

802.20(a); 801.10(b) [partner's purchase of other partner's interest]

1 October 1996

Via Hand Delivery

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Bureau of Competition
Federal Trade Commission
Room 323
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Valuing a Partnership's Assets Pursuant to Rule 801.10(b)

Dear Dick:

On behalf of my client [REDACTED], I am writing to confirm my traditional understanding, as well as the advice you graciously provided in our recent discussion, that for purposes of applying 15 U.S.C. § 18A(a)(3) and 16 C.F.R. §§ 801.1(h)(1), 801.10(b) and 802.20(a) to a transaction whereby a person buys out its remaining partner in a joint venture partnership, the size of the transaction is always the current gross fair market value of the partnership's assets regardless of the acquisition price for the partnership interest or any value which could be imputed therefrom.

I. SUMMARY OF THE RELEVANT FACTS

The Parties [REDACTED] the ultimate parent entity of the acquiring person and has annual net sales and total assets each exceeding \$100 million. [REDACTED] is an ultimate parent entity of the acquired entity, which is engaged in manufacturing cable assemblies and subsystem harnesses. The acquired person has annual net sales exceeding \$10 million, although its most recent balance sheet states that its total assets have a book value below \$10 million.

[REDACTED]

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Formation of the Joint Venture Partnership: In July 1994, [REDACTED] wholly-owned subsidiary [REDACTED] acquired fifty percent of [REDACTED] assets for approximately \$7 million plus the assumption of certain liabilities. This transaction was exempted by Rule 802.20(a) because neither the purchase price nor the fair market value exceeded \$15 million, and there were no other assets or voting securities the value of which needed to be aggregated. [REDACTED] then immediately contributed these assets to a newly formed partnership, [REDACTED], in exchange for a fifty percent partnership interest. [REDACTED] then contributed the remainder of its assets and liabilities to [REDACTED] in exchange for the remaining fifty percent interest in [REDACTED]. Partner's profits and its assets in the event of dissolution. The formation of [REDACTED] was also not reportable. See, 52 Fed. Reg. 20061 (May 29, 1987). In connection with the formation of the Partnership, [REDACTED] entered into one or more option agreements whereby AMP could buy (or be forced to buy) GCA's interest in [REDACTED] for a purchase price which was established at that time, and based upon the then expected growth of [REDACTED] A Partners.

The Proposed Partnership Buyout: [REDACTED] now desires to exercise its call option and has notified [REDACTED] of its intent to do so. Accordingly, [REDACTED] plans to indirectly acquire [REDACTED] fifty percent partnership interest for approximately \$9.8 million plus the assumption of certain liabilities. This purchase price is consistent with the terms of the 1994 option agreements, but does not reflect the current fair market value of the fifty percent partnership interest or fifty percent of the partnership's assets, because [REDACTED] has not performed anywhere near as well as expected when the option agreements were executed in 1994. Indeed, [REDACTED] has just completed an analysis which determined that the gross fair market value of the partnership's assets is between \$5,391,000 and \$9,231,000. Finally, the aggregation rules would not require [REDACTED] to aggregate the value of any other assets or voting securities in determining whether it will cross the \$15 million notification threshold.

II. SUMMARY OF THE RELEVANT LEGAL PRINCIPLES

Rule 801.10(b) states that "[t]he value of assets to be acquired shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price." The acquisition of a 100 percent interest in a partnership is for H-S-R purposes deemed to be an acquisition of 100 percent of that partnership's assets. See, 52 Fed. Reg. 20061 (May 29, 1987). Although Interpretation 132 states that "the FTC staff has not formed a definitive position," I understand based on our recent and prior conversations, as well as a number of letters I have seen in my H-S-R FOIA files over the years, that such a transaction is necessarily valued at the gross fair market value of the partnership's assets, regardless of any value which could be imputed from the acquisition price(s) for the partnership interest(s). In other words the acquisition price is for the partnership interests, not for the partnership's assets; but the latter is all that is deemed to be acquired and held for H-S-R purposes. Thus, in a partnership buyout the acquisition price of the assets is necessarily undetermined (notwithstanding any value which could be imputed or extrapolated from the price of the partnership interests) and the fair market value of the assets is therefore controlling even where the fair market value is less than the purchase price for the partnership interests.

