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file



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Federal Trade Commission
6th and Pennsylvania Avenue
Room 301
Washington, D.C. 20580

APR 1 12 54 PM '86
FEDERAL TRADE COMMISSION
NOTIFICATION OFFICE

Dear Ms. Williams:

This letter will confirm our discussion of March 31, 1986 regarding Hart-Scott-Rodino premerger notification requirements. In the case I presented to you, a company with total assets in excess of \$100,000,000 would sell the assets of one of its divisions to a newly-formed entity (Newco). Newco would purchase the assets for approximately \$15,000,000. Newco would have an initial capitalization of \$1,000 and would, just prior to the asset purchase, raise the \$15,000,000 in cash required for the purchase through the issuance of preferred stock (\$10,000,000) and notes (\$5,000,000). The cash would be paid immediately over for the assets. You informed me that in such a situation no Hart-Scott-Rodino premerger notification would be necessary because of an informal FTC staff position which holds that a newly-formed entity generally should not include funds used to make an acquisition in determining its size.

We also discussed the proposed amendment to 16 C.F.R. §801.11 which would codify the staff's informal position. The preamble to the proposed regulation, which appears at 50 F.R. 38749-38751, states:

The Commission proposes to amend §801.11 to codify a longstanding informal position of the staff that a newly-formed entity generally should not include funds used to make an acquisition in determining its size. Under this proposed rule, if an entity's only assets are cash that will be used to make the acquisition and securities of the entity it is acquiring, it generally will not have to file for that acquisition because the new entity will be deemed too small to meet the act's size-of-person test.

...

In advising newly-formed persons of their obligation to prepare balance sheets, the Commission staff has advised that acquiring persons should not include as assets cash or loans that will be used to make an acquisition. The Commission now proposes to adopt this staff position and incorporate it in a new §801.11(e) which establishes the procedure for calculating the total assets of newly-formed persons.

You informed me that the proposal has not been adopted, as it is one of several proposals as to which a number of comments were received, and will not be adopted in the near future. You are not aware, however, of any comments received by the FTC which would change the proposed asset-calculation regulation. At the present time, however, the staff's informal position is still in effect and no filing will be required to be made given the facts of our proposed transaction.

Thank you for your assistance in this matter.

Very truly yours,



4/7/86

ALLEN MR. [REDACTED] HAS INDICATED THAT THE PMN STATE WAS IN AGREEMENT WITH THE FACTS AS STATED. HOWEVER, DID POINT OUT TO MR. [REDACTED] THAT A REFERENCE TO NO REGULARLY PREPARED BALANCE SHEET (FINANCIALS) SHOULD BE MADE.

h.w.