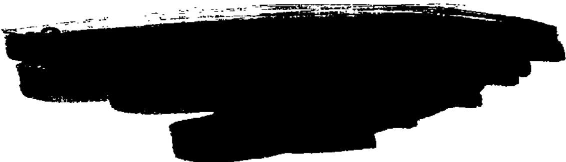
§ 801.1 (c)
hold



A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS

September 28, 1988

RECEIVED
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PREMERGER NOTIFICATION OFFICE

Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington D.C. 20580
Attn: Patrick Sharp, Compliance Specialist

Gentlemen:

Pursuant to a telephone conversation with Patrick Sharp of your office, we are writing this letter on a "no-name" basis to ask whether any filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") or regulations promulgated thereunder (the "Regulations" or "Reg.") is required on account of the acquisition of voting securities of a client, which is a public company (hereinafter, "Parent"), or its public indirect subsidiary (hereinafter, "Subsidiary") by the related entities (the "Investors") described below. This letter is written based on our understanding that we will not be required to disclose to you the identity of our client or the Investors without our client's consent.

Parent and Subsidiary each has annual net sales or total assets of $100,000,000 or more. We believe the Investors have total assets, excluding voting securities of Parent and Subsidiary, exceeding $10,000,000. The other information contained in this letter relating to Investors and their investment in Parent and Subsidiary is taken from the Investors' Schedules 13D filed with respect to their Parent and Subsidiary investments.

The Investors engage in various aspects of the securities business, primarily as investment advisors to various institutional and individual clients. Until recently, Investors had reported their holdings of voting securities of Parent and Subsidiary on Schedules 13G, a filing that is permitted for certain institutional investors respecting investments made

without a purpose of changing or influencing control of an issuer. However, the Securities and Exchange Commission ("SEC") recently instituted proceedings against certain of the Investors and related entities with respect to their reporting on Schedule 13G their investments in a company ("T Co.") unrelated to Parent or Subsidiary.

The SEC found that those Investors and related entities formed a group owning in excess of five percent of T Co. for the purpose of changing or influencing control of T Co. In effectuating their settlement of such SEC claims (without admitting or denying them), the Investors have commenced filing Schedules 13D, instead of Schedules 13G, in respect of a number of their investments, including their investments in Parent and Subsidiary.

In their Schedules 13D, the Investors state that "implementation of their investment philosophy may from time to time require action which could be viewed as not completely passive." The Schedules 13D add that, as a result of the Investors' analysis of the companies in which they invest, the Investors

> "may issue analysts reports, participate in interviews or hold discussions with third parties or with management in which the [Investors] may suggest or take a position with respect to potential changes in the operations, management or capital structure of such companies as a means of enhancing shareholder values. ...
>
> "Each of the [Investors] intends to adhere to the foregoing investment philosophy with respect to the Issuer. However, none of the [Investors] intends to seek control of the Issuer or participate in the management of the Issuer.
>
> . . .
>
> "With respect to voting of the Securities, the [Investors] have adopted general voting policies relating to voting on specified issues affecting corporate governance and shareholder values. Under these policies, the [Investors] generally vote all securities

over which they have voting power in favor of cumulative voting, financially reasonable golden parachutes, one share one vote, management cash incentives and pre-emptive rights and against greenmail, poison pills, supermajority voting, blank check preferred stock and superdilutive stock options."

The Investors consist of A, an individual; P, a corporation; and the other corporations referred to below. A is the majority stockholder of P, which is described in the Investors' Schedules 13D, as the "ultimate parent entity for a variety of companies engaged in the securities business... ." P owns 100% of the voting stock of corporations S1 and S2 and controls the other corporations comprising the Investors. All of the Investors other than P are attributed direct beneficial ownership of voting securities of Parent or Subsidiary, but only the holdings of S1 and S2 are significant and will receive further discussion.

S1 and S2 are each an investment adviser registered under the Investment Advisers Act of 1940. S1 is a money manager providing discretionary managed account services for employee benefit plans and private investors. S2 provides discretionary managed account services for entities that are not among, but are apparently related to, the Investors.

The following table sets forth certain information relating to the ownership by S1 and S2 of Parent and Subsidiary voting securities:

	Parent Voting Securities		Subsidiary Voting Securities	
	Percent of Outstanding Voting Power	Aggregate Purchase Price (3)	Percent of Outstanding Voting Power	Aggregate Purchase Price (3)
S1	(1)	$41,271,448	14.16%	$39,602,450
S2	(1)	18,535,992	4.83%	13,581,250
	(2)	$59,807,440	18.99%	$53,183,700

(1) Less than 10%.

(2) Slightly less than 10%.

(3) Funds provided through the accounts of certain investment advisory clients and, in the case of S1, through borrowings from client margin accounts.

S1 and S2 each has the sole power to vote or direct the vote and to dispose or direct the disposition of the voting securities referred to in the above table, but the clients of S1 and S2 have the sole right to receive and, subject to the notice, withdrawal and/or termination provisions of the investment advisory arrangements, the sole power to direct the receipt of dividends from, and the proceeds of sale of, such voting securities. Neither A nor P has any economic interest in any of such voting securities.

A preliminary question is whether S1 or S2, and therefore, P or A "holds" voting securities of Parent or Subsidiary as contemplated by the Regulations. According to Reg. §801.1(c), "the term 'hold' ... means beneficial ownership, whether direct, or indirect through ... controlled entities... ." The release promulgating the Regulations, 43 FR 33450 (1978), states that "the indicia of beneficial ownership...include...the right to vote the stock or to determine who may vote the stock, the investment discretion (including the power to dispose of the stock)."

If S1 or S2 "holds" the voting securities of Parent, then filings should be required under the Act with respect to such holdings unless such holdings are "solely for the purpose of investment..." within the meaning of Reg. §802.9. In its letter dated August 19, 1982, the Bureau of Competition advised [redacted] that the Bureau construes such term "to apply only to purchasers who intend to hold the voting securities as passive investors," but material quoted above from the Investors' Schedules 13D discloses that the Investors may not be passive. Accordingly, the exemption provided by Reg. §802.9 may not be available with respect to the Investors' holdings of Parent voting securities.

If S1 or S2 "holds" the voting securities of Subsidiary, no exemption appears available, and filings should be required under the Act with respect to such holdings.

We would appreciate your earliest convenient response. Please contact me if you desire additional information.

Very truly yours,