Rec'd 2/15 9 mm S
Tells him that the bottom
two paragraphs was
a verbal interpretation.

February 15, 1983

John Sipple, Esquire
Premerger Notification Office
Federal Trade Commission
7th and Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Premerger Notification Requirements
and Employee Savings Plans

Dear Mr. Sipple:

Enclosed please find a copy of the "Discussion Memorandum" that I submitted to you last summer and that I discussed at a meeting with you and Ms. Baruch, and that I have subsequently discussed with you from time to time.

I would appreciate it if you could confirm my understanding of the Commission's response to the hypothetical set out in the "Discussion Memorandum" -- namely that:

(1) Where a company's Savings Plan purchases shares sufficient to exceed a threshold for which a Premerger Notification and Report Form has been filed (and where the Company does not believe the Savings Plan will acquire shares sufficient to breach any other threshold) then the Commission will deem Section 802.21 as continuing to apply, thus giving a reporting firm another five-year "grace period" beyond the initial such period, provided another form is filed with respect to the threshold exceeded.

(2) Where a company's Savings Plan does not purchase shares sufficient to breach the notification threshold (or where the shares owned by the Savings Plan fluctuate above and below the notification threshold) then the Commission will deem Section 802.21 as continuing to apply, thus giving a reporting firm another five-year "grace period" beyond the initial such period.

In short, the Commission's view of the hypothetical set forth in the "Discussion Memorandum" is that the five-year grace period provided by Section 802.21(b) will again apply after a company files its 1983 Premerger Notification and Report Form, provided that the threshold respecting which a form is filed is (a) exceeded within a year after the filing, or (b) exceeded at the time the 1983 form is filed.

I look forward to hearing from you on this.

Enclosure

DISCUSSION MEMORANDUM

Re: Premerger Notification Requirements and Employee Savings Plans

The regulations as they apply to employee savings plans produce a result that would appear to be unintended and, in any event, wasteful both in terms of the point of view of the government and the private sector. The problems can be gleaned from the following hypothetical situation, which is doubtless very real to scores of companies.

A Company files a premerger notification report form in the fall of 1978, relating to the acquisition of its stock by its own Employee Savings Plan. That notice advised that the Company's Savings Plan intended to acquire in excess of 25 percent of the shares of the Company within the succeeding twelve month period (e.g., by the fall of 1979).

Rule 803.7 provides that:

> Notification with respect to an acquisition shall expire 1 year following the expiration of the waiting period. [Thus], if the acquiring person's holdings do not meet or exceed the notification threshold with respect to which the notification was filed, the requirements of the act must thereafter be observed with respect to any notification threshold not met or exceeded.

By the fall of 1979, the Company's savings plan had acquired in excess of 25 percent of the then outstanding common shares of the Company. Specifically, the Savings Plan ownership then constituted 25.07 percent of the then outstanding common shares

of the Company. Thus, the acquisition of stock exceeded the notification threshold of 25 percent within a year of the filing.

A problem now is created because of the operation of § 802.21 of the rules, which establishes (or fails to establish) certain exemptions. Section 802.21 exempts acquisitions of voting securities if:

> (a) The acquiring person and all other persons required by the Act in these rules to file notification, filed notification with respedt to an earlier acquisition of voting securities of the same issuer;
>
> (b) The waiting period with respect to the earlier acquisition has expired, or been terminated pursuant to Section 803.11 and the acquisition will be consummated within five years of such expiration or termination; and
>
> (c) The acquisition will not increase the holding of the acquiring person to meet or exceed a notification threshold greater than the greatest notification threshold met or exceeded in the earlier acquisition.1/

The relevant "notification thresholds" are defined in Section 101.1(h)(3) and (4) and are respectively, 25 percent and 50 percent of the outstanding voting securities.

1/ The Statement of Basis and Purpose indicates that

> The final version of Section 802.21(c) also accommodates the insertion of Section 803.7 into the final rules. Its phrasing, 'the greatest notification threshold met or exceeded in the earlier acquisition' means the greatest threshold met or exceeded within the one year period before the notification expires under Section 803.7. See the example to that rule.

43 Fed. Reg. 33,493 (July 31, 1978).

The Company's Savings Plan now holds about 27 percent of the Company's outstanding common stock, which is held by a bank as trustee under the Company's Savings Plan. Many employees can elect to contribute up to 8 percent of their salary to the Savings Plan. The employee's contribution can go to one of several funds held by the trustee, which for present purposes can be considered to be similar to mutual funds. One is a diversified stock fund, one a bond fund, one a Company stock fund, etc. For each dollar that an employee contributes, the Company will contribute $.75 of its common stock into a separate stock fund. It is this latter fund, together with the contributory Company stock fund, that represents this 27 percent holding of the Company's common stock by the Savings Plan trustee.

The number of shares in this fund fluctuates, tending to decrease as a result of employees retiring or leaving the Company and the resultant transfer from the fund to the individuals of the stock to which they have become eligible. On the other hand, the number of shares will tend to increase each month as a result of the Company's matching the monthly payroll deductions for the Savings Plan for its eligible employees. The rate at which any increase takes place will vary depending upon fluctuations in the number of eligible employees. The number of eligible employees may increase either through employees becoming eligible through seniority advances or as a result of an increase in the

number of employees due to the expansion of the total work force. Conversely, a reduction in the work force will result in a decrease in the number of shares purchased each month and distribution of shares to retiring employees.

A further variable is the total number of outstanding common shares. They will decrease should the Company repurchase its own common shares; they will increase through the conversion of preferred shares to common shares, the exercise of stock options, or the issuance of new common shares incident to an acquisition (thereby decreasing the percentage represented by the Savings Plan's holdings).

The problem presented to the Company in 1983 is that the five year grace period provided by Section 802.21(b) from its 1978 filing will expire. With a current base holding of 27 percent, the next threshold with respect to which the Company can file is the 50 percent threshold. It will be impossible for the Company to exceed that threshold within the year succeeding its 1983 filing. In fact, it is doubtful that the Savings Plan holding will ever exceed the 50 percent threshold simply because of the effect of ebb and flow of shares into and out of the plan and fluctuations in the overall number of outstanding shares, all as previously described. Since the Company will not meet or exceed any new threshold within the year after it files in 1983, Section 802.21 will not apply, and the effect of the notification will, pursuant to Section 803.7, expire one year following the expiration of the waiting period.

As a result, for the Savings Plan to purchase shares after September 30, 1984, it will have been necessary to file a further notification by August 31, 1984. An annual filing will continue to be thereafter required -- forever it would appear.

This unfortunate effect of the rule has no apparent beneficial effect whatsoever insofar as the government is concerned. For the Company to file this report annually will be a waste of time for it, as well as for the personnel of the Antitrust Division and the Federal Trade Commission.

For these reasons, and given the likelihood that a substantial number of companies face a similar prospect, discussion about the nature of some suitable relief would appear to be in order.

July 16, 1982

801.15

When:

1. Exempt + non exempt current trans
2. Bought exempt, now buy nonexempt
3. Can apply to 802.20 (always aggregate)

proceed if criteria applicable

For:

1. SOT (15% or $15 min)
2. Notif thresholds

801.15

a) Can aggregate (even if 801.15 would say to):

7A (c) 1, 5, 6, 7, 8, 11 (B)

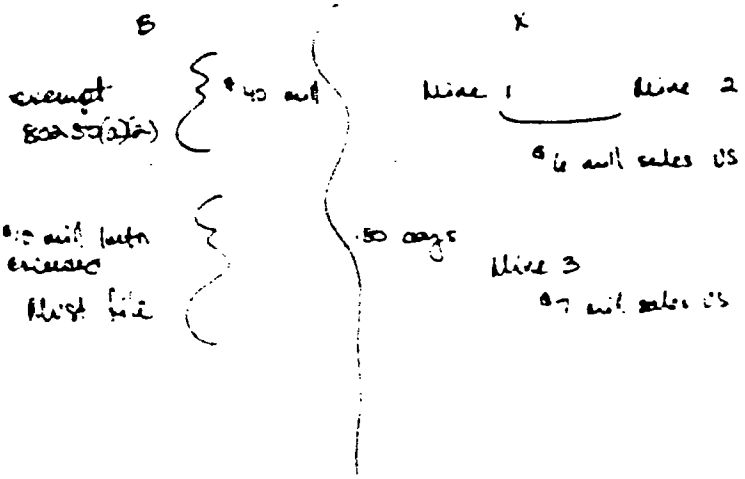
Rules 802.8
802.31
802.50(a)(1)
802.[redacted]51(a)
802.52
802.53
802.63
802.70

b) aggregate if limitations met or exceeded

7A (c)9

Rules 802.50(a)(2)
802.50(b)
802.51(b)
802.64

c) aggregate vs. if same issuer under 7A(c)(11)!



Assets
1) 150 days
2) $10 mil limitation not exceeded
3) at least $15 mil acquisition price for all assets aggregate

US - need to be same issuer to aggregate?
~~same issuer~~

801.15
802.50 (a)(2)

Add sales attributable to foreign & US assets being acquired from same acquired person to meet $10 MM limitation

SOT: aggregate all US
aggregate all foreign
∴ aggregate a foreign w/ a U.S.

801.15 Even if exempt u/ 802.50(f)(2) does one aggregate now to get SOT?
Yes, see BBP 33498
not

1. US - Can
2. For [illegible] US [illegible]

[redacted]

	3 mill purch	2 mill purch	5 mill purch
	Can assets	US assets	Can assets
	$ 5 mill sales	3 mill sales	$2 mill sales
	5 mill sales	3 mill sales	1 mill sales

[redacted]