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January 23, 1992

BY TELECOPIER

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Premerger Office
6th and Pennsylvania Ave., N.W.
Washington, D.C. 20583

Dear Mr. Smith:

As you and I discussed earlier today, we would appreciate receiving the views of the Premerger Office on the

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corporation and corporation and enter into a
single agreement whereby Y will transfer 100% of

I believe that we agreed that the transaction has two
elements: (1) the acquisition of the 60% partnership
interest in P by X; and (2) the acquisition of 100% of the
stock of Y by the entity Z. With respect to the first

The analysis of whether the second element is reportable is much more involved. Starting first with the question of who is the acquired person, it seems clear that Corporation X, as the ultimate parent entity prior to the transaction of the entity to be acquired, is the acquired person. As our discussions made clear, the more difficult question is who is the acquiring person.

In defining "acquiring person", the Premerger Notification Rules provide:

assets, either directly or indirectly, or through fiduciaries, agents or other entities acting on behalf of such person, is an acquiring person.

16 C.F.R. § 801.2(a) (emphasis added). As the hypothetical is structured, it appears that X is also the acquiring person. When X "sells" its shares of Z to P, the consideration it receives as part of that sale is the 60% interest in the partnership. Thus, as a result of the acquisition, the acquiring person will be

own 60% of P which will in turn hold 100% of Z. Moreover, if X is both the acquired person and the acquiring person, the acquisition of the shares of its more than 50%-owned subsidiary is exempt under Section 7A(c)(3) of the HSR Act.

The hypothetical described above assumes that the transaction will be effected by having the parties sit down

simultaneously transferred. I understand that the Premerger

must be separately examined. Thus, if the partnerships interests in P are deemed to be transferred first, and the voting securities of Z transferred second, it would be clear that X is the acquiring person since P would be under X's control. However, if the fiction that the voting securities

* I fully agree with your statement that if the hypothetical transaction is not structured as a simultaneous exchange or that somehow one aspect of the transaction is postponed while the other goes forward, different HSR implications may result.

are transferred first is adopted, then there would be a period of time (albeit fictional) that Z was within A's person. My understanding of the position that the Premier

transaction is reportable.

There are at least three reasons why the analysis

of the rule clearly demonstrates that its focus is on who

acquiring the voting securities. In this case, there is one acquisition involving the transfer of shares for consideration of the transfer of partnership interests. As a result of that single transaction, X will control P which in turn will own all of the voting securities of Z. Thus,

This straightforward application of the plain language of the rule is fully supported by the Statement of

The final rule makes several changes to revised

acquiring voting securities or assets. The

of such acquisition, the acquiring person would hold" (emphasis supplied). Thus, the statute focuses on holding as a result of an acquisition rather than on the act of acquiring. This focus is reflected in the language of final § 801.2(a), which describes an acquiring person as one "which, as a result of an acquisition, will hold voting securities or assets . . ."

43 Fed. Reg. 33,467 (July 31, 1978) (emphasis added). The commentary in the Statement of Basis and Purpose shows that the determination of the acquiring person is accomplished by taking a post-acquisition snapshot of who will hold (directly

or indirectly) the voting securities to be acquired.

practical purposes, A would never have direct control of P while P had direct control of Z. Even if there was some fleeting instant in time where P had control of Z and A had not yet legally surrendered its control of P, A still could not be the acquiring person under the concept of beneficial

"hold" the securities of Z for HSR Act purposes and therefore cannot be the acquiring person.

Finally, ignoring the simultaneous nature of the transaction and imposing a fiction makes for difficult HSR policy to enforce. First, it makes little sense to adopt fictional views of the structure of transactions, especially in cases where they are not needed to interpret and to apply the Premerger Notification Rules. Second, reliance on such a fiction in analyzing HSR reportability encourages parties to write into their contracts a prescribed order of steps such that the transaction would be non-reportable. For example, in this instance, the parties could agree that at closing the partnership interest will be transferred one second prior to the transfer of the shares of Z. Finally, it is not too

fiction described above leads to the conclusion that two

is therefore the acquiring person in a "second" transaction.

* * *

It seems to us that there can be little question that the acquiring person in this hypothetical is P. We would, of course, very much appreciate receiving the thoughts and comments of the Department Office on the issues raised by this

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action, it would be very helpful to have your comments as soon as it is convenient. If I can be of assistance on this matter, please do not hesitate to call me.

Very truly yours,

