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April 11, 1985

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PREMERGER  
NOTIFICATION  
OFFICE

**BY ZAP MAIL**

Mr. Patrick Sharpe  
Compliance Specialist  
Premerger Notification Office  
Bureau of Competition  
Room 303  
Federal Trade Commission  
6th and Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Application of Hart-Scott-Rodino Antitrust  
Improvements Act of 1976 (the "Act") and  
the rules promulgated thereunder (the "Rules")

Dear Mr. Sharpe,

Reference is made to our telephone conversation of April 10, 1985 during which we discussed the treatment of certain types of indebtedness and how such indebtedness affects the computation of the acquisition price for purposes of determining the dollar value of assets to be acquired. Pursuant to your suggestion, I am submitting this letter for the consideration of members of the premerger notification staff.

**Facts:** The specific facts are as follows: Acquiring Person "P" proposes to acquire the real estate and personal property comprising a hotel (the "Hotel") from Acquired Person "S". It may be assumed that P and S satisfy the size-of-person threshold standards of the Act. The Hotel is presently subject to a mortgage which secures a loan of approximately \$13,000,000 (the "Loan"). The Loan is "non-recourse" in nature, i.e., in the event of a default, the remedy of the lender is limited to foreclosure of its lien on the Hotel and no person or entity has any direct or personal liability with respect thereto. In connection with the acquisition of the Hotel, P will pay to S \$6,250,000 and will acquire the Hotel "subject to" the lien created by the Loan, but will not assume the Loan. P will also assume payments on the Loan. *13 mm loan, but counsel claims no one assumes liability for the loan!*

**Issue:** The issue is whether the acquisition price should include the Loan, i.e., is the acquisition price \$6,250,000 or \$19,250,000?

  
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Discussion: Section 801.10(c)(2) of the Rules indicates that the acquisition price of assets to be acquired includes the value of all consideration for the assets. The Background Analysis to the Act and Rules further indicates that such consideration includes liabilities assumed, the theory being, presumably, that the purchaser is providing consideration by assuming liabilities of the seller since the seller is thereby relieved from a personal obligation. In the factual situation described above, no similar consideration flows to S since S has no personal liability with respect to the Loan and because, in any event, the Loan is not being assumed by P.

By way of comparison, it seems clear that if the Hotel was contributed by S to its wholly-owned corporation as the corporation's sole asset and P then acquired all of the capital stock of such corporation, the acquisition price would be considered \$8,250,000, i.e., the amount of consideration being paid to the seller. The fact that the assets of such corporation would be subject to certain indebtedness would be irrelevant since the selling shareholder would have no personal liability with respect to such debt and the purchaser would not be assuming any such personal liability.

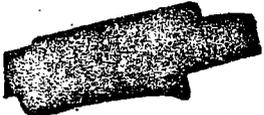
It seems to me that the transactions described are, from an economic and certainly from an antitrust standpoint, substantially equivalent and that there is no policy reason for the asset transaction to be reportable when the stock transaction is not. However, if a distinction is to be made between a stock vs. an asset structured transaction, I would contend that the instant situation is more similar to a stock transaction inasmuch as S has no personal liability with respect to the Loan and P is not assuming any personal liability.

I would appreciate if you would, as you indicated in our conversation, circulate this letter to various members of the staff and contact me with your conclusion at your earliest convenience.

Thank you for your consideration of this matter.

Very truly yours,





I believe this is a \$19 mm plus transaction.  
and is reportable under H-S-R.  
Patrick

Agreed	Disagreed
DA	VC
AS	
JS	
ST	



called 4-12-85 consensus opinion is that \$13 mm payments are included in value