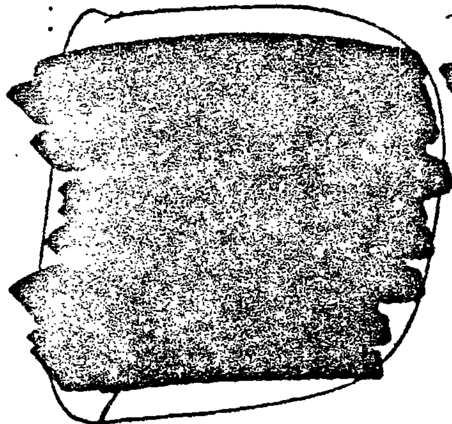
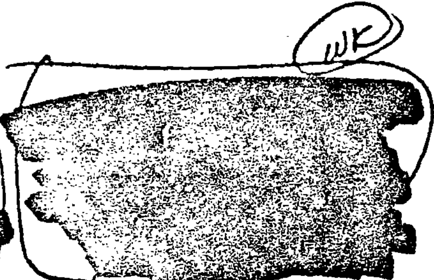
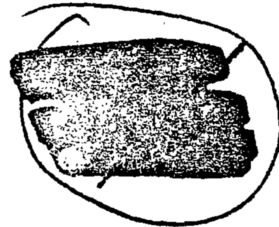




November 19, 1984

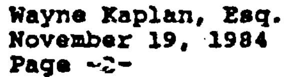
Wayne Kaplan, Esq.
Federal Trade Commission
Room 301
Washington, D.C. 20580

This material may be subject to the confidentiality provision of Section 7A (h) of the Clayton Act which restricts release under the Freedom of Information Act

Dear Wayne:

This will confirm our telephone conversations on October 26 and November 5, 1984, regarding the reporting requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"), 15 U.S.C. Section 18A, and the rules and regulations promulgated pursuant thereto, 16 C.F.R. Pt. 800. Briefly, I informed you that our client and another person propose to form a new corporation that essentially will acquire the assets of one of the operating units of our client. Based on my description of the transaction, described more fully below, you advised that the formation of the new corporation would be exempt under the minimum dollar value exemption, C.F.R. Section 802.20, and that the acquisition of assets by the new corporation would not be reportable because it would not meet the size-of-the-parties test, 15 U.S.C. Section 7A(a)(2).

The proposed transaction may be summarized as follows: Our client, A Corp., and a second party, B Corp., will form a third entity, C Corp. A Corp. will make a capital contribution to C Corp. of $5 million in exchange for 45% of the voting stock and certain preferred stock of C Corp. B Corp. will make a capital contribution to C Corp. of $8 million in exchange for 45% of the voting stock and certain preferred stock of C Corp. The remaining ten percent of the voting stock of C Corp. will be distributed to the key officers and employees of C Corp. without cash consideration. Immediately following the formation of C Corp., C Corp. will acquire the assets of an operating unit of A Corp., Unit D, for a purchase price of $70 million and will pay approximately $6 million in transactional costs. In conjunction

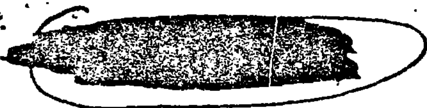




with the acquisition by C Corp. of Unit D, A Corp. will make loans and guaranties to C Corp. in the amount of $35 million, A Corp. will agree to provide, subject to certain conditions, revolving credit and an additional loan guaranty to C Corp. in the amount of $10 million, and B Corp. will make loans and guaranties to C Corp. in the amount of $28 million. For purposes of our discussion, I asked you to assume that both A Corp. and B Corp. have assets of over $100 million, that neither A Corp. nor B Corp. will have "control" of C Corp., see 16 C.F.R. Section 801.1(b), and that the loans and guaranties to be provided to C Corp. will be at market rates (the rights to which will not be of significant monetary value). You asked whether A Corp. or B Corp. is a corporation in Unit D's line of commerce and I advised you that they were not.

After discussing at length the above arrangement, you stated that the staff of the Federal Trade Commission would analyze this transaction as follows: The formation of C Corp. would be reviewed under Section 801.40 of Title 16 of the Code of Federal Regulations and would be reportable, unless exempt, because the formation would meet the criteria of Section 7A(a)(1) and (3) of the Act, A Corp. will have total assets of $100 million or more, C Corp. will have total assets of $10 million or more, and B Corp. will have total assets of $10 million or more. The formation of C Corp. would be exempt, however, by reason of the minimum dollar value exemption, 16 C.F.R. Section 802.20, because the formation of C Corp. would satisfy Section 7A(a)(3)(A) of the Act but would not satisfy Section 7A(a)(3)(B), and, as a result of the formation of C Corp., A Corp. would hold no assets of C Corp. and A Corp. would not hold voting securities of C Corp. conferring "control" of C Corp.

The subsequent acquisition of Unit D by C Corp. also would not be reportable because that acquisition would fail to meet the size-of-the-parties test under Section 7A(a)(2) of the Act. You explained that the Commission staff informally takes the view that because newly-formed corporations typically do not



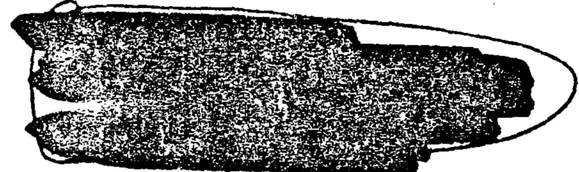


have regularly prepared financial statements, the size of a newly-formed corporation is analyzed in terms of the amount by which the new corporation's assets at the time it makes an acquisition exceeds the acquisition price of the securities and assets being acquired. If the total assets of the newly-formed corporation exceed by $10 million or more the value of assets given to the acquired party in consideration of the acquisition, then it will be deemed to meet the size-of-the-parties test under Section 7A(a)(2) of the Act. You explained that conditional loans and guaranties that have not been drawn upon at the time of the acquisition will be included in the assets only to the extent of the value of the right to such loans and guaranties. You also noted that in making this calculation, transactional costs are not deemed to be part of the consideration exchanged. Under the transaction contemplated by our client, assuming the value of the rights to the conditional revolving credit loan guaranty is less than $4 million, C Corp. would have less than $10 million in assets in excess of the acquisition price for Unit D and thus the acquisition by C Corp. of Unit D would not be reportable.

To summarize, you agreed that no part of this proposed transaction would be reportable under the Act. Unless we hear from you to the contrary by December 7, 1984, we will assume that the analysis described above correctly reflects your views on this matter and that neither the formation of C Corp. nor C Corp.'s acquisition of Unit D would be reportable under the Act.

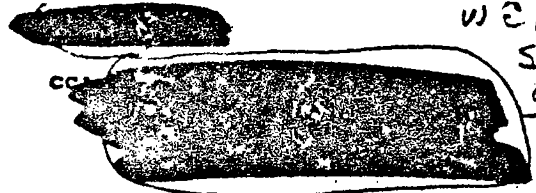
Thank you for your assistance in this matter.

Very truly yours,



WEK note: 11/26/84
See attached note re specification of advice transmitted by telephone to Jenkins on 11/30/84

cc:



and by W E K on 11/6/78.
The fact that B is making loans and guarantees to the newly formed C corporation besides its purchase of $8 MM of voting securities of C to obtain 45% of C stock raises the issue of what the value of the voting securities acquired by B. In that we don't know the real terms of the loans and guarantees by B and the terms relating to the purchase of the preferred stock it is impossible to endorse this joint venture transaction as exempt under §802.20 and thus non reportable. It seems clear that the acquisition of issuer D from A by C is non reportable under our newly formed entity rule regarding size of person calculation in the absence of a regularly prepared balance sheet. However it is not possible to say that the joint venture formation is not reportable on these limited facts. It depends on whether the value of the C voting securities obtained by B ~~was~~ is in excess of 15 MM.
The possibility of §801.90 is relevant where ~~purchase price~~ acquisition value is left up to the parties to allocate between consideration for voting securities, loans and guarantees and purchase of non-voting preferred. In all cases the same request of control
[illegible]

[illegible]
of $8 MM of voting securities of C to obtain 45% of C stock raises the issue of what is the value of the voting securities acquired by B. In that we don't know the real terms of the loans and guarantees by B and the terms relating to the purchase of the preferred stock it is impossible to endorse this joint venture transaction as exempt under §802.20 and thus non reportable. It seems clear that the acquisition of issuer D from A by C is non reportable under our newly formed entity rule regarding size of person calculation in ~~the~~ absence of a regularly prepared balance sheet. However it is not possible to say that the joint venture formation is not reportable on these limited facts. It depends on whether the value of the C voting securities obtained by B ~~[illegible]~~ is in excess of 15 MM. The possibility of §801.90 is relevant where ~~purchase price~~ acquisition value is left up to the parties to allocate between consideration for voting securities, loans and guarantees and purchase of non-voting preferred. In all cases the same request of control of 45% of A's business by B may result and may have competitive effects where B & D are competing.

W E Kapler PMN agreeing 11/29/84.