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#239 PNPM

[redacted]

CONFIRMATION COPY

November 21, 1996

VIA TELECOPY

Victor L. Cohen
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Exempt Transaction

Dear Victor:

Attached is an outline of a transaction that involves the transfer of certain assets in the ordinary course. We believe that the events described in the attached outline are exempt from the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act.

We would appreciate your thoughts at your earliest convenience.

[redacted]

[redacted]

See separate reply by VC

This transaction involves the transfer of certain assets to a limited liability company ("LLC"). This outline has been prepared to facilitate the determination that neither: (a) the transfer of an undivided interest in certain assets of one LLC member to the other LLC member, and the subsequent contribution of such assets to the LLC; nor (b) the contribution of certain assets by one LLC member to the LLC and the subsequent purchase of member interests in the LLC by the non-contributing member, are subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

For purposes of this outline, assume that parties A and B (who are each their own "ultimate parent entities") meet the $100 million "size-of-person" test.

Background

1. A1 (a "controlled" entity of A) and B1 (a "controlled" entity of B) are the sole members of an LLC (hereafter, "AB LLC"). Each of A1 and B1 hold 50% of the membership interests of AB LLC.

2. AB LLC is governed by a six person management committee. A1 appointed three persons; B1 appointed the other three persons.

   a. These persons are officers, directors or employees of A or B or their respective "controlled" entities.

   b. The management committee governs the day to day operations of AB LLC. The management committee has limited authority -- all "board of directors" type powers (e.g. sale of AB LLC, merger or consolidation or AB LLC, voluntary liquidation or dissolution of AB LLC, incurrence of indebtedness of more than $25,000 by AB LLC, etc.) have been specifically retained by A1 and B1.

Is LLC a partnership

Contemplated Transaction

1. A1 and B1 desire to expand the business of AB LLC. To that end, certain assets held by A1 (the "Assets") will be transferred to AB LLC. A and B, through various mechanisms, regularly acquire and dispose of the types of assets that constitute the Assets. The Assets represent less than 2 percent of the assets of A which relates to AB LLC's business. Depending upon the resolution of certain tax and accounting issues, the transfer of the Assets should occur in one of two ways:

   a. A1 will transfer to B1 an undivided 50% interest in the Assets in exchange for which B1 will pay to A1 an amount in excess of $15 million in cash, and thereafter, A1 and B1 will contribute their undivided 50% interests in the Assets to AB LLC; or

   b. A1 would contribute the Assets to AB LLC as a capital contribution. As a result of the contribution, A1 will be deemed to own greater than 50% of the membership interests in AB LLC. To equalize A1's and B1's holdings in AB LLC, B1 will acquire from A1 membership interests in AB LLC so that following the acquisition of membership interests, A1 and B1 will hold 50% of the membership interests of AB LLC. In connection with B1's acquisition of certain of A1's membership interests in AB LLC, B1 will pay to A1 an amount in excess of $15 million in cash.

[redacted]

Answer to 11-21-96 letter to Victor Cohen from [redacted]

Possible transfer "a.": the transfer of an undivided 50% interest to B1 is the transfer of an asset and reportable if all HSR tests are met, no exemption applies and the continuum theory does not apply. The subsequent, immediate transfer of the 50% undivided interests in the asset by both A1 and B1 create fileable events since both A and B (who control A1 and B1 respectively) control the LLC and therefore have made an acquisition of the other person's asset (the undivided 50% interest). Since this is fileable the continuum theory applies to the transfer to B1 since A will need to file to acquire this asset.

Possible transfer "b.": When A1 contributes the asset to the LLC it occurs at a time when the LLC is under the control of B and therefore, B must file to acquire the assets. The fact that the ownership in the LLC is being diluted does not excuse the filing. Furthermore, even if B was not required to file based on its ownership being diluted, B is still acquiring the asset since it will control the LLC after the two steps have been completed at which time the LLC has the asset and B (through B1) has paid consideration, in effect, for the asset. Whenever there are simultaneous transactions we analyze them as if any one could go first in order to determine if an acquisition has been made. In transfer "b." if A had sold LLC interests to B first and thereafter the assets had been conveyed to the LLC, B would be acquiring the assets since it is in control of the LLC. The possible scenario "b." also could be viewed as a device for avoidance pursuant to section 801.90 of the HSR rules.