Proposed acquisition by Coca-Cola would require prior Commission approval under the Commission's order of August 3, 1983. [*The Coca-Cola Company, C-3113*]

May 9, 1988[1]

Dear Mr. Prescott:

This is in response to your request for advice ("Request") on behalf of The Coca-Cola Company ("Coca-Cola") as to whether its proposed acquisition of the Institutional Food Service Group of H.P. Hood, Inc. ("Hood") requires prior Commission approval pursuant to Part III of the consent order in Docket No. C-3113 ("the order"). The Commission has carefully considered Coca-Cola's request and has concluded that the proposed acquisition is covered by Part III of the order. Accordingly, Coca-Cola must obtain the Commission's prior approval before Coca-Cola may acquire Hood.

Background

The complaint in this matter, which was issued with the consent order, challenged under section 7 of the Clayton Act and section 5 of the Federal Trade Commission Act, Coca-Cola's acquisition of Doric Foods Corporation ("Doric") in 1982. The complaint alleged that Coca-Cola's acquisition of Doric may have had the effect of substantially lessening competition or tending to create a monopoly. Complaint, paragraph 9. The consent order required the divestiture of Doric, which Coca-Cola completed in 1983. Part III of the order prohibits Coca-Cola, for a ten-year period, from acquiring without prior Commission approval, any interest in any firm that is engaged directly or indirectly in the manufacture and sale of "drinks, punches and ades." The order defines drinks, punches and ades as "non-carbonated, ready to serve, naturally or artificially flavored fruit drinks, fruit punches or fruit ades which contain 50% or less fruit juice and are customarily sold under refrigeration to the consumer."

The Request

The proposed transaction would involve the acquisition by Coca-Cola of the institutional food service group of Hood, consisting primarily of the Dunedin facility located in Dunedin, Florida ("Dunedin"). According to the Request, Dunedin procures raw fruit which it

[1] This matter was inadvertently omitted from Volume 110.

delivers to Alcoma Packing Company ("Alcoma") in Lake Wales, Florida, pursuant to contract. Alcoma processes the fruit into concentrate. The juice is then mixed, packaged and sold by Dunedin to institutional customers located in all fifty states. The Request states that Coca-Cola will likely succeed to co-packing arrangements that Dunedin presently has with Golden State Food Corporation of Pasadena, California and with Trenton Cold Storage Ltd. in Trenton, Ontario, Canada. The Request explains that under the co-packing agreements, the co-packer mixes, packages and warehouses fruit juices and other products according to formulas and specifications provided by Dunedin. Dunedin delivers to the co-packer substantially all the necessary ingredients and packaging materials (except purified water); the product is processed and packaged by the co-packer and then sold through the Dunedin distribution network. Request at 3, 4.

The Hood Institutional Food Service Group sells only to institutional customers, as distinct from grocery stores or retail customers. Institutional customers are said to include such purchasers as restaurants, schools, hospitals and other non-grocery store purchasers. The Request states that Dunedin processes and sells 15 different kinds of juice and juice drinks to institutional customers: orange, grapefruit, apple, grape, pineapple, cranberry, orange-pineapple, peach nectar, pear nectar, apricot nectar, fruit punch, lemonade, orange-grapefruit, prune and tomato. Request at 4.

The Request asserts three reasons why the proposed acquisition does not require prior Commission approval under Part III of the order: (1) the proposed transaction would take place in a different market from that with which the order was concerned; (2) virtually all of the products sold by Hood and Coca-Cola in the relevant market do not constitute "drinks, punches and ades" as defined in the order; and, (3) the amount of fruit drinks (as distinct from 100% fruit juice) sold by Hood is *de minimis* in relation to Hood's total sales and so small as to be of "no conceivable competitive significance" as a share of total sales of fruit drinks to institutional buyers in the United States. Request at 2. In the alternative, respondent has requested that the Commission waive the prior approval provision both because the proposed transaction requires a premerger filing under the Hart-Scott-Rodino Act and because, in its view, delay could have an adverse impact on the value of the proposed acquisition to Coca-Cola. Request at 11, 12.

Prior Commission Approval Is Required

The Commission has concluded that the proposed transaction requires prior approval pursuant to Part III of the order. The order is applicable to Coca-Cola's acquisition of any interest in a firm that is engaged in the manufacture of drinks, punches and ades as defined in the order and the information supplied in the Request indicates that Hood is so engaged. The order does not contain any exclusion for institutional sales nor does it contain a *de minimis* exception.

Coca-Cola contends the acquisition of Hood's Institutional Food Service Group does not require prior approval under the order because the proposed transaction would take place in a different market from that with which the order was concerned. According to the Request, the Doric transaction involved the retail market, while the proposed Hood acquisition involves only the institutional market. However, neither the complaint nor the order identifies or draws a distinction between a retail market or an institutional market. While the characteristics of the covered products are set forth in detail, nothing in either the complaint or the order limits the order's coverage to a particular channel of distribution. Part III of the order requires prior approval of acquisitions of assets of a firm that is engaged "directly or indirectly in the manufacture and sale of drinks, punches and ades." Coca-Cola does not seriously contend that Hood is not engaged in that activity. There is nothing in the order to suggest that the defined products are not covered unless they are sold in grocery stores or other retail stores. It would have been simple to draft a proviso excluding institutional sales from the coverage of Part III of the order if that had been intended. However, there is no basis for reading such an exclusion into the order at this time.

Coca-Cola claims that nearly all of the products sold by Hood and Coca-Cola to institutional customers do not fall within the definition of "drinks, punches and ades" set forth in the order. One of the categories respondent attempts to exclude from order coverage is products "sold to institutions (not to consumers)." Request at 7. However, as discussed above, there is no exclusion in the order for sales to institutions. And, of course, products sold to institutions ultimately reach the consumer, often by sale.* Coca-Cola concedes that some products sold by Hood come within the definition of drinks, punches and ades. Respondent acknowledges that [ ] of Hood's

*There is no requirement in the order that any sale that may be involved has to be made directly to the ultimate consumer by the manufacturer or distributor of the drink, punch or ade product.

sales consist of non-frozen non-concentrate single strength juices or fruit drinks that "might" be considered ready to serve and under refrigeration. Request at 8. Coca-Cola also acknowledges that a small percentage of Hood's institutional sales are products containing 50% or less fruit juice. Request at 9. While much of the institutional product sold by Hood may be outside the scope or the order the requirement or prior approval is not limited to companies whose sales consist solely of the covered products or a specific percentage of the covered products.

Finally, Coca-Cola argues that Hood's sales of fruit drink products possibly covered by the order represent an extremely small part of the Hood institutional business and amount only to a *de minimis* share of total United States sales of fruit drinks to institutional buyers. However, this order, unlike some other Commission orders, does not contain any *de minimis* exception. The order requires respondent to seek prior Commission approval for all proposed transactions covered by Part III of the order not merely for those that reach some subjective standard of competitive significance. The purpose of the prior approval requirement is to give the Commission the opportunity to determine the competitive effects of the proposed transaction.

The Commission has also considered Coca-Cola's request for a waiver of the prior approval provision in this matter because the proposed transaction requires a Hart-Scott-Rodino Act premerger filing and because of Coca-Cola's concern that delay could have an adverse impact on the value of the proposed transaction to Coca-Cola. The Commission finds no grounds for a waiver of the order's requirements in this case, even if it is assumed such a waiver is permissible. At the time that respondent agreed to this order, the Hart-Scott-Rodino procedures were in effect and Coca-Cola nevertheless agreed to the prior approval requirement. Similarly, Coca-Cola has failed to show any special costs or consequences of the prior approval requirement that were not contemplated when it agreed to the order. Accordingly, there is no basis for a waiver of the prior approval requirements of the order.

Based on the foregoing, the Commission is of the opinion that the proposed transaction requires prior Commission approval pursuant to Part III of the order in this matter.

By direction of the Commission.

Letter of Request

March 30, 1988

Dear Ms. Rock:

Pursuant to sections 1.1–1.4 and 2.41(d) of the Commission Procedures and Rules of Practice, 16 CFR 1.1–1.4 and 2.41(d), The Coca-Cola Company ("the Company") hereby requests advice confirming that its proposed acquisition of the Institutional Food Service Group of H.P. Hood, Inc. ("Hood") is outside the scope of the Decision and Order dated August 3, 1983 in the matter of *The Coca-Cola Company,* 102 FTC 1102, 1103 (Docket No. C–3113) (the "Consent Order").

Specifically, the Company requests a ruling that the proposed acquisition does not require the prior approval of the Commission under Part III of the Consent Order because (1) the present transaction would take place in a different market from that with which the Consent Order was concerned; (2) virtually all of the products sold by Hood and the Company in the relevant market do not constitute "drinks, punches and ades" as defined in the Consent Order (¶IC); and (3) the amount of fruit drinks (as distinct from 100% fruit juices) sold by Hood is *de minimis* in relation to Hood's total sales and so small as to be of no conceivable competitive significance as a share of total sales of fruit drinks to institutional buyers in the United States.

Alternatively, if the proposed transaction is deemed to fall within the Consent Order, the Company requests that the prior approval provision be waived with respect to the present transaction for the foregoing reasons and for the further reason that a complete Hart-Scott-Rodino filing will be made with respect to this transaction. Therefore, the benefits which would result from the prior approval provision of the Consent Order would be fully served by the premerger filing under the Hart-Scott-Rodino Act. Any unnecessary delay which might be occasioned by the prior approval provision of the Consent Order carries with it a risk that the value of this acquisition to the Company would be substantially impaired. Therefore, for serious business reasons, the Company wishes to avoid any undue delay in closing this transaction.

The Proposed Transaction

Under the letter of intent (Exhibit A hereto),* the Company would acquire assets constituting the *institutional* food service group of Hood, consisting primarily of the Dunedin facility located in Dunedin, Florida. ("Dunedin"). The total purchase price would be approximately $45 million. The closing is planned for May 1, 1988, and the transaction is subject to obtaining any necessary government approvals.

Dunedin procures raw fruit which, pursuant to contract, it delivers to Alcoma Packing Company, located in Lake Wales, Florida. Alcoma processes the fruit into concentrate. The juice is then mixed, packaged and sold by Dunedin to institutional customers located in all fifty states. The Company will likely succeed to co-packing agreements between Dunedin and Golden State Food Corporation of Pasadena, California and Trenton Cold Storage Ltd. located in Trenton, Ontario, Canada.[1] Under the co-packing agreements, the co-packer mixes, packages and warehouses fruit juices and other products[2] according to formulas and specifications provided by Dunedin. Dunedin delivers to the co-packer substantially all the necessary ingredients and packaging materials (except purified water); the product is processed and packaged by the co-packer and then sold through the Dunedin distribution network.

The Hood Institutional Food Service Group sells only to *institutional* customers, as distinct from grocery stores or *retail* customers. Institutional customers include such purchasers as restaurants, schools, hospitals and other non-grocery store purchasers. Dunedin processes and sells 15 different kinds of juice and juice drinks to institutional customers: orange, grapefruit, apple, grape, pineapple, cranberry, orange-pineapple, peach nectar, pear nectar, apricot nectar, fruit punch, lemonade, orange-grapefruit, prune and tomato.

I. The present transaction is outside the scope of the consent order because it would not take place in the product market with which the consent order was concerned.

The Commission has held that sales of orange juice to institutional

*Not reproduced herein.

[1] The Trenton facility sells solely in Canada.

[2] Golden State also produces Shake-Ups, a dairy product similar to a milk shake. Dunedin has co-packing arrangements with Dairymens Inc. of Jacksonville, Florida and Dairylea of Oneida, New York for the production of Shake-Ups. Dunedin has a co-packing arrangement with Hood for the production of Frogurt, a frozen yogurt product.

customers constitute a separate line of commerce distinct from sales to retail customers:

> "The ALJ held that the evidence 'overwhelmingly shows' a separate line of commerce for COJ [chilled orange juice] [8] sold to the retail market, I.D. 56, justifying the exclusion of orange juice sales to institutions from consideration in assessing the competitive impact of the merger. I.D.F. 29-40. We agree with the ALJ's determination to exclude institutional sales, and note that respondents have not seriously challenged it on appeal."

Beatrice Foods Co., 101 FTC 733, 800 (1983). In so holding, the Commission referred to the "fundamental soundness of the ALJ's finding of a separate market of COJ sales to the retail segment". *Id.* at 800-801 n.7. *See also id.* at 743, 744, 785, 818.

The Consent Order dealt with sales in the *retail* market, while the Institutional Food Service Group of Hood sells solely to the *institutional* market. The Consent Order was concerned with the acquisition and divestiture of Doric Foods Corporation, a company which was involved solely in sales to the retail market. The data presented in connection with the Consent Order dealt with sales in the retail market and it was clearly those sales with which the Commission was concerned.[3] Thus, the Consent Order dealt with a market which the Commission has held to be separate and distinct from that in which the present acquisition would take place.

The Consent Order was addressed to "a line of commerce in a section of the country." (Complaint ¶9, 102 FTC at 1103). We believe that it should not be construed to cover acquisitions in lines of commerce that clearly were not involved in the transaction out of which the Consent Order arose.

The Consent Order was negotiated between the Commission and the Company at an early stage of the proceedings before a full investigation by the Commission could be completed. In a spirit of cooperation, the Company agreed to divest Doric Foods in order to resolve the Commission's antitrust concerns without incurring the large time commitment and expense which would have been involved in a full investigation and litigation of that matter. This type of cooperation should be encouraged by the Commission. As a matter of policy, the Company should not now be penalized by an overly expansive reading of the Consent Order.

[3] The market data submitted to the Commission was published by SAMI ("Selling Area Market Intelligence") and the A.C. Nielsen Company, which only publish data for sales to the retail market, not for the institutional market.

II. Nearly all of the products sold by Hood and by the company's institutional sales division fall outside the definition of "drinks, punches and ades" set forth in the consent order.

The Consent Order dealt with sales of "drinks, punches and ades" which were specifically defined as:

> "non-carbonated, *ready to serve,* naturally or artificially flavored fruit drinks, fruit punches or fruit ades which contain *50% or less fruit juice* and are *customarily sold under refrigeration to the consumer.*" Consent Order ¶I.C. (emphasis supplied)

Nearly all of the juices sold by the Company and by Hood to institutional customers do not fall within this definition because (1) they are 100% fruit juice (not 50% or less fruit juice); (2) they are sold as concentrate (not ready to serve); (3) they are sold frozen (not merely chilled and ready to serve) and/or (4) they are sold to institutions (not to consumers).

[ ] of the juice sold by the Company's institutional sales group is not sold in ready to serve form; it is sold as frozen concentrate, which must be mixed with water in a ratio of 3 parts water to one part of concentrate before it is served. The concentrate is sold in 32-ounce or 64-ounce containers which are mixed with water by hand or through a fountain-type dispenser.

The majority [ ] of Hood's sales (in gallons or gallon equivalents) to institutional buyers are also made in frozen concentrate in 32-ounce and 64-ounce sizes. In addition, Hood sells juices and juice drinks in single strength "portion control" form; juice and juice drinks sold in this form are typically transported and stored *frozen* and are then thawed shortly before they are sold by the institutional buyer to its customer. "Portion control" accounts for [ ] of Hood's sales. Only [ ][4] of Hood's sales consist of non-frozen non-concentrate single strength juices or fruit drinks and thus might be considered "ready to serve" and under "refrigeration" rather than concentrated or frozen at the time they are sold by Hood. But the great bulk of this [ ] consists of 100% orange juice and 100% grapefruit juice, not drinks, punches or ades.

Moreover, institutional products are not "sold to consumers" as required by the definition. They are sold to large institutions, such as restaurant chains, hotels, hospitals, schools and large institutional distributors. And they must be concerted to another form—mixed,

[4] The [ ] is included in the [ ] figure, since the single-strength juices are sold in "portion control" form. "Portion control" containers come in 4-ounce, 6-ounce and 10-ounce sizes.

dispensed or thawed—before they are ultimately consumed. For this reason as well, they do not fall within the terms of the Consent Order.

III. Hood's fruit drinks are a minimal portion of Hood's sales and a minuscule portion of total U.S. sales of fruit drinks to institutional customers.

Even if the products sold by the Hood Institutional Food Service Group which contain 50% or less fruit juice were deemed to be "drinks, punches or ades" for purposes of the Consent Order, such products are an extremely small part of the Hood institutional business. In fiscal year 1987[5] Hood sold to institutional customers a total of [ ] gallons of drinks containing 50% or less fruit juice. Hood's total institutional sales in fiscal year 1987 were [ ] gallons. Thus, products containing 50% or less fruit juice constituted less than [ ] of Hood's total institutional sales. In other words, over [ ] of Hood's institutional sales consist of products such as 100% orange juice, 100% grapefruit juice and other 100% fruit juices which could not conceivably be considered products containing 50% or less fruit juice.

No market data is publicly available to the Company which specifies total sales of "drinks, punches and ades" as defined in the Consent Order. However, the *U.S. Fruit Beverage Marketing and Packaging Report 1987* published by Beverage Marketing Corporation ("Beverage Marketing Report") publishes figures for total U.S. sales of "fruit drinks" (as distinguished from "fruit juice").[6] In calender year 1987, approximately 626,700,000 gallons of fruit drinks were sold in the United States.[7] This would give the Hood Institutional Food Service Group (which sold [ ] gallons of drinks containing 50% or less fruit juice in its fiscal year 1987) a share of [ ]—a share which is obviously *de minimis.* Approximately 68.31 million gallons of fruit drinks were sold to institutional buyers in 1987.[8] Hood's 1987 sales would give it a share of [ ] of sales of fruit drinks to institutional buyers—again a share which is *de minimis* by any standard.

Clearly, the proposed acquisition could have no conceivable anticompetitive impact on sales of drinks, punches and ades in the United States and there is no substantive antitrust reason to insist upon

[5] Hood's fiscal year runs from July 1 to June 30. Hood sales data was provided to the Company by Hood.

[6] "Fruit drinks" are defined as drinks which contain a percentage of fruit juice but are not 100% fruit juice. These include such drinks as lemonade, orange-ade or drink, cranberry juice cocktail, grape drink, fruit punch and other fruit drinks. Beverage Marketing Report at 54–55.

[7] Beverage Marketing Report at 13.

[8] *Id.* at 149.

compliance with the prior approval provision. *See, e.g., Beatrice Foods Co., supra,* 101 FTC at 818–19, 821, 825 (.57%); *Federal Trade Commission v. Beatrice Foods, Co.,* 587 F.2d 1225, 1230, 1234 (D.C. Cir. 1978) (0.19% and 0.5%) (appendix to order denying motion for rehearing en banc); *Federal Trade Commission v. Tenneco, Inc.,* 433 F. Supp. 105, 114 n.21 (D.D.C. 1977) (0.3%).

The purchase price to be paid for the Hood Institutional Food Service Group will be approximately $45 million. The transaction will be subject to the provisions to the Hart-Scott-Rodino Act, 15 U.S. Code §18a, and a complete premerger filing will be made in accordance with the permerger notification rules. Therefore, the Commission will have a full opportunity to review the competitive impact, if any, of this transaction. Thus, any benefits which may exist under the prior approval provision of the Consent Order would be fully served by the premerger filing, on the facts of this particular transaction. *Compare Diamond Crystal Salt Co.,* 3 Trade Reg. Rep. (CCH) ¶22,180 (Docket 7323, July 30, 1984); *ITT Continental Baking Co.,* 102 FTC 1298 (Docket 7880, October 12, 1983).

In 1987 the Premerger Notification Rules were modified to delete paragraph (b) of Rule 802.70. In so doing, the Commission stated that it wanted to "assure that the rule . . . does not create a barrier to voluntary settlements of antitrust actions by unnecessarily requiring public disclosures of information about acquisitions." 52 Fed. Reg. No. 44 p. 7073 (March 6, 1987). Much of the information needed to assess the present acquisition would likely be proprietary and confidential commercial information which the Company would not want to disclose publicly. Section 7A(h) of the Hart-Scott-Rodino Act provides that premerger filings under the Act are exempt from public disclosure. For this reason as well, the Hart-Scott-Rodino Act procedures would be preferable to the provisions of the Consent Order.

Finally, the business reasons, undue delay in closing this transaction would have a material adverse impact on the value of the acquisition to the Company. The acquisition has been publicly announced. Customers, employees, suppliers, co-packers and distributors for Dunedin have expressed uncertainty as to their roles in the post-acquisition Dunedin. Such uncertainty is exerting a negative impact on Dunedin's sales. It is therefore essential that the acquisition be closed as soon as possible in order to remove this uncertainty and prevent deterioration in the value of Dunedin. For this reason as well, we request expedited treatment of this application.

For all of the above reasons, we believe that the acquisition of the Hood Institutional Food Service Group would fall outside the terms of the Consent Order, and we request the Commission's advice confirming our interpretation. Alternatively, the lack of any competitive impact whatsoever in "drinks, punches and ades" is so readily apparent that compliance with the prior approval provision should be waived in this case.

We would be pleased to attempt to answer any questions which the Commission may have and to provide additional information which the Commission may believe to be necessary to respond to this request.

Respectfully submitted,

Darrell Prescott
Coudert Brothers
Counsel for The Coca-Cola Company