801.90; 801.2; 801.1(c)

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[redacted]

March 2, 1999

VIA FAX (202) 326-2624

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Smith:

This will confirm our telephone conversation of February 22, 1999, during which you advised me that no Hart-Scott-Rodino Pre-Merger Notification is required under the circumstances described below:

A U.S. partnership ("US PS"), which is its own ultimate parent entity, owns approximately $6 million/6% of X Corp. An off-shore corporation ("OS Co."), which is its own ultimate parent entity owns $5 million/5% of the same issuer. US PS and OS Co. are separate entities except that OS Co.'s investment manager is an individual who is also a non-controlling partner of US PS. As OS Co.'s investment manager, this individual receives a fee based on the performance of OS Co.'s portfolio, but holds no beneficial interest in the shares of X Corp. other than his role as investment manager.

US PS and OS Co. are making coordinated purchases of X Corp. Each entity will acquire up to $15 million of X Corp. (which, separately, will not exceed 49% of X Corp.) on the assumption that the holdings of US PS and OS Co. need not be aggregated. If aggregated, the size of persons test and size-of-transaction test would be met.

Eventually, it may be decided that 100% ownership of the shares of X Corp. will be attempted. This transaction would be accomplished by forming a partnership acquisition vehicle of which 49% of the partnership interest would be held by US PS, 49% would be held by OS Co. and 2% would be held by an unrelated general partner.

The reason the new partnership vehicle would be employed would be to allow outside investors to participate in the acquisition. Neither US PS's nor OS Co.'s structure

[redacted]

allows for such outside participation. The newly formed partnership structure has been used by US PS and OS Co. in the past in connection with other acquisitions to allow outside investor participation. The newly formed partnership would not meet the size-of-persons test under Rule 801.11(e).

The issues we discussed are:

1. Is the assumption that the acquisitions by US PS and OS Co. are separate for HSR purposes correct given that neither is controlled by any other entity or person, and neither entity is included within the other, even though a non-controlling partner with US PS is investment manager for OS Co.?

2. Would the FTC staff view the formation of the partnership acquisition vehicle to be a transaction in avoidance under 801.90 given that there are legitimate business justifications for the structure and that the entities have utilized this structure in the past?

Based on our discussion, it is my understanding that regarding the first issue, US PS and OS Co. should be considered separate entities with the result that both entities may acquire up to $15 million of X Corp. before a filing would be required under HSR.

As to the second issue, it is my understanding that the utilization of the partnership acquisition vehicle under the circumstances described above would not be viewed as a transaction in avoidance based on the presence of legitimate business justifications for the structure.

Please let me know if this letter does not satisfactorily set forth the substance of our discussion. Thank you for your attention to the above.

Very truly yours,

[redacted]

3/2/99 - Letter is revision of 3/1/99 letter on which I provided comments. As revised, I am in agreement with its conclusions.

RBSmith

801.40; 802.30

STATEMENT OF FACTS

Basic Facts

In 1993, a German company ("G"), through a subsidiary ("GUS"), organized a joint venture in the form of an LLC ("F") with an American manager ("A"). GUS took a 70% interest in F, and A took a 30% interest in F. G filed under § 801.40 with respect to the formation and capitalization of F.

In 1997, a Dutch company ("D") acquired 95% of the voting securities of GUS. D and G submitted HSR filings with respect to that transaction. At the time, F was an acquired entity because of GUS' controlling interest in it.

A plan is now underway to reorganize and streamline D's U.S. operations. D has an existing subsidiary called "DUS." D's ownership of DUS is under a chain of ownership that is separate from the chain of ownership leading from D to F. Hence, the plan is to move F under DUS. GUS will contribute its 70% interest in F to DUS in return for stock of DUS. In addition, A will contribute his 30% interest in F to DUS in return for stock of DUS. F will thereby become a single-member LLC owned by DUS (and ultimately by D). The voting securities of DUS being acquired by A will be valued at less than $15 million.

Basic HSR Analysis

(a) D's roll-up of F is not a reportable event under the new Formal Interpretation, because D filed in 1997 when it took control of F from G;

(b) The acquisition of DUS stock by GUS is an intraperson transaction; and

(c) A would have to file for his acquisition of voting securities of DUS if the jurisdictional tests were met. As it happens, A's acquisition will be exempt by reason of § 802.20

Additional Facts

CIP is a partnership owned 99% by F and 1% by A. The planned reorganization of D's U.S. operations also involves the consolidation of CIP under DUS, as well as the conversion of CIP into a corporation in order to achieve a benefit under state law. Therefore, on the closing date, A will contribute his 1% partnership interest in CIP to a newly formed corporation ("CI, Inc.") in return for 1% of the voting securities of CI, Inc. At the same time, F will contribute its 99% partnership interest in CIP to CI, Inc. in return for 99% of the voting securities of CI, Inc.

Immediately afterwards, as described above, GUS and A will collectively contribute 100% of the ownership interests in F to DUS. Ownership of 100% of F will indirectly confer upon DUS ownership of 99% of the voting securities of CI, Inc. (Through D's indirect control of F, D will hold those voting securities even before GUS contributes its ownership interest in F to DUS.) In addition, A will immediately contribute his 1% stock interest in CI, Inc. to DUS in exchange for stock of DUS. At the end of the day, DUS will own 100% of CI, Inc. (1% directly and 99% through F).

It has not yet been determined whether A is a $10 million person.

Issues Raised by Additional Facts

(a) Do the described steps constitute a potentially reportable "roll-up" of CIP, or is the roll-up subsumed within the formation transaction for CI, Inc.? Does the answer hinge on whether the formation of CI, Inc. is reportable under § 801.40? (Formation of CI, Inc. will probably trigger § 801.40 if A is a $10 million person; § 801.40 will <u>not</u> come into play if A is not a $10 million person.)

(b) If the Premerger Office considered both the roll-up of CIP and the formation of CI, Inc. to be reportable events, would multiple filings be required?

(c) Does the immediate contribution of the stock of CI, Inc. to DUS make the formation of CI, Inc. a non-event under the continuum theory? If so, how does that affect the reportability <u>vel non</u> of the roll up of CIP? (Note that the acquisition by DUS of the voting securities of CI, Inc. is an intraperson transaction, because both entities will be controlled by D.)

3/3/99 Discussed with sender. Advised that position PNO is that if an 801.40 filing was made for formation of F, an LLC, then interests in F are always considered voting stock. Sender confirmed that D's ownership chain down to DUS and down to F are both through control of corporations, i.e., there are no intervening partnerships or other entities. New LLC Formal Interpretation not applicable. D's roll-up of F is exempt under 802.30. Conversion of CIP partnership into CI, Inc., a corporation, is potentially reportable under 801.40 if jurisdictional tests, including A being a $10 MM person, are met. This is only potentially reportable event.

R.B. Smith