801.11
801.11(d)

[redacted] [redacted] [redacted]

DIRECT DIAL NUMBER
[redacted]

February 13, 1995

<u>VIA TELEFAX</u>

Mr. Patrick Sharpe
Premerger Notification Office
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Sharpe:

~~As discussed in our telephone conversation on~~ Friday, February 10, this letter outlines a proposed transaction ~~and discusses certain~~ issues raised under the

Act"). We would appreciate your consideration of whether the acquiring person in the proposed transaction has total assets or annual net sales of $100,000,000 or more for purposes of 15 U.S.C. § 18A(a)(2). The facts are as follows:

A limited liability company ("W") is considering purchasing the assets of X, a corporation not engaged in manufacturing. The purchase price for the assets will be in excess of $15,000,000. The ultimate parent entity of X has total assets in excess of $10,000,000.

The <u>ultimate parent entity of W</u> is an individual ("Z"). (He owns in excess of <u>50% of the equity</u> in W). Z's principal asset is holdings of voting securities in a now publicly traded corporation (the "Company").

Does he control? yes hold 50% of th v/s of W? yes

Other of Z's assets include his interests in his residential properties, as well as automobiles, boats and airplanes (collectively, the "Vehicles"). For liability and other reasons, the Vehicles are held by separate corporations in which Z is the only shareholder. The

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[illegible]

corporation solely owned by Z) for his personal use. Occasionally, however, the airplanes are leased to third parties or used by Z for business purposes. (Unlike the boats which are exclusively personal and on which Z does not take depreciation or other deductions, Z does determine the [illegible] depreciates a portion of the airplanes and deducts a portion of certain expenses related to the airplanes based on the ratio of business use to personal use. For 1994, the airplanes were used roughly 90% for Z's personal purposes and 10% for business use.

Z maintains at all times a current personal financial statement. The statement is kept "on line" in Z's computer system and (subject to security precautions) may be [illegible] statement is updated at the time of each major acquisition by Z and reflects all of his principal assets, including his personal residences and his interest in the Vehicle owning companies.

Z's assets are carried in the computer and listed in the financial statement at book value (acquisition cost). This includes Z's holdings in the Company. Z was one of the original shareholders of a predecessor of the Company and acquired his stock in the Company for a low initial price.

As reflected in his personal financial statement, Z's total book assets, including the residential property and Vehicles, exceed $100,000,000. If the residential property and Vehicles (and other solely personal property) are excluded, however, his total book assets are below $100,000,000. Z's total sales, moreover, including all income earned from his stock and other investment assets and including all income received from leasing of the aircraft [illegible]

(airplanes?)

Using his regular financial statement as the base of information, Z has prepared financial statements in [illegible] statements in that they show the then-fair market value of Z's stock holdings in the Company. Fair market values are

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taken from the Wall Street Journal and inserted in lieu of historical cost for the Company shares. Tax costs of sale are also reflected. The current fair market value of Z's holdings in the Company, when coupled with Z's other assets, and after adjustment for tax costs of sale, would show Z's assets in excess of $100,000,000, even if the residential property and Vehicles are excluded.

[redacted]

he was deemed the ultimate parent entity of the Company, a fact that no longer is the case.

Based on these facts, we believe that Z should not satisfy the $100,000,000 size of person test. Our reasoning is as follows:

1. Z's regularly prepared financial statements are the financial statements that Z prepares and maintains for his own benefit, which he updates at the time of each acquisition. The financial statements prepared at the time of the borrowing are not "regularly prepared" in that they

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only assets to be included are "investment assets, voting securities and other income-producing property." 16 C.F.R. § 801.11(d). This would exclude Z's personal residence as well as his personal Vehicles. The fact that Z includes

[redacted]

Moreover, the fact that Z chooses to hold these personal assets in a corporation (and thus, theoretically holds "voting securities") should not affect the principal characterization of the property as non-income producing. In addition, even if several of the airplanes are used to a limited extent for business purposes, no portion of such property should be classified as income producing for HSR Act purposes.

I'm troubled by this

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3. We do not believe that Z's prior HSR Act filing using a fair market valuation of his stock holdings in the Company should preclude use of Z's current regularly prepared balance sheet showing assets at book value in the current analysis.

We would appreciate an opportunity to discuss this matter further with you. Please call me at [redacted]

[redacted]

PMN Practice manual - #162 - size-of-person test - back out personal assets

(non-income producing) property from his or her assets.
The PMN office told [redacted] to include the 10% of the asset value of the planes used for business by Z.

Called [redacted]
2-23-95 (BS)

I bounced this off [illegible] staff

responded.

[redacted]