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File

August 29, 1985

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FEDERAL EXPRESS

Mr. Andrew M. Scanlon  
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Premerger Notification Office  
Federal Trade Commission  
Room 301  
Sixth and Pennsylvania  
Washington, D.C. 20580

Dear Mr. Scanlon:

The purpose of this letter is to summarize and confirm certain informal advice that [redacted] and I received from you regarding the reportability under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") of a proposed transaction involving a client of this firm. You advised that a letter such as this is appropriate when informal advice has been given with regard to a particular transaction. I will first summarize the facts relevant to the proposed transaction and then what we understood to be your analysis with respect to reportability. You concluded that the transaction as [redacted] and I described it was not reportable under the Act.

I.

This firm represents a corporation ("Person A") which proposes to acquire 100% of the outstanding stock of an unrelated corporation ("Person B"). As of its last annual financial statement (October 31, 1984), Person A had annual sales of less than \$100 million and, as of its last regularly prepared balance sheet, it had assets valued at less than \$100 million. Person B has assets and annual net sales in excess of \$10 million. The proposed transaction will satisfy the size-of-transaction test and the commerce test of the Act.

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Since the end of its last fiscal year (October 31, 1984), Person A has acquired, through a newly formed subsidiary ("Person C"), substantially all of the assets of another unrelated company ("Person D"). The combined annual net sales of Person A and Person C for the current fiscal year will exceed \$100 million. (The value of the combined assets of Person A and Person C as of the last regularly prepared balance sheet of Person A is less than \$100 million.)

II.

The issue discussed by you, [REDACTED] and me on August 27, 1985, was whether the subsequent acquisition of Person C by Person A would require the annual net sales of Person A to be recomputed pursuant to §801.11(b).

Section 801.11(c) states that the annual net sales of a person are as stated in the last regularly prepared annual statement of income and expense of that person. Section 801.11(b) provides in relevant part that:

" . . . the annual net sales and total assets of a person shall be as stated on the financial statements specified in [§801.11(c)]; provided: (1) that the annual net sales and total assets of any entity included within such person are consolidated therein. If the annual net sales and total assets of each entity included within the person are not consolidated in such statements, the annual net sales and total assets of the person filing notification shall be recomputed to include the nonduplicative annual net sales and nonduplicative total assets of each such entity . . ."

[REDACTED] and I were of the opinion that the foregoing language in §801.11(b) was intended to include within the annual net sales of a person, the annual net sales of any entities that were not consolidated in the last regularly prepared statements of such person for whatever reason (e.g., minority ownership). We felt that the clear intent of the rules promulgated under the Act was to exclude a transaction as described above from the reporting requirements of the Act.



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You agreed and stated that the history of the rulemaking under the Act supported this conclusion. The background information to Rule 801.11(c) stated:

"The earlier rules would also have required restatement of the annual net sales and total assets to reflect certain changes occurring since the beginning of the fiscal year. See the Statement of Basis and Purpose to paragraph (b). The final rule abandoned that approach and instead inserted paragraph (c)."

The background information to paragraph (b) elaborates:

"Paragraph (b) of original 801.25 would have required a different restatement of the financial statements if a material change in net sales or total assets had occurred after the date of the statement, which could reasonably have been expected to increase the annual net sales or total assets to the levels of section 7A(a)(2), the rule required either preparation of a new statement or compliance with the act as though the test of section 7A(a)(2) had been satisfied. Revised subparagraph (b)(2) preserved a similar provision and encompassed dispositions as well as acquisitions since the last statement. However, no consistent easily administrable way could be found to require restatement of annual net sales when a business had been acquired or disposed of after the beginning of the fiscal year. The final rule abandons the approach as not worth the added complexity."

### III.

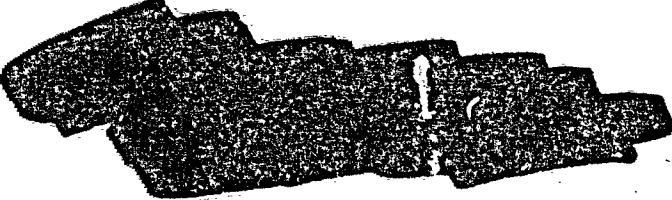
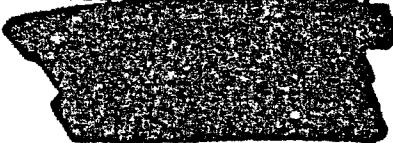
For the reasons described above, and assuming the facts are as stated in this letter, it was your conclusion that the



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transaction described in this letter was not reportable under the Act. For these reasons, the participants in the proposed transaction intend to proceed without reporting under the Act.

Very truly yours,



*OK*  
*8/29/85*

