

§ 801.40

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

December 6, 1994

BY TELECOPY AND FIRST CLASS MAIL

John M. Sipple, Jr., Esq.
Assistant Director
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 308
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

DEC 6 2 45 PM '94
FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION


Dear John:

I am writing in response to your offer in our telephone conversation last Friday (December 2, 1994), to provide your views regarding the applicability of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act" or the "Act") to a particular transaction we are analyzing. This letter is not being written under the Commission's advisory opinion procedures. Instead, I am writing in the hope and understanding that we may get a response from you within a few days.

Following is a description of the transaction and why we do not believe it should be reportable under the Act. Please let me know promptly if you disagree with our analysis or conclusions in any way because the parties are on a tight schedule and plan to close in the very near future.

A married couple (the "Owner") currently holds directly or indirectly 100% of the partnership interests in a number of partnerships. In some instances, the Owner holds a 1% general partnership interest in such partnerships directly; in other instances, the Owner holds the 1% general partnership interest through a partnership or corporation which is wholly owned by the Owner. The only assets of some of the partnerships are residential properties for senior citizens. The only holdings of the remaining partnerships are partnership interests in other partnerships, the assets of which consist solely of similar residential buildings. In

[REDACTED]


John M. Sipple, Jr., Esq.
December 6, 1994
Page 2


*MRS. Sipple
8059
OR
8361 Residential*

the case of one such partnership, the assets consist in part of partial, non-partnership ownership interests in such residences. Each resident of each residence pays a monthly charge to cover rent, meals at a cafeteria on the premises, and similar additional services. The residences do not have a hospital, doctors, a pharmacy, a grocery store, or any other retail establishment on the premises. Each residence generally has a nurse, however, to handle basic procedures such as blood tests. The staff at each residence also provides some "assistance with the activities of daily living" such as storing and dispensing medication to residents on a doctor's orders and bathing, feeding, and counseling residents. All such services are provided exclusively to residents. A small additional fee is charged for dispensing medications. Higher fees may be charged as a resident's medical or physical frailty increases and greater levels of services are required.

The Owner also holds 100% of the voting securities of several corporations. The only "assets" of a number of these corporations are real estate management contracts; one of them also has a minority stock ownership interest in a consulting company which provides services to the owner of a similar residence and a minority partnership interest in partnerships which own such residences. Over half of the management contracts apply to the residential properties held by the Owner's partnerships. The remaining management contracts apply to properties which are not held by the Owner's partnerships or otherwise controlled by the Owner. The only "assets" of another corporation are land purchase and development contracts for the types of residence at issue and minority general partnership interests in partnerships which own such types of residences. The only "assets" of another corporation are partnership or other ownership interests in partnerships which own the same types of residences. The only assets of the remaining corporations are 1% general partnership interests in some of the Owner's real estate partnerships.

The Owner is planning to undertake the following multi-step transaction:

First, the Owner will create a new corporation ("Newco"). For a nominal cash consideration, the Owner will receive 100% of Newco's voting securities. This transaction should be exempt under the intraperson transaction exemption of section 802.30 of the HSR regulations and particularly Example 2 to that section.



[REDACTED]
John M. Sipple, Jr., Esq.
December 6, 1994
Page 3

*Nursing home - 8059
Partnerships not
viewed as entities
since how own
assets... Transfer
of assets to Newco
not necessary for
HSR purposes
in this case.*

Second, the Owner will transfer all of its 100% partnership interests in its partnerships (including the 1% general partnership interests) to Newco in exchange for additional Newco voting securities. Because the assets of the partnerships consist entirely of residential property, of assets incidental to the ownership of such property, or of interests in partnerships whose only assets are such realty and incidental assets, Newco's acquisition of such partnership interests should be exempt from the requirements of the Act under Section 7A(c)(1) of the Act and section 802.1 of the HSR regulations. Similarly, the Owner's acquisition of additional voting securities of Newco should be exempt under section 802.1(a) of the HSR regulations, since Newco's only assets following this step consist or will consist of real property and incidental assets.

OK

Third, the Owner will transfer its 100% stock ownership in its real estate management, development and other corporations to Newco in exchange for additional Newco voting securities. The Owner is both the acquired and acquiring person by reason of holdings of voting securities, because it is the ultimate parent entity of the corporations it is transferring to Newco and of Newco. Accordingly, this transaction should be exempt from the reporting requirements of the HSR Act under the intraperson transaction exemption of section 802.30 of the HSR regulations.

Fourth, a number of investors will invest capital in Newco in exchange for Newco voting securities. Each investor is investing substantially less than \$15 million and, as a result of the investment, no investor will control an issuer which, together with all entities its controls, has annual net sales or total assets of \$25 million or more. Thus, these investments should be exempt under section 802.20 of the HSR regulations.

*OK
assuming this
Really had
an 800,000
UM formation
if investors had
been identified and
are voluntarily
committed, it is
a formation
Sec 802.199
for criteria
P no has
used.*

All of the above steps could occur in succession on one day, although the first step (formation of Newco) is expected to occur several days before the second and succeeding steps. It is essential from the investors' perspective, however, that the first three steps be completed before the fourth step occurs.

*Have they
been
identified?
If public
sent offering
not identified.*

For the reasons indicated above, we do not believe that the Owner's formation of Newco and transfer to Newco of its partnership interests and of the voting securities of its corporations in exchange for Newco stock should be reportable under the HSR Act. Similarly, we do not believe that the investors' subsequent acquisition of Newco voting securities should be reportable. Please let us know as soon as possible whether you agree. Because time is of the essence, we

[REDACTED]

[REDACTED]

John M. Sipple, Jr., Esq.
December 6, 1994
Page 4

would welcome the opportunity to respond to any questions or concerns you may have in person or by telephone.

Thank you in advance for your attention and assistance.

Sincerely yours,

[REDACTED]

Reportability depends on whether the plan is viewed as the formation of a joint venture corporation and subject to § 801.40. If the investors in step 4 have been identified and are contractually committed to invest in Newco, the PNO would view the plan as the formation of a joint venture corporation. I referred the caller to ABA letter 199 which identified the criteria the PNO has used to distinguish formations of joint ventures from the formation of a Newco and the subsequent sale of US in Newco (Non § 801.40).

In a subsequent call, the issue arose whether the acquisition of US of Newco would qualify for exemption under § 802.1(a). I advised the caller that if the facilities being transferred to Newco were residential not nursing homes, the exemption was applicable. I asked the caller to determine whether the facilities fell under SIC code 8059, Nursing & Personal Care facilities, or 8361, Residential Care. If the latter, and the other matters noted, were generally treated as mostly by the PNO, the exemption would apply.

[REDACTED]