

801.40; 801.2(d)

October 23, 1995

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Bureau of Competition
Room 303
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6th Street and Pennsylvania Avenue, N.W.
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Dear Mr. Smith:

The purpose of this letter is to follow up on our telephone conversation of Friday, October 20. At that time, I presented the substance of the attached transaction description to you and we discussed several issues relating to the analysis of these transactions under the premerger rules. I have set forth below the matters we discussed and my understanding of your advice.

1. Is the joint venture regulation (§ 801.40) applicable to the analysis of these transactions?

No. To the extent that § 801.40 is applicable, the formation of H appears to have been previously completed. The IPO and mergers would be considered transactions subsequent to the formation. In addition, § 801.40(a) contains language specifically excluding merger transactions from the formation of a joint venture.

2. How is the size-of-person of H determined?

The financial statements prepared for the IPO filing can be considered to contain the first regularly prepared balance sheet of H. On this basis, H is initially a less-than-\$10 million person. However, the premerger staff does not treat "simultaneous" transactions as such for analytic purposes. For purposes of premerger analysis, the transactions must be considered to occur sequentially. In the first merger in the sequence, H would have its "nominal" financial statements, but in each succeeding merger, the financial statements of each previously merged company would have to

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be included. The "largest" merger may generally be considered to occur first (and, in this case, will be exempt from notification). Here, after H has acquired B₁, the acquisition of B₂ appears reportable, but the acquisitions of B₃ through B₆ would not appear reportable. [If alternative orders are examined, it appears that if the acquisitions were sequenced as B₃ through B₆ followed by B₁ and then B₂, H would be considered a \$10 million person prior to the acquisition of B₁ and a \$100 million person prior to the acquisition of B₂. In this ordering the acquisitions of both B₁ and B₂ would appear reportable. Is there any reason that the staff would require that this sequence be used in preference to the "largest first" approach?]

For purposes of analyzing the acquisitions of voting securities of H by the shareholders of the merged corporations, H should be considered to have total assets and annual net sales which include those of B₁ through B₆. For example, notwithstanding the sequential nature of the analysis discussed above, the shareholders of B₁ would be considered to acquire securities in a \$100 million person, not in the original H (a less-than \$10 million person).

Please call me at [redacted] and let me know whether I have correctly understood your advice. Thank you for your time and assistance with this matter.

Very truly yours
[redacted]

Enclosure

10/27/95 - talked with writer. As to 1., the j/o formation seems to be in connection with a subsequent merger. (Also joining persons are not 100% in eye and thus not reportable under 80040.) As to brackets, italicized sentences above, the filing persons must also view this way (since PMN office does not recognize simultaneity) and must make report if this order results in two reportable transactions (which it seems to do).

RBSmith

TRANSACTION DESCRIPTION

H is a corporation newly organized for the purposes of the transactions described herein. Six wholly owned subsidiaries (S₁ - S₆) have also been organized. In connection with the organization of H, a minimal amount of securities was issued to each of two individuals (I₁ and I₂), each of whom became a 50% shareholder of H. I₁ and I₂ are executive officers of B₁ (described below), but do not own controlling interests in that corporation.

H and S₁ - S₆ have entered into six merger agreements with six unrelated and mutually unaffiliated operating companies (B₁ - B₆), all corporations. The merger agreements provide that S_n is to merge into B_n. B_n will become the wholly owned subsidiary of H and the shareholders of B_n will receive voting securities of H (and, in some cases, cash as well). H has filed with the SEC to conduct an initial public offering. All six mergers are to close simultaneously with the initial public offering. At the same time, the shares in H originally issued to I₁ and I₂ will be surrendered and canceled.

Audited financial statements of H were prepared in connection with the preparation of the SEC filing. These financial statements show nominal assets. Neither I₁ nor I₂ has \$10 million in assets or annual net sales.¹ None of B₁ - B₆ is engaged in manufacturing.² B₁ has total assets greater than \$10 million, but less than \$100 million; its annual net sales exceed \$100 million. B₂ (together with its ultimate parent) has total assets greater than \$10 million, but less than \$100 million; its annual net sales exceed \$25 million, but are less than \$100 million. B₃ - B₆ (together with ultimate parents, where applicable) each have total assets of less than \$10 million and annual net sales greater than \$10 million, but less than \$25 million.

¹ Counting investment assets, voting securities, income producing assets and the assets and annual net sales of businesses which they respectively control.

² I.e., their revenues are characterized in SIC codes outside of industries 2000-3999.