

Not an asset
purchase subject to
§ 01.10
formation of
a partnership,
and for

ATTORNEYS AT LAW

MEMORANDUM

September 8, 1998

TO: Patrick Sharpe
CC: [REDACTED]
FROM: [REDACTED]
RE: HSR Advice Re Partnership Transactions

We are writing in response to the voice mail I received from you on September 2, 1998, and our subsequent telephone conversation on Friday. As we understand it, your office now believes that the transaction described in my memorandum of September 2, 1998 (attached) may be subject to HSR reporting. While we will obviously accept this advice if it is your final word, we want to explain the reasons why we believe that no filing should be required.

At the outset, and while not technically relevant, we assure you that this is not an antitrust-sensitive transaction. The acquisition is of timber assets in the Pacific Northwest and, as one would expect, the parties hold collectively an inconsequential percentage of the timber assets in that region.¹

Further, as I advised you Friday, we want to make a factual correction to my memorandum of September 1, 1998. Although the closing will occur on the same date, I am informed that the various transactions described will not technically be simultaneous. The first step is that the new investors will contribute cash to the new partnership. The second step is that the new partnership will purchase for cash about 38% of the partnership interests in the old partnership from its existing partners. The final step is that the existing partners will then contribute the remaining 62% of the interests in the old partnership to the new partnership in exchange for a 62% interest in the new partnership, thus completing the formation of the new partnership.

Analysis.

The proposed transaction can be analyzed at any of a variety of levels, none of which should result in a reporting obligation. First, in the broadest view, the proposed

¹ Unfortunately, while the issue has not been analyzed in detail, it appears that the exemption for nonproductive real property probably will not apply.

transaction is essentially equivalent to a transfer for cash of a 38% interest in the existing partnership — a transaction that obviously would not be subject to reporting. At the end of the day the existing partners will own approximately 62% of the new partnership, the new partners will own 38%, and virtually the only asset of the new partnership will be all of the interests in the old one.

Second, the proposed transaction is also equivalent in substance, from an HSR perspective, to a transaction in which new investors contribute cash, the partners in the existing partnership contribute their partnership interests (i.e., the assets of the partnership for HSR purposes) and an "equalizing distribution" of cash is then made to the carryover partners. It is my understanding that, if this approach were taken, no filing would be required because all of these transactions would be viewed as incident to the formation of the partnership. The only reason that a portion of the transaction is structured to include a technical purchase of partnership interests in the old partnership, rather than an equalizing distribution, is that some of these partnership interests have different holding periods and bases than others. There is apparently a tax advantage to selling certain of these partnership interests before contributing the remainder.

Finally, for HSR purposes, the form of the transactions should all be treated as exempt as well. All that is occurring in this transaction is the formation of a new partnership (which is exempt) and the sale of a minority partnership interests in the old partnership (which is also exempt). We are aware of the Premerger Office's position that a transfer of assets undertaken prior to the formation of a partnership may be subject to reporting (if otherwise covered by the rules) notwithstanding that the transferred assets will be contributed to the partnership and that both the seller and buyer will be partners. However, in the current circumstances, the sale is not of assets but rather of 38% of the partnership interests in the old partnership — a transaction that is not independently subject to reporting. Although the new partnership will hold 100% of the interests in the old partnership interests and hence the assets of the old partnership at the end of the day, this result will occur through the contribution of the remaining interests, not through the earlier purchase. Note also that the purchase transaction is not only first in time, but it is also the lesser transaction. The majority of the partnership interests will be acquired through the subsequent contribution.

We would appreciate it if you would discuss these points with your colleagues. We hope you will agree upon reconsideration that these proposed transactions should not be subject to HSR reporting.

Alternative Form of Transactions.

As I informed you Friday, an alternative form for these transactions has also been under active consideration. This form involves two steps: (1) the purchase by the new investors of a 38% interest in the old partnership directly from the existing partners, followed by (2) a contribution by both the original partners and the new investors of all of the

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partnership interests of the old partnership to the new partnership. It is our understanding, confirmed by you in our conversation, that this alternative format would not involve a filing. Both the sale of the partnership interest and the subsequent formation of the partnership would be exempt. We would appreciate confirmation of this advice. However, please do not view this advice as a "solution" to the problem, since the first approach described above may well be the approach taken, regardless of HSR issues.

We are in need of a prompt response on these issues if that is possible. We very much appreciate your cooperation.

called [redacted] 9/14/98 -
this is a formation of a partnership
and is not a purchase of a partnership interest,
and not reportable under H-S h,

(PS)

RS - concurs.