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801.116

[REDACTED]

July 5, 1996

Patrick Sharpe  
Compliance Specialist  
Premerger Notification Office  
Federal Trade Commission  
Sixth Street and Pennsylvania Avenue, NW  
Washington, DC 20580

Re: *Size of Person Test for Premerger Notification*

Dear Mr. Sharpe:

This will summarize our telephone conversation on July 2, 1996. My understanding of our conversation is that after I described the following facts to you, you did not disagree with my conclusion that my clients are not required to file a premerger notification because they fall below the minimum "size of person" specified by 15 U.S.C. § 18a (a)(2). If you believe there should be any changes to this summary, I would appreciate it if you could let me know, because the clients do intend to rely on the analysis below.

H Corp. is a corporation that operates [REDACTED] H Corp. has annual revenues in excess of \$100 million per year and thus appears to meet the larger "size of person" test in the statute. All the voting securities of H Corp. are owned by five individual shareholders, HS-1 through HS-5. HS-1, HS-2 and HS-3 also control a number of real estate partnerships that directly and indirectly own or lease the buildings and land for the facilities operated by H Corp. and own five [REDACTED] office buildings.

My clients are a corporation ("A Corp.") and an individual ("AS") who owns all the voting securities of A Corp. A Corp. has entered into an agreement with HS-1 through HS-5

✓

to acquire all the voting securities of H Corp. for approximately \$28 million. This appears to satisfy the "size of transaction" test in the statute. A Corp. is an inactive corporation with no assets or revenues, and neither a balance sheet nor an income statement has been prepared for A Corp. Neither a balance sheet nor an income statement will be prepared for A Corp. until after it has acquired all the voting securities of H Corp.

AS appears to be the ultimate parent entity of A Corp., which will acquire the voting securities of H Corp. AS and all the entities AS and AS's spouse control derive less than \$10 million in consolidated nonduplicative annual revenue from providing professional services and from income-producing business and professional assets. Therefore it appears AS does not have \$10 million in annual net sales and does not satisfy the "size of person" test in the statute through net sales.

-ok

AS directly or indirectly owns or controls income-producing assets for which the total most recent appraised value and fair market value both are less than \$7.15 million. Therefore if only these assets are counted, AS does not have \$10 million in assets of the kind that would satisfy the "size of person" test in the statute.

ok

Make or break  
Crux of the question  
Do not include since it is a residence and not a business

AS also owns four residences in three different states, and their total most recent appraised value and fair market value both are less than \$7.8 million. AS uses the four residences only as personal and family residences, they never have produced rental or other income for AS, and AS never has characterized any of them as a business for tax purposes.

One of these residences is a ranch. The most recent appraised value and fair market value of the ranch is less than \$3.5 million, although the ranch might have a significantly higher value if it were subdivided. AS has no plans to dispose of the ranch but has given some thought to selling it to a nature preservation organization for public use or subdividing it. AS also owns five parcels of unimproved land for which the total most recent appraised value and fair market value is less than \$575,000. The unimproved land never has produced rental or other income for AS, and AS never has characterized any of this land as a business for tax purposes. My understanding is that the four residences and five parcels of land are properly characterized as personal, not income-producing assets, and their value therefore is not counted in calculating AS's assets under the "size of person" test.

can be an investment asset and included on a balance sheet for size-of-person test

The stock purchase agreement under which A Corp. will buy the voting securities of H Corp. from HS-1 through HS-5 is conditioned upon A Corp. demonstrating that it will be able to obtain \$47 million in financing, virtually all of which will be used to discharge A Corp.'s expenses and obligations under the stock purchase agreement. Approximately \$28 million of the funding will be paid to HS-1 through HS-5 for their H Corp. stock, and approximately \$9 million will be used to satisfy obligations of H Corp. as required by the stock purchase agreement. A Corp. plans to borrow the financing, probably either from R Corp., a real estate investment trust, or O Corp., a corporation that operates a number of [redacted] facilities. O

[redacted]

[REDACTED]  
[REDACTED]  
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Corp. does not operate [REDACTED] facilities in the state where H Corp.'s facilities are located.

R Corp. has entered into an agreement with H Corp. under which R Corp. is providing interim financing to H Corp. and HS-1 through HS-5 have granted options to R Corp. to purchase all the voting securities of H Corp. R Corp., H Corp., HS-1 through HS-5 and A Corp. expect that R Corp. will transfer its options to A Corp. before A Corp. purchases the H Corp. voting securities. A Corp. hopes to negotiate an agreement with R Corp. to acquire and lease back or sublease the ownership and leasehold interests in the facilities operated by H Corp., but there is no such agreement at this time. A Corp. also hopes to negotiate agreements for O Corp. to operate some or all of the facilities now operated by H Corp., and to obtain warrants for securities issued by O Corp. to provide as part of the consideration A Corp. will pay to HS-1 through HS-5 for the voting securities of H Corp.

After I summarized the facts above, you and I discussed my specific conclusions that AS does not have sufficient assets to meet the "size-of person" test of the statute because (1) the values of the multiple residences and undeveloped real estate that AS owns are not included for purposes of the "size of person" test; (2) the options to purchase all the voting securities of H Corp. that A Corp. will obtain from R Corp. either do not have value for purposes of calculating assets of A Corp. and AS, or the value of the options is not counted for purposes of the "size of person" test; and (3) funding obtained by A Corp. but spent for expenses and consideration in carrying out the acquisition of the voting securities of H Corp. will not be included in A Corp.'s assets for purposes of the "size of person" test.

Thank you very much for your assistance in this matter.

Very truly yours,  
[REDACTED]  
[REDACTED]  
[REDACTED]

called [REDACTED] 7/9/96  
§01.11(e) can apply. The ranch can be excluded since  
it is a personal residence and not a business.

(RS)

(RS) concurs  
He did not read the  
letter but concurs  
with the ranch  
issue.