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July 31, 1995

BY FACSIMILE 202-326-2050

Mr. Richard Smith, Attorney
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Smith:

As a follow up to our recent telephone conference, I am writing to request an informal staff interpretation relating to Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the Federal Trade Commission's implementing rules (the "Act").

As we discussed, we represent a partnership organized under [REDACTED] which is its own "ultimate parent entity" under the Act's definitions. This client's only business activity has been to hold nonvoting stock in Corporation A (hereinafter referred to as the "Corporation A Stock"). The only asset held by the client other than the Corporation A Stock is a small amount of cash. The client has derived no income from its investment in Corporation A or any other activity. The only financial statements that the client has prepared have been in connection with its annual income tax returns, which include a balance sheet. In preparing the tax return balance sheets each year, the client has always valued its Corporation A Stock at acquisition value, which is substantially less than \$10 million. As a result, its total assets are reflected on its most recent annual tax return balance sheet at less than \$10 million. The client has also prepared a proforma balance sheet in connection with state regulatory approval of the transaction described in the next paragraph on which, consistent with the accounting principles used in preparing the client's annual tax

[REDACTED]

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return balance sheets, the Corporation A Stock and, therefore, the client's total assets are reflected as having a value of less than \$10 million. However, the current fair market value of the Corporation A Stock held by the client has been determined to exceed \$10 million.

Corporation A is proposing to merge with Corporation B, with the surviving entity being Corporation B. As a result of this proposed merger, the client will receive voting stock of Corporation B having a value in excess of \$15 million. The person in which Corporation B is included has total assets and annual net sales in excess of \$100 million. Other persons, which will be acquiring voting securities of Corporation B as a result of the proposed merger, have total assets and/or annual net sales in excess of \$10 million. A premerger notification will be filed under the Act with regard to the merger itself and, possibly, with regard to the acquisition of Corporation B voting securities by at least one other person.

Based on 16 C.F.R. sec. 801.11(c)(2) and Interpretation 162 contained on pages 134 and 135 of the ABA Premerger Notification Practice Manual, we are proposing to advise the client that it need not file a premerger notification under the Act with regard to its acquisition of Corporation B's voting securities (the "Transaction") because the Transaction does not satisfy the Act's "size-of-person" test. This proposed advice assumes that the last annual tax return balance sheet of the client qualifies as its "last regularly prepared balance sheet" for purposes of sec. 801.11(c)(2). It further assumes that if this first assumption is not correct, the pro forma balance sheet prepared in connection with the transaction, which reflects the Corporation A Stock at acquisition value, may be used in determining whether the client will satisfy the "size-of-person" test, even though the current market value of the Corporation A Stock exceeds \$10 million. By this letter, we are asking for an informal staff interpretation confirming the correctness of these assumptions.

[REDACTED]

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I will contact you by telephone later this week to discuss this request in further detail.

Very truly yours,

[REDACTED]

[REDACTED]

8/2/95 - Called writer and advised that it was the view of the PMN office that the balance sheet prepared by the partnership for submission with its yearly federal tax filing was a "regularly prepared" balance sheet and the last one could be used to determine its size-of-person. The fact that the stock holdings were carried on an acquisition price basis was fine and did not compromise the ability to use such balance sheet for size-of-person purposes.

RS Smith