801.11(e); 801.40; 801.90

[redacted]

December 2, 1994

BY HAND

Richard B. Smith, Esq.
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Sixth St. and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Dick:

This letter memorializes the advice you provided over the telephone on November 30 concerning the appropriate analysis under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the implementing regulations, of the following set of transactions:

1. A partnership will be formed that will not be controlled 50% or more by any of its partners.

2. The partnership will then create a wholly-owned subsidiary corporation, Newco. Newco will then, in turn, create three wholly-owned subsidiary corporations --Sub1, Sub2, and Sub3.

3. After being formed, Newco will enter into acquisition agreements with each of ultimate parent entities ("UPE's") A, B, and C. A is a $100 million person; B and C are each $10 million (but not $100 million) persons.

4. Through Sub1, the Partnership (as UPE) will first acquire assets from A for approximately $32.5 million in cash. Prior to this acquisition, the Partnership (including Newco and its subs) will have total assets of approximately $39 million in cash (from contributions by partners, plus loan proceeds), but will not have a regularly prepared balance sheet.

5. Through Sub2, the Partnership will then acquire all the voting securities of a subsidiary of B in return for cash of

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approximately $4 million, plus voting and nonvoting securities of Newco. Then, through Sub3, the Partnership will acquire all the voting securities of a subsidiary of C in return for voting and nonvoting securities of Newco. After completion of all the above acquisitions, the Partnership will remain the UPE of Newco and will be a $10 million, but not a $100 million, person.

You advised that the creation of the Partnership in Step 1 would be an exempt partnership formation transaction, and that the Partnership should be considered its own UPE, despite the fact that, as I explained, two of the partners are anticipated to be a father and son whose partnership interests, combined, would constitute more than 50% of the outstanding partnership interests. As I indicated, the son is not a minor, both father and son would be investing independent funds, and each would hold bona fide independent partnership interests and have no buyout commitment with the other. You also advised that the creation of Newco, Sub1, Sub2, and Sub3 (Step 2) would be exempt under § 802.30.

You further advised that § 801.11(e) would govern the determination of the Partnership's "size of person" for the acquisition of assets from A (Step 4). Under this section, as illustrated by the examples to the section, an acquiring person with no regularly prepared balance sheet has a "size of person" equal to the value of all assets held by the person at the time of the assets acquisition, minus cash (including acquisition expenses) to be used for the acquisition. Applying this test, the Partnership's "size of person" at the time of the acquisition from A would be $6.5 million ($39 million total assets less $32.5 million cash to be used for the acquisition). You therefore advised that the acquisition would not be reportable.

You further advised, in accord with § 801.11(e), that the Partnership would have a "size of person" for the acquisition from B equal to the value of the assets acquired from A, less the cash to be used for the acquisition from B. With respect to the acquisition from C, you advised that the Partnership's "size of person" would be based upon the value of the assets acquired from A, plus the financial statements of the entity acquired from B. Because the Partnership's "size of person" under these tests would be less than $100 million with respect to both the acquisitions from B and C, and because B and C are each less than $100 million in size, you advised that these acquisitions would also not be reportable.

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If this letter does not accurately reflect the advice you provided concerning the nonreportability of the transactions described above, please call me as soon as possible.

As always, I thank you for your time and assistance.

Very truly yours,

[redacted]

12/12/94 - called writer and advised that, based on the facts in this letter and the order in which the three acquisitions will take place, that 801.11(e) is useable and that 801.40 does not appear applicable. Also, no aggregation of son's and father's partnership interests are required under 801.90 principles.

RBSmith