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From: [REDACTED]
To: "Mike Verne (E-mail)" <mverne@ftc.gov>
Date: 11/11/01 6:22PM
Subject: HSR Assistance Requested

Mike:

Several months ago, a colleague and I contacted you regarding a transaction (I represent the Acquiring Company; my colleague represents Acquired Company). The deal has still not closed but has changed somewhat since then. I would like to run the modified deal by you.

The proposed transaction involves a tender offer and follow-on merger (the "Tender Offer") that will result in 100% of the voting securities of the acquired company being acquired by the Acquiring Company for aggregate consideration of over \$200,000,000. It is a condition to the Tender Offer that, immediately following the completion of the Tender Offer, all of the remaining operating assets held by the Acquired Company are to be sold to Company X for cash consideration of approximately \$120,000,000 (the "Asset Sale"). Company X is an independent third party unrelated to the Acquired company or the Acquiring company. For practical purposes, the closing of the Tender Offer and the closing of the Asset Sale will occur simultaneously. For a number of business reasons, however, the parties have ordered the transactions such that the Tender Offer will be deemed to have been completed immediately prior to the Asset Sale.

The acquired company and Company X should will submit filings under the HSR Act with respect to the Asset Sale. My colleague and I sought your advice as to whether HSR filings would be required with respect to the tender offer in light of the fact that the ultimate parent entity of the acquired company will change as a result of the Tender Offer being completed immediately prior to the Asset Sale.

Based on these facts, you advised that the Staff would not require premerger notification filings under the HSR Act from Acquired Company and Acquiring Company with respect to the Tender Offer. You indicated that the Staff would apply a continuum theory to subsume the Tender Offer within the reportable Asset Sale in light of the fact that (i) the Tender Offer and the Asset Sale are each conditioned on the other, such that it is impossible for the Tender Offer to close without the Asset Sale immediately following, and (ii) following the transactions, Acquired Company's assets will consist exclusively of cash. You acknowledged that the HSR filings being submitted in connection with the Asset Sale are being filed only by Acquired Party and Company X not by Acquiring Company and indicated that the Staff would nevertheless subsume the Tender Offer within the Asset Sale and not require filings for the acquisition by Acquiring Company of the voting securities of Acquired Company.

The only aspect of the deal that has changed is that Company X will no longer be the acquiring party in the asset deal. Instead, a new company and a Trust have stepped in to acquire the remaining operating assets held by the Acquired Company following the tender offer. I assume the new company will need to make a filing. My question is whether the Trust will need to make a filing. The trust is related to the Acquiring Company in the Tender Offer, although the exact relationship is not yet clear. It is also not clear at this point how much of the purchase price for the asset sale will

be contributed by the new company and how much will be contributed by the Trust. Will the Trust need to make a filing if its contribution to the asset purchase price is below \$50 million, which is likely to be the case?

I may be reached at [REDACTED] Thank you very much for your assistance.

[REDACTED]

ADVISED THE WAITER THAT IF TRUST IS INCLUDED WITHIN THE ACQUIRING PERSON MAKING THE TENDER OFFER, THE TENDER OFFER CANNOT BE SUBSUMED IN THE REPORTABLE ASSET ACQUISITION SINCE A PORTION OF THE ASSETS WILL REMAIN WITH THE ACQUIRED COMPANY.

B. Michael [Signature]

11/14/01