of the [redacted] from approximately $1.7 million of remaining obligations under those guaranties.

1. Cause [redacted] to be converted from a general partnership to a limited partnership whereunder the ABC Group Trust would be the only limited partner.

2. In order to satisfy the objective of maintaining partnership management authority in the settlor/beneficiaries of ABC Group Trust with respect to [redacted] without exposing the assets of the settlor/beneficiaries of that trust to personal recourse for the obligations of XYZ Partnership and without triggering a tax termination of [redacted] the ABC Group Trust formed ABC-LLC and will be conveying to ABC-LLC 49/50 of its partnership interest in [redacted]

D. The ownership structure of XYZ Partnership after all of the foregoing steps have been completed will be:

| Description of Partner | Share of Partnership Profits and Assets upon Liquidation |
|---|---|
| Corporation X | 6.60% |
| Corporation Y | 6.60% |
| Corporation Z | 1.80% |
| ABC-LLC | 15.00% |
| [redacted] | 70.00% |

All of the above will be general partners in XYZ Partnership.

E. The ownership of [redacted] after all of the foregoing steps have been completed will be as follows:

| Description of Partner | Share of Partnership Profits and Assets upon Liquidation |
|---|---|
| ABC-LLC | 49.00% |
| Corporation X | 21.67% |
| Corporation Y | 21.67% |
| Corporation Z | 6.66% |
| ABC Group Trust | 1.00% |

All of the above will be general partners in [redacted] except the ABC Group Trust, which will be the sole limited partner.

**Because none of the above described entities has the right to receive 50% or more of the profits (or assets upon dissolution) of [redacted] that partnership is not controlled by any other person and is its own ultimate parent entity (see 16 C.F.R. Sections 801.1 (b) (1) (ii) and 801.1 (a) (1) (3)).**

## III. Hart-Scott-Rodino Analysis

We now need to address whether any Hart-Scott-Rodino ("HSR") filings are required under the foregoing scenario and, if any are so required, who should file.

### A. The Formation Transaction

You have advised me that the Premerger Office currently treats the formation of a limited liability company the same as the formation of a corporate joint venture. Predicated upon that approach, it is our belief that the Formation Transaction is not reportable because it fails to meet the size of transaction test and also because it fails to meet the special size of person test set forth in 16 C.F.R. Sec. 801.40.

#### 1. The Size of Transaction Test

Under 16 C.F.R. Sec. 802.20, no filing is required unless a contributor acquires voting securities which:

(a) are valued at [more] not less than $15 million; or

(b) confer control of an issuer which, together with all entities it controls, has at least $25 million in annual net sales or total assets.

ABC Group Trust has agreed to transfer a 49% interest which it currently holds in [redacted] to ABC-LLC. Because ABC Group Trust is a revocable trust, it does not, for HSR purposes, hold any of the partnership interests in [redacted] (16 C.F.R. Sec. 801.1 (e) (4)). As a consequence, the partnership interests in question are deemed acquired by ABC-LLC from Fund A and Fund B, the settlor/beneficiaries of ABC Group Trust. (also a revocable grantor - can't hold anything) ok

ok

In addition, ABC-LLC will, in an almost simultaneous but separate transaction, acquire a direct 15% interest in XYZ Partnership.

Because the membership interests (i.e. "voting securities") in ABC-LLC are not and will not be publicly traded and their acquisition price is not determined, you have advised us that those interests are to be valued at their

Fair Market Value

FMV as determined by each acquiring person (16 C.F.R. Sec. 801.10 (a) (2) (ii)).

Under the HSR rules, it is assumed that the amount of any indebtedness with respect to the underlying assets of a corporation is taken into account in arriving at the FMV of its voting securities. One means by which Fund A and Fund B may determine the FMV of the voting securities they are acquiring in ABC-LLC is by valuing the [redacted] interests in [redacted] that are being transferred to ABC-LLC and will be its sole asset.

I said the value of a voting security usually reflects the net value of the underlying assets,

You have advised us that in valuing those voting securities, it would be appropriate to begin with the equity value of the sole asset of XYZ Partnership, i.e. the [redacted] Th[redacted] has a free and clear value of $184 million but is subject to $164 million of mortgage indebtedness. Therefore, the equity value of the [redacted] is $20 million. net

At most, the aggregate equity value of all partnership interests in [redacted] being transferred to ABC-LLC will be $9.86 million, calculated as follows:

(a) The value of ABC-LLC's interests in [redacted]

$20 million value of XYZ Partnership's assets X 70% [redacted] ownership percentage of XYZ Partnership) = $14 million X 49% (ABC-LLC's ownership percentage of [redacted] = $6.86 million; plus

(b) The value of ABC-LLC's direct interest in XYZ Partnership:

$20 million value of XYZ Partnership's assets X 15% (ABC-LLC's direct ownership percentage of XYZ Partnership) = $3 million.

Because Fund A and Fund B will collectively be acquiring less than $15 million in voting securities of ABC-LLC, neither individual acquisition meets the $15 million size of transaction test under 16 C.F.R. Sec. 802.20 (a).

In addition, the alternative size of transaction test under 16 C.F.R. 802.20 (b) is not met because the issuer, ABC-LLC, will not control any other entity[3] and because ABC-LLC does not itself have annual net sales or total assets of not less than $25 million.

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[3] ABC-LLC will be entitled to only 49% of the profits (or assets upon liquidation) of the [redacted] In addition, ABC-LLC will be entitled to only 49.3% of the profits (or assets upon liquidation) of XYZ Partnership.

2. **The Size of Person Test**

Under the special size of person rules applicable to the formation of corporate joint ventures (as set forth in 16 C.F.R. Sec. 801.40), a formation transaction is not reportable, regardless of the size of the contributors to that venture, unless the venture itself will have at least $10 million in assets. Because ABC-LLC will not obtain a majority of the interests in any preexisting partnership or other venture, the assets of [redacted] and XYZ Partnership will not be included at book value in determining the size of ABC-LLC (cf. ABA, Premerger Notification Practice Manual Par. 214 (1991)). The appropriate approach to valuation is the one set forth in Paragraph A above.

Pursuant to that approach, the value of all assets (i.e. partnership interests) which will be owned by ABC-LLC as a result of the Formation Transaction will be less than $10 million. As a consequence, the joint venture does not meet the special size of person test under 16 C.F.R. Sec. 801.40.

(?) will be less than $10 million

As a consequence, the joint venture does not

B. **The Acquisition Transaction**

You have on several occasions confirmed to me that the transfer of partnership interests is not reportable unless it results in one person holding all of the interests in the partnership. This position is supported in ABA, Premerger Notification Practice Manual, Par. 93 (1991).

ok

As reflected earlier in this letter, the Acquisition Transaction will result in the interests in XYZ Partnership being held by five different ultimate parent entities as follows:

1. The sole shareholder of Corporation X (by virtue of that corporation's newly acquired direct ownership of a 6.6% partnership interest in XYZ Partnership);

2. The sole shareholder of Corporation Y (by virtue of that corporation's newly acquired direct ownership of a 6.6% partnership interest in XYZ Partnership);

3. The sole shareholder of Corporation Z (by virtue of that corporation's newly acquired direct ownership of a 1.8% partnership interest in XYZ Partnership);

4. Fund A (by virtue of 66.67% ownership of ABC-LLC, which in turn has a newly acquired direct ownership of a 15% partnership interest in XYZ Partnership); and

5. [redacted] which we have previously determined to be its own ultimate parent entity (by virtue of its continued direct ownership of a 70% partnership interest in XYZ Partnership).

There does exist a nexus between the acquiring parties and [redacted] namely that the principals of the acquiring parties are also principals of [redacted] However, this is not the same as [redacted] acquiring the remaining interests in XYZ Partnership. Therefore, because the acquisitions are all acquisitions of interests in a partnership, there is no filing requirement.

To assist you in your review of this letter, I am also enclosing a diagram which depicts the various entities and their interrelationship as described in this letter. The solid lines indicate the current structure and the broken lines indicate the proposed structure. We hope that it will be helpful in your analysis.

Finally, it is very important to us and our institutional clients that the Federal Trade Commission is comfortable that the transactions described in this letter are free from any considerations with respect to 16 C.F.R. Sec. 801.90. The design of the Formation/Acquisition Transactions has at all times been entrusted to outside tax and transactional attorneys with a mandate to maximize federal tax benefits and minimize or eliminate exposure to recourse liability. The Formation/Acquisition Transactions, as presently structured, accomplish that objective whereas the immediately previous format, which would have resulted in the deemed acquisition of the partnership interests in question by [redacted] would have accomplished the undesired opposite result. The attorneys in question were explicitly instructed by me from the outset to design the transactional structure without any regard to HSR implications and neither I nor our HSR counsel were consulted as to how to structure these transactions.

Before proceeding, we want to be sure that the Premerger Office is satisfied with this explanation without further support.

Please call either [redacted] or me after you have had an opportunity to review this letter to confirm the conclusions which we have reached. Once again, thank you for your help.

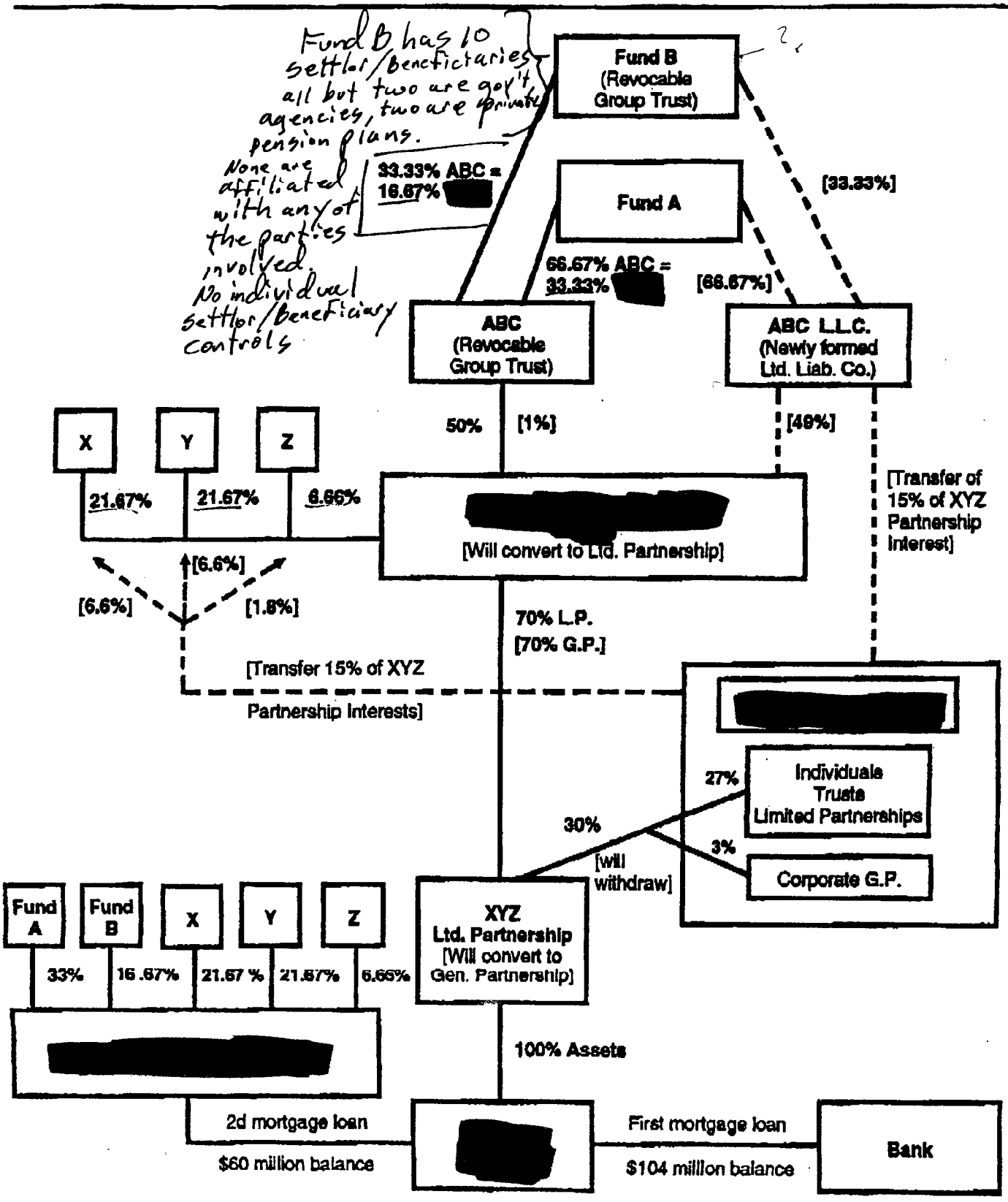
Very truly yours,

[redacted]

Enclosure

[redacted]

# [redacted] Formation and Withdrawal Transactions




| | |
|---|---|
| Market Value | $184 million |
| Debt | $164 million |
| EQUITY | $20 million |