7A(a)(3)

[redacted]

August 8, 1989

In re: Sale of Fixed Assets of [redacted]

Our file: [redacted]

Lynn Guelzow, Esq.
Pre-Merger Notification Office
Room 303
Federal Trade Commission
Sixth Street & Pennsylvania Avenues NW
Washington, DC 20580

FEDERAL EXPRESS

Dear Ms. Guelzow:

This letter will set forth in more detail the asset acquisition involving the above businesses which we discussed with you by telephone on August 3, 1989. [redacted] is counsel for the acquired person(s), [redacted] is counsel for the acquiring person, [redacted]

As we explained, our question is whether the $15,000,000 asset acquisition "size of the transaction" test of 16 C.F.R. §802.20(a) is met. This, in turn, depends upon application of the definitions of "ultimate parent entity" and "control" in 16 C.F.R. §801.1, where assets are acquired from three separate businesses with common shareholders or partners. As discussed below, it appears that the size of the transaction test would not be met if the three businesses from which assets are to be acquired are separate ultimate parent entities and separate "acquired persons," but would be met if these three businesses were considered part of a single person.

Description of "Acquired Person(s)."

[redacted] has signed a letter of intent to acquire all fixed assets of [redacted] plus inventory and management of uncompleted contracts of [redacted] as described more fully below. [redacted] Corporation whose voting stock is owned as follows:

[redacted]

There are no contractual agreements giving any person or estate the right to vote or control the vote of any other shareholder, or to designate 50% or more of the directors of [redacted]. The executor of each estate has full power to vote, sell or dispose of its shares. The executor of the estates of [redacted] is the same person, [redacted] The executor of the estate of [redacted] is [redacted]. At the time of his death, [redacted] was an adult married individual. Under his will, his beneficiaries are his spouse and his children. [redacted] died in [redacted] died in [redacted] died in [redacted]. Together, the stock held by the two estates [redacted] with a common executor totals [redacted] voting stock.

[redacted] We can provide you more detailed information on [redacted] and its operations if you wish.

[redacted] is a [redacted] corporation. Its voting stock is owned 20% each by the three estates and two adult individuals that are shareholders of [redacted] It has no employees. It owns [redacted] It receives payments of royalties and rents from [redacted]

[redacted] is a [redacted] partnership. Its partners are the three estates and two adult individuals that are stockholders of [redacted] Each partner has the right to 20% each of its profits, and upon dissolution would have the right to 20% each of its assets. Like [redacted] it has no employees, but receives royalties and rents from [redacted] Its principal business is [redacted]

geographic areas listed above in which [redacted] does business, except for [redacted]

Value of Assets.

[redacted] will pay approximately $2,000,000 for the fixed assets of [redacted] $6,000,000 for the fixed assets of [redacted] and $9,700,000 for the fixed assets of [redacted] will not purchase cash or accounts receivable. In addition, [redacted] will purchase all saleable [redacted] material inventories, and usable spare parts of [redacted] at closing. Inventory of [redacted] as of its March 31, 1989, balance sheet was $978,521.64. Inventory has been consumed during the summer construction season, and it is estimated that saleable inventory as of August 31, 1989 would be approximately $500,000.

[redacted] will also manage [redacted] uncompleted at closing, in exchange for a 5% management fee and 50% of net profits thereon, after deduction of the management fee. [redacted] will receive 50% of any net profits after deduction of the 5% management fee. Escrow accounts will be established at closing, from which payments will be made to [redacted] in accordance with the above management fee and share of profits, if any. Any losses in excess of the escrow accounts will be the responsibility of [redacted]

The parties' best estimate of the profit payable to [redacted] for uncompleted contracts to be managed by [redacted] is as follows:

[redacted]	-	$16,000,000
	-	6,500,000
Total Contract Revenue	-	$22,500,000
Estimated profit percentage	-	6.2%
Estimated Profit	-	$ 1,395,000
Less [redacted] Management fee (5% of contract revenue)	-	$ 1,125,000
Net Profit	-	$ 270,000
[redacted] Consideration (50%)	-	$ 135,000

Since [redacted] are not operating companies, they have no inventory and no [redacted] contracts.

In summary, the value of the assets to be sold by [redacted] the consideration to be received by each from [redacted], is approximately as follows:

[redacted] $ 2,000,000
$ 6,000,000
$10,335,000 (fixed assets - $9,700,000; inventory - estimated $500,000; uncompleted contracts - estimated $135,000).

Ultimate Parent Entities.

A "person" is "an ultimate parent entity and all entities which it controls directly or indirectly." 16 C.F.R. §801.1(a)(1). An ultimate parent entity is "an entity which is not controlled by any other entity." 16 C.F.R. §801.1(a)(3). Natural persons, corporations, partnerships and estates of deceased natural persons are all separate "entities." 16 C.F.R. §801.1(a)(2). "Control" is defined as follows:

> The term "control" (as used in the terms "control(s)," "controlling," "controlled by" and "under common control with") means:
>
> (1) Either. (i) Holding 50 percent or more of the outstanding voting securities of an issuer or
> (ii) In the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or
> (2) Having the contractual power presently to designate 50 percent or more of the directors of a corporation...

16 C.F.R. §801.1(b). A natural person who controls 50% or more of voting stock of a corporation (or has the right to 50% or more of the profits, or upon dissolution assets, of a partnership) will be that corporation's or partnership's ultimate parent entity. 16 C.F.R. §801.1(a)(3) (example 2).

Only if the holdings of shareholders or partners were aggregated together would the 50% or more control threshold be met. There is no reason for such aggregation in this case. Although "the holdings of spouses and their minor children shall be holdings of each of them," 16 C.F.R. §801.1(c)(2), parents and minor children are not involved in this case. [redacted] the two natural persons, are not minors but married adults.1/

1/ It does not appear that §801.1(c)(2) requires attribution of holdings of estates of parents and minor children to each other. However, even if it did, [redacted] was not a minor at death, but a married adult with

Since no entity which is a shareholder of [redacted] holds 50% or more of the voting securities of [redacted] it appears that no shareholder of [redacted] "controls" that entity and is its ultimate parent entity under 16 C.F.R. §801.1(a)(3) and (b). Rather, it appears that [redacted] is its own "ultimate parent entity." Since [redacted] appears to be its own ultimate parent entity, it would be a separate "person" as defined in 16 C.F.R. §801.1(a)(1). For the same reasons, it appears that no shareholder of [redacted] or partner of [redacted] "controls" those businesses, and that each should be its own ultimate parent entity, and a separate person. If this is correct, then no acquired person would meet the $15,000,000 size of the transaction test of §802.20(a).[2/]

In the above analysis, we have treated the stock and partnership interests of the three estates as held by the estates rather than their beneficiaries. This appears consistent with consideration of an estate as a separate "entity" under §801.1(a)(2). However, even pouring over the stock ownership interests of the estates to their beneficiaries would not result in the two natural persons, [redacted] holding 50% or more of the stock of [redacted] The beneficiaries of the estate of [redacted] spouse and his minor children. The remaining two estates, [redacted] together, own only 7-1/2% of the stock of [redacted] and addition of this stock to the holdings of the two natural individuals, [redacted] and [redacted] would not result in either of their ownership interests exceeding 37-1/2% or, if divided equally, 33-2/3%. We can provide you with a more detailed analysis of the beneficial interests in the estates if you deem it relevant.

At the conclusion of our telephone conversation, you indicated that it did not appear that any shareholder or partner would be in control of [redacted] so that each should be its own ultimate parent entity and a separate acquired person, and that a Hart-Scott-Rodino filing would not be necessary. However, you also indicated that our factual situation was not a common one,

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children. Attribution of the holdings of the estates of [redacted] would not result in common control of any business. The relevant percentages would be [redacted] were [redacted]. Even if the holdings of the estate of [redacted] were considered commonly held with his parents' estates, the three estates as a group would not "control" [redacted] These three estates hold only 40% (32-1/2%, 2-1/2% and 5%) of its voting stock. These three estates, however, together hold 60% of the voting stock of [redacted] and 60% of the partnership interests of [redacted] However, the assets to be acquired from, and the consideration to be paid to, [redacted] together total only approximately $8,000,000.

2/ As noted in footnote 2, aggregation of [redacted] with each other, but not with [redacted] would not satisfy this test.

and that you would review this letter, discuss it with your colleagues, as appropriate, and telephone us with your final advice.

We very much appreciate your time and courtesy in discussing this factual situation with us in our telephone conversation, and in reviewing the information set forth in this letter. If there is any information which you need, or would like to have, please call us as soon as possible. Again, thank you for your consideration and cooperation.

Sincerely yours,

[redacted]

[redacted]

[redacted]

8-11-89 - called [redacted] the transaction would not be reportable - Size of transaction is not met as the holdings are not aggregated