§801.10 Fair mkt. value

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DOCUMENT NUMBER

April 10, 1991

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APR 10 4 03 PM '91
PREMERGER NOTIFICATION OFFICE

Jeffrey Dahnke, Esq.
Staff Attorney
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303
6th Street and Pennsylvania Ave. NW

[redacted]

Re: Acquisitions of Partnership Interests Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976

Dear Jeff:

I am writing as you suggested in order to obtain informal advice regard [redacted]

We represent a husband and wife who are the sole shareholders of a corporation which is the general partner of a Delaware limited partnership. The only other partner is an unaffiliated, publicly held financial institution which is the limited partner of the partnership. The general partner owns a 62% interest in the partnership, and the limited partner owns the remaining 38% interest. Our clients are interested in acquiring, through a newly formed sister corporation of the general partner, the interest of the limited partner in the partnership, and have reached an agreement in principle with the limited partner regarding such acquisition. The parties are [redacted]

whether the prospective acquisition would require the filing of Notification and Report Forms under the Act.

To begin with, as you and I have discussed, it is only the fact that this [redacted]

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limited partnership were instead a corporation, the acquisition would be exempt from the filing requirements under Section 7A(c)(3) of the Act and 16 C.F.R. § 802.30. Furthermore, if our clients were acquiring anything less than a 100% interest in the partnership, the purchase would again fall outside the jurisdictional scope of the Act, as a transaction involving the acquisition of neither voting securities nor assets. Since, however, upon consummation of the acquisition our clients would own all of the limited partnership, the acquisition is treated for purposes of the Act as an acquisition

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of-the-Parties Test. The only question, then, is whether the transaction would satisfy the Size-of-the-Transaction Test. The rules under the Act provide, in 16 C.F.R. § 801.10(b), 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." We understand that for purposes of determining the size of our proposed acquisition

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partnership as a whole. 52 Fed. Reg. 20,058, 20,061 (1987); S. Axinn, B. Fogg, N. Stoll & B. Prager, Acquisitions Under The Hart-Scott-Rodino Antitrust Improvements Act, § 6.04[3] at 6-25 and n. 7.

Our clients have agreed to pay $4.75 million for the interest of the limited partner in the partnership. This purchase price was reached after extensive

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However, this purchase price represents only the price for acquisition of a 38% interest in the partnership. Since the acquisition of the entire partnership has not specifically been in issue, the parties have not formally determined what the acquisition price would be for the entire partnership.

In the absence of any agreement as to an applicable acquisition price, 16 C.F.R. § 801.10(c)(3) requires that our clients, as the prospective acquiror, determine the fair market value of the partnership. Fair market must, of course, in accordance with the requirements of 16 C.F.R. § 801.10(c)(3), "be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if

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such notification has not been filed, within 60 calendar days prior to the consummation of the acquisition." See 43 Fed. Reg. 33,450, 33,471-72 (1978).

Our review of the applicable authorities indicates that the process of determining the fair market value of a partnership in the circumstances with which

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involve a mere balance sheet analysis (i.e., a determination of the net worth of the partnership based on historical costs of assets and the face amounts of liabilities), but instead a more comprehensive examination along the same lines that an investment

ation of a wide range of factors, such as asset value, earning power, industry position, management and so forth. See S. Axinn, B. Fogg, N. Stoll & B. Prager, Op. Cit., § 5.04[4][c][iii] at 5-41 - 5-42. Although the acquiring person may retain consultants to assist in making the valuation, the acquiror nonetheless bears responsibility for the determination and must ensure that the determination has been made in good faith and is current.

Our clients, aware of the requirements of 16 C.F.R. § 801.10(c)(3), have made a determination that the fair market value of the assets of the entire partnership

and will be made again if the closing does not occur within 60 days. However, before finally concluding that the acquisition is exempt from the jurisdictional requirements of Act, we would appreciate any advice which you could give us concerning our interpretation of the applicable statutory and regulatory provisions.

Thank you for your assistance.

Very truly yours,

4/11/91
Called. Interpretation correct.
-JW