October 22, 1996

Via Facsimile
Richard B. Smith
Premerger Notification Office
Room 303
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Dick:

I am writing to you to confirm your conclusions regarding the appropriate Hart-Scott-Rodino analysis of a transaction I described to you on the telephone on October 17, 1996.

As you recall, I stated that a newly formed partnership, P, is planning to acquire over $15 million worth of assets from another entity. P has two partners -- S Corp. with a 99% interest in P, and another new partnership, P1, with a 1% interest in P. P1, however, is entitled to over 50% of the profits and, upon dissolution, assets of P because it has a preferred return due to the fact that it has invested most of the money in P. Accordingly, P1's ultimate parent entity ("UPE") would be the UPE of P.

The partners of P1 include two individuals who each have a 45% interest in P1 and various other individuals who collectively have a 10% interest in P1. The two individuals are collectively contributing over $19 million to P1 and the remaining partners are collectively contributing $1000 to P1. Each of the partners will be given a preferred return, which means that the two individuals will each be entitled to 49.99%+ of P1's profits and 49.99%+ of P1's assets upon dissolution. Accordingly, no one would be entitled to at least 50% of P1's profits or assets upon dissolution and P1 would be its own UPE.

If P1 is its own UPE, there is no Hart-Scott-Rodino filing obligation because the size-of-person test would not be satisfied. P1 is a newly formed entity without regularly prepared financials. A pro forma consolidated balance sheet,

which would exclude the money P1 would give to P to make the $40 million asset acquisition, would show well below $10 million in total assets. However, if a preferred return were not given to all of P1's partners, but only to the two partners who are contributing the lion's share of the money to P1, these two individual partners would each be entitled to 50% of P1's profits or assets upon dissolution and would each be P1's UPE. A filing obligation would then arise because the size-of-person test would be satisfied if the two individual partners were P1's UPEs.

I understand that under my hypothetical, the Premerger Notification Office would view P1 as P's UPE. I also understand that even if P1 gave a preferred return to all its partners (rather than just to the two individuals who are contributing the lion's share of the money to P1) solely to ensure that P1 is its own UPE in order to avoid a HSR filing (which is not the case), the Premerger Notification Office would not view this as a "device for avoidance" under 16 C.F.R. § 801.90 so long as the preferred return is in fact given to all of P1's partners.

If this letter does not accurately reflect your analysis of the hypothetical I posed to you, please call me by the end of today. Thanks, once again, for your help.

Enclosures

10/22/96 Writer advises that preferred returns to all partners in a partnership is not unusual. Sometimes given to partners who are making the major contributions and sometimes given to all. As a result of the preferred returns to all, no person has the right to 50% of the profits or 50% of the assets on dissolution of P1. Therefore, P1 is its own UPE and, since not controlled, newly formed and without a regularly prepared balance sheet, may use 801.11(e) to determine its size. The substance of the transaction is that P1 is its own UPE and the proposed acquisition does not violate 801.90.

R B Smith