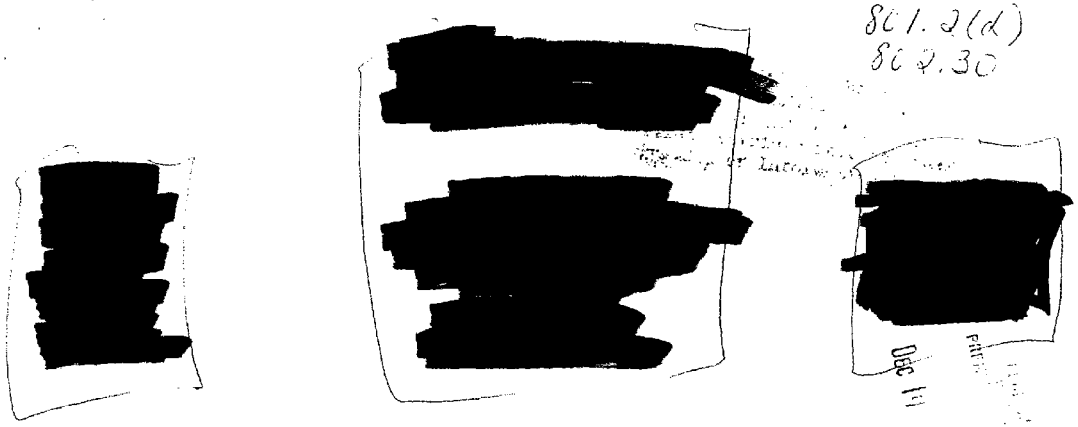


801.2(d)
802.30

December 10, 1992

VIA FACSIMILE

Ms. Nancy Ovuka
Federal Trade Commission
Bureau of Competition
Washington, D.C. 20580

Re: Request for Informal Opinion

Dear Ms. Ovuka:

Pursuant to §803.30 of the Premerger Notification Rules, I would request an informal opinion confirming that under the circumstances set forth in this letter a second Premerger Notification Form is not required to be filed pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976. While we would like to have a response to the two specific questions set forth below, this letter should also be taken as our general request for an informal opinion that no filing is required, regardless of the particular exemption.

Questions Presented

[redacted] After the early termination of the waiting period in [redacted] two [redacted] nonprofit corporations merged through the creation of a common nonprofit parent corporation that became the sole voting member of each of the two merging corporations. Under the circumstances set forth in this letter, is a second premerger notification filing required if the two subsidiary corporations now merge in a form that one or both of the subsidiary corporations ceases to exist?

We believe that this question should be answered in the negative, and no second filing is required.

2. For purposes of the intra-person exemption under §802.30, does the sole voting member of these two subsidiary nonprofit corporations control the corporations such that they are the same person so as to constitute an intra-person transaction that is exempt from the requirements of the Act?

We believe that this question should be answered in the affirmative, and no second filing is required.

Factual Background

On [redacted], the Commission granted early termination of the waiting period for the merger of [redacted] and [redacted] ([redacted]) (Transaction Identification Number [redacted], both of which were [redacted] nonprofit corporations organized pursuant to [redacted]. Ch. 317. At the time, both of these [redacted] were managed pursuant to separate contracts with a single management company whose employees performed most of the functions on behalf of [redacted] including various officer positions. In addition, certain functions, such as claims, had previously been consolidated.

As described in the premerger notification, the merger was accomplished through the creation of a separate [redacted] nonprofit corporation, [redacted] which became the sole voting member of both [redacted] and [redacted] in [redacted]. Attached to the [redacted] Premerger Notification and Report Form as the "most recent version of contract or agreement" was the Letter of Intent between [redacted] and [redacted] which detailed a three year transition period. Consistent with the Letter of Intent, the corporate parent has controlled the governance of each subsidiary corporation, including: (a) approval of annual operating and capital budgets, and any material variances therefrom, and approval of strategic plans; (b) approval of the incurrence of any indebtedness in excess of amounts determined from time to time by resolution of [redacted]; (c) approval of mergers or consolidations, or the sale, transfer, encumbrance or other disposition of assets with a fair market value in excess of an amount determined from time to time by [redacted] other than in the ordinary course of business; (d) appointment or removal of the Chief Executive Officer; (e) exercising rights, including voting rights, which each [redacted] and its subsidiaries and affiliates possess as a member, shareholder, or partner of any organization; (f) adoption of repeal of amendments to the Articles of Incorporation and By-Laws of each [redacted] and its subsidiaries and affiliates; and (g) development of policies regarding the implementation of any of these powers.

Since the merger, both entities are managed under a single management agreement with the management company, whose employees include vice presidents of the various corporate departments of [redacted] which manage operations at [redacted] and [redacted] The primary products of [redacted] and [redacted] (doing business as, respectively, [redacted] and [redacted]) have been marketed jointly by [redacted] on a complementary basis since the merger. Since the [redacted] merger, the organization has found that Board, executive, committee and subcommittee meetings and activities to be repetitive, duplicative and an unnecessary drain on the resources and time of the corporations, their officers and directors.

Merger Is Within Scope of Previous Filing

We believe that the [redacted] filing encompasses this restructuring for at least the following reasons:

- [redacted] and [redacted] merged through the creation of a common parent corporation that is the sole voting member of each entity. This restructuring now contemplated does not have any competitive consequences, in that since the [redacted], both entities have both operated as a single person.

- As the sole voting member of [redacted] and [redacted] "controls" those entities as that term is used in §801.1(b)(1)(ii). Under [redacted] law, the rights of voting members of a nonprofit corporation are entirely comparable to the rights of the holders of voting securities in a [redacted] for-profit corporation.

- The original transaction was treated and examined by all parties and the Commission as a merger or consolidation.

- The rights of the sole voting member of [redacted] and [redacted] have similar protections to those applicable to the rights of the holders of voting securities in a for-profit corporation.

[redacted] and [redacted] Are the Same "Person" for Which the "Intra-Person Transaction" Exemption Applies

We believe that the intra-person exemption under §802.30 applies for at least the following reasons:

- Because [redacted] and [redacted] are [redacted] nonprofit corporations, they do not issue "voting securities." Nevertheless, the rights of the sole voting member are exactly comparable to the rights of the holder of voting securities in a for-profit corporation.

- The [redacted] merger for which early termination was granted was a merger or consolidation which, pursuant to §801.2(d)(1)(i), "shall be treated as acquisitions of voting securities."

- According to the ABA Premerger Notification Practice Manual (1991), Interpretation 64, the FTC staff concluded that a single-member public benefit corporation under California law is controlled by that member because the member's interest in the corporation is equivalent to that of a person holding all the voting securities of a proprietary corporation. In that 1981 interpretation, the staff also decided that the relationship between the single member and the public benefit corporation was one resulting from "holdings of voting securities" within the meaning of §802.30 and therefore that member and the corporation could engage in exempt intra-person transactions. Although the Manual indicates that under some other circumstances a nonprofit member's status may be viewed as a "contractual power to appoint the director," under the circumstances here presented that power is instead comparable to voting securities rights, and the competitive consequences of the merger have previously been considered and decided in the earlier filing.

- Under the 1978 comments accompanying the proposed Premerger Notification Rules, the exemption was the extended:

> . . . to other situations to which the same rationale applies: transfers of assets between subsidiaries of the same parent, formations of new wholly owned subsidiaries, repurchases of stock by a corporation, and the like.

43 Fed. Reg. 33,450, 33,495 (1978). We believe that under the circumstances presented here the proposed transaction would be exactly comparable to the merger of wholly owned subsidiaries of a for-profit corporation.

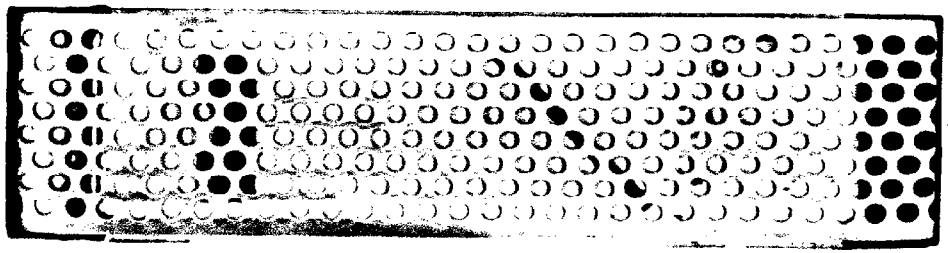
Conclusion

We would respectfully request your prompt attention to this matter. I may be reached at the above telephone number for any questions you have.

Very truly yours,

[redacted]

[redacted]



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The transaction is exempt. The parties have already filed for a merger and consolidation so that the contemplated restructuring is covered by the prior filing. JS & LS concur.

§ 802.30 does not apply, unless we view that being the sole voting member in a non-profit is the equivalent to holding voting securities. See ABA #64.