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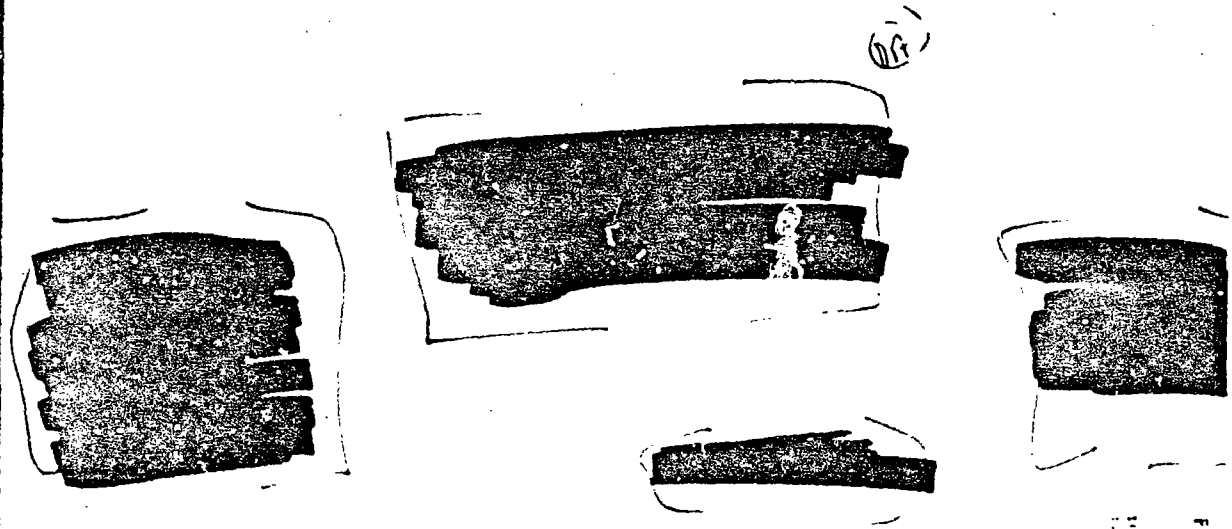

Dana Abrahamsen, Esq.
Premerger Notification Office
Bureau of Competition - Room 303
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Abrahamsen:

On Friday, February 16, 1984 you and I discussed by telephone the question ~~of whether~~ pre-acquisition notification pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §18a (the "Act"), would be required with respect to an assets acquisition involving the following facts:

1. The person whose assets will be acquired is engaged in commerce and has total assets of $10,000,000 or more.

2. As a result of the acquisition, the acquiring person will hold assets of the acquired person in excess of $15,000,000.

3. The acquiring person will be a not-yet formed limited partnership and whatever assets (substantially less than $100,000,000) it will have just prior to the closing of the acquisition will have been contributed specifically for the purpose of consummating the acquisition.

4. It is anticipated that a private offering of units of limited partnership interests in the limited partnership will be completed before the acquisition is consummated, but the acquisition will be consummated irrespective of the completion of the offering. Therefore it is possible that a general partner will be the only limited partner in the limited partnership after the acquisition is consummated.

This material may be subject to

of the Companies is engaged in the same line of retail sales and is affiliated through their common ownership by Persons A, B and C. As a group, the Companies have total assets in excess of $10,000,000 and annual net sales in excess of $100,000,000. Persons A, B and C do not have any oral or written agreement for control or management of the Companies. Persons A and B are brothers; Person C is married to the sister of Persons A and B. Among the Companies, there are oral or written operating agreements which allow for common receivables and payables accounting, common payroll, common inventory accounting and common financing obligations.

Persons A, B and C have formed a new corporation, Newco, for the acquisition of certain retail sales assets being sold by an independent third party. Newco will engage in the same line of retail sales as the Companies and will join in the common operating arrangements with the Companies. Each of the three Persons, A, B and C, owns one-third of Newco. Upon consummation of the asset purchase, Newco will own in excess of $15,000,000 of assets acquired from the third party. At formation and upon consummation of the asset purchase, Newco will acquire less than $10,000,000 of assets in excess of the assets necessary to accomplish the purchase transaction.

Regarding the first question, you noted that the "control" test is determined pursuant to Section 801.1(b). In the absence of one person holding 50 percent or more of the outstanding voting securities of Newco, and in the absence of one of the principals having the contractual power presently to designate a majority of the directors of Newco, or the Companies, then control of Newco or the Companies does not exist for purposes of Section 801.1(b), and consequently, the ultimate parent entity is Newco, within the meaning of Section 801.1(a)(3).

Regarding the second question, you noted that the "size of person" test is determined pursuant to Section 801.11(c) as of the last regularly prepared annual statement of income and expense or balance sheet of the person. In the absence of such a regularly prepared document, you indicated that the acquiring entity should not calculate its assets or income in such a way as to include in the calculation assets obtained solely for the purpose of making the acquisition. You noted that if the calculation did include such assets, the

satisfaction of the "size of transaction" test might in many cases automatically result in the satisfaction of the "size of person" test. Since the Congress and the Federal Trade Commission intended that both the size of the transaction and the size of the parties involved in the acquisition be of a certain magnitude to justify pre-merger reporting, such an approach would defeat the purposes of the Hart-Scott-Rodino Act. Therefore, if an acquiring entity does obtain some assets, such as cash, prior to making the acquisition or for the purpose of making the acquisition, such assets should not be counted in calculating the size of the acquiring entity.

Based on the principles which we discussed, Newco does not meet the "size of person" test under the Rules, regardless of the assets which Newco acquires to make the acquisition. Further, Newco is the "ultimate parent entity" within the meaning of Section 801.1(c)(3). Therefore, the proposed acquisition is not a reportable transaction under the Rules.

If the foregoing analysis and conclusion are not an accurate reflection of the interpretation of the Rules by the Federal Trade Commission staff, please inform me in writing no later than Friday, March 16, 1984. If I do not hear from you prior to that date, I will assume that the foregoing analysis is accurate and will proceed accordingly. Thank you very much for your time and consideration.

Sincerely yours,

[redacted]

[redacted]

Wayne - OK
Dana - OK
Pat - OK
Andy - OK

DRAFT FOR DISCUSSION

TO: PMN GROUP March 13, 1984

FROM: Sandra M.Vidas
RE: Aggregation of voting securities held by a pension trust and a UPE.

A, a natural person holds 11% of the voting securities of company B. The pension plan for A-1, an entity controlled by A, also holds voting securities of company B. Under what circumstances, if any, should the holdings of A and the pension trust of A-1 be aggregated?

The first issue to be addressed is control of the pension trust.

1. If the trust is not controlled by A-1, and therefore not by A, the holdings of A and the pension for A-1 in company B would not be aggregated.

2. Under § 801.1(b)(2) in certain circumstances, however, the pension trust may be controlled by A-1 and therefore by A.

> "[I]f a corporation appoints the trustees of an employee pension plan organized as a trust, then the corporation would control the trust under § 801.1(b)(2)., and the trust would not be a separate person under the rules. 43 Fed. Reg. 33459 (1978).

3. If the pension trust is deemed to be controlled by A-1 under §801.1(b)(2), then the holdings of the pension trust in company B would be aggregated with those of A-1 and A.

> "The holdings of a trust are not aggregated with those of any other entity for any purpose unless the trust is controlled by or is controlled by another entity.

The second issue to be addressed is whether the trust "holds" the voting securities for purposes of the Act and the rules.

Under the rules, the pension trust "holds" the voting securities.

> "a trust, including a pension trust is deemed under § 801.1(c)(3) ~~to~~ to hold the assets and voting securities constituting the corpus of the trust;...." 43 Fed. Reg 33458.

Proposed conclusion

Thus, under § 801.1(c)(3), "in addition to his own holdings an entity (including an ultimate parent entity) holds all assets and voting securities which it controls directly or indirectly. Moreover, a person holds all assets and voting securities held by entities included within it." 43 Fed. Reg. 33456.

If the trust is included w/in A the holdings must be aggregated.