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This material may be subject to the confidentiality provision of Section 7A (h) of the Clayton Act which prohibits public disclosure [illegible]

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November 25, 1985

Wayne Kaplan, Esq.
Premerger Notification Office
Bureau of Competition
Room 301
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Kaplan:

I am writing to confirm our telephone conversations on November 20, 1985, during which I was advised that notification under the Hart-Scott-Rodino Antitrust Improvements Act ("the Act") is not required in the situation described below.

The question we discussed is whether a company which previously acquired both voting securities and convertible voting securities of an issuer in a negotiated transaction in which notification under the Act was not required, and which now desires to convert the convertible securities into additional voting securities may rely on § 801.13(a)(2) of the Commission's rules under the Act (the "premerger rules") in valuing the voting securities it already holds, or whether the previously acquired voting securities need to be valued at the higher price set forth in the acquisition agreement. In addition, we discussed whether under these circumstances the transaction would be viewed as a "transaction or device for avoidance" under § 801.90 of the premerger rules. The situation we explained giving rise to these questions is as follows:

Company A sold one of its subsidiaries ("S") to a newly formed company, Company B, in a transaction which did not require notification under the Act because the newly formed Company B did not meet the "size-of-person" test set forth in the Act.

Part of the consideration which Company A received for Subsidiary S were shares of a third company, Company C, which is a publicly traded company. Company A received both voting common stock of Company C and non-voting preferred stock convertible into voting common on a one-for-one basis. (For purposes of illustration, assume that Company A acquired 750,000

voting shares and 150,000 non-voting shares convertible into voting shares.)

The contract between Company A and Company B assigned a dollar value to Subsidiary S and to the Company C shares received by Company A. The dollar value assigned to the Company C voting shares was significantly higher (approximately 40%) than the market price of the shares. (The convertible shares are not publicly traded.) One of the reasons for using the higher price is that Company A has a separate agreement with Company C which provides that, if after one year and before the end of the second year Company A sells the Company C common stock in the open market and realizes a lower price than the value assigned in the contract, Company C will make up the difference. (For purposes of illustration, assume that the Company C common had a market price of $14 per share but was assigned a value in the contract of $20 per share. Also assume that the convertible shares were assigned a value in the contract of $20 per share.)

Company C is a shareholder of Company B. In connection with Company C's investment in Company B, C issued to B the 750,000 shares of common and 150,000 shares of convertible preferred stock which B used as partial consideration for its acquisition of S. Company A understands that the Company C convertible shares were previously authorized as a "blank check preferred stock" and were issued in connection with C's investment in B.

Based either on the market price of the Company C common shares or on the value assigned in the contract, the value of the Company C voting securities acquired by Company A did not exceed $15 million. Based on the value assigned in contract, the value of the voting shares was exactly $15 million. No filing was required under the Act with respect to Company A's acquisition of voting securities of Company C pursuant to the minimum dollar value exemption in § 802.20 of the premerger rules.

If Company A on closing had acquired both the (150,000) shares of voting common into which the preferred was convertible and the (750,000) shares of voting common which were acquired at the time, the value of the (900,000) common shares would not have exceeded $15 million based on the ($14 per share) market price (i.e., $12.6 million), but would have

exceeded $15 million based on the ($20 per share) value assigned in the contract (i.e., $18 million).

For various business reasons, the parties needed to close the transaction simultaneously with the execution of any contract. Therefore, the overall transaction was structured in order to make a simultaneous agreement and closing possible. One thing, but not the only thing, that could have delayed the closing and caused the transaction not to take place would have been the need to observe any waiting period under the Act. Because there was a question about how the Company C common shares should be valued under the premerger rules, i.e., based on the market price or based on the higher value assigned in the contract between Company A and Company B, Company A determined to acquire only the 750,000 shares of Company C voting securities so that the $15 million threshold would not be exceeded even if the shares were valued at the ($20 per share) value assigned in the contract. In addition, as partial consideration for S, Company A acquired the 150,000 convertible shares.

At the time of closing the S transaction, Company A had the intent to convert the Company C convertible shares into voting shares as soon thereafter as possible. Less than two weeks after the closing of the first transaction, Company A desires to convert the Company C convertible shares it now holds into Company C common shares. The question arises whether notification under the Act is required prior to conversion. If the voting shares Company A already holds are valued at their market price, pursuant to § 801.13 of the premerger rules, no filing would be required because the $15 million threshold would not be exceeded. This is the case whether the (150,000) additional voting shares Company A will receive on conversion are valued at the market price ($14) or at the higher value ($20) assigned in the contract.

The question arises, however, whether Company A may use § 801.13 of the premerger rules to value the 750,000 shares of Company C common stock it already holds; or whether, because the 150,000 shares of convertible stock Company A intends to convert into voting stock were acquired as part of the same transaction in which A acquired the 750,000 shares of Company C stock and because A had the intent to convert as soon thereafter as possible, A must use the $20 per share value in the acquisition agreement to value both the 750,000 voting shares

it already holds and the additional 150,000 voting shares it will acquire upon conversion. The question also arises whether the two transactions would be regarded as a single transaction, i.e., as a transaction or device for purposes of avoidance under § 801.90 of the premerger rules. Company A is prepared to make a filing if necessary; it is not attempting to avoid making a filing if a filing is required. Company A and Company C are not competitors in any line of business and are in different industries.

Based on the situation described above, you stated that it was your informal interpretation that no filing was required under the Act and premerger rules. In particular, you indicated that the 750,000 shares already held and the 150,000 shares to be acquired as a result of the conversion by Company A are to be valued in accordance with § 801.13. Further, you stated that the transaction would not be regarded as a transaction or device for purposes of avoidance under § 801.90. We will rely on your interpretation in advising our client that it may convert the shares without the need to make a filing under the Act unless we hear from you to the contrary by December 6, 1985.

Very truly yours,

OK WEK 12/6/85
w/ concurrence of
Dana Abrahamsen.